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# I HAVE FEDERAL PLEADING ALL FIGURED OUT

*Bradley Scott Shannon*<sup>†</sup>

## ABSTRACT

*The Supreme Court's recent decisions in Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, both of which deal with federal civil pleading standards, are important, but misunderstood. This Article hopes to alleviate some of the confusion and place these decisions in proper perspective. Viewed in terms of the two primary ways in which an action may be dismissed for failure to state a claim upon which relief can be granted—factual insufficiency and legal insufficiency—coupled with an understanding of a plaintiff's obligations under Federal Rule of Civil Procedure 11, these decisions arguably have resulted in little practical change in the overall federal pleading scheme. What these decisions have done, though, is brought renewed attention to the requirement that a plaintiff's allegations be supported by evidence, and the problems that accompany such a requirement. But this Article argues that concerns regarding a plaintiff's insufficiency of proof should be resolved not through Federal Rule of Civil Procedure 8 and the requirement that a plaintiff "show" that it is entitled to relief—as the Supreme Court appears to have done—but rather through Rule 11. This Article also argues that a federal-court action dismissed for failure to state a claim because of insufficiency of proof should not be given claim-preclusive effect in those state courts with less stringent pleading standards.*

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## I. INTRODUCTION

The Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*<sup>1</sup> and *Ashcroft v. Iqbal*<sup>2</sup> are probably the most significant civil procedure rulings in decades.<sup>3</sup> Remarkably, though, for all of their significance, there remains widespread confusion as to what these decisions mean.<sup>4</sup> The reaction to these decisions is also remarkable, for despite broad disagreement as to the meaning of *Twombly* and *Iqbal*, the consensus (at least within the legal academy) has been negative.<sup>5</sup> In particular, many have accused the Court of reinterpreting the *Federal Rules of Civil Procedure* (the "*Rules*") and thereby effecting a significant change in federal civil pleading practice,<sup>6</sup> a change that generally works to the disadvantage of plaintiffs.<sup>7</sup>

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<sup>1</sup> 550 U.S. 544 (2007).

<sup>2</sup> 129 S. Ct. 1937 (2009).

<sup>3</sup> See, e.g., Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1295 (2010) ("*Twombly* has been so influential that it is already among the most frequently cited Supreme Court decisions of all time.").

<sup>4</sup> See, e.g., Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 852 (2008) ("Because *Twombly* is so widely cited, it is particularly unfortunate that no one quite understands what the case holds.").

<sup>5</sup> See, e.g., Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 476 (2010) ("Scholars have been largely critical of [*Twombly*].").

<sup>6</sup> See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) ("The Court has revolutionized the law on pleading . . . [and] destabilized the entire system of civil litigation.").

<sup>7</sup> See, e.g., Comment, *The Supreme Court 2008 Term: Leading Cases—Federal Jurisdiction and Procedure*, 123 HARV. L. REV. 252, 253 (2009) ("[The *Twombly/Iqbal*] standard will likely constitute a substantial hurdle to most types of litigation.").

Incidentally, though the concerns associated with *Twombly* and *Iqbal* impact not just

The primary purpose of this Article is twofold. First, the Article attempts to ease the confusion in this area by explaining the meaning of *Twombly* and *Iqbal* and identifying their place in the broader procedural context. Second, this Article attempts to show that some of the criticism directed toward these decisions might be unfounded. In its attempt to achieve this purpose, this Article will reach a number of conclusions, many of which run counter to the conventional thinking on this subject:

1. The Supreme Court's rulings in *Twombly* and *Iqbal* probably did not result in a significant change in the overall federal-court pleading scheme. Rather, these decisions have brought increased attention to a plaintiff's obligations in the pleadings stage and have invigorated the use of the motion to dismiss for "failure to state a claim upon which relief can be granted,"<sup>8</sup> much as the Supreme Court's decisions in *Celotex Corp. v. Catrett*,<sup>9</sup> *Anderson v. Liberty Lobby, Inc.*,<sup>10</sup> and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*<sup>11</sup> invigorated summary-judgment practice.<sup>12</sup>

2. The word "plausible" as used by the Supreme Court in connection with a plaintiff's allegations cannot be construed as meaning "believable." Rather, it must refer only to the factual sufficiency of a complaint. This means that a factually suspicious (or even frivolous), but otherwise factually and legally sufficient, complaint should not be dismissed for failure to state a claim.

3. The venerable passage from *Conley v. Gibson*<sup>13</sup> that was "retired" by the Court in *Twombly*<sup>14</sup>—"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>15</sup>—appears to be dicta, and in any

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plaintiffs, but claiming parties generally, I use the shorthand term "plaintiff" throughout this Article, both for clarity and because plaintiffs are probably the most impacted by these decisions. For similar reasons, this Article uses "defendant," rather than "defending party," to refer to those parties responding to a claiming party's claims.

<sup>8</sup> FED. R. CIV. P. 12(b)(6).

<sup>9</sup> 477 U.S. 317 (1986).

<sup>10</sup> 477 U.S. 242 (1986).

<sup>11</sup> 475 U.S. 574 (1986).

<sup>12</sup> See generally FED. R. CIV. P. 56 (providing the federal standard for summary judgment).

<sup>13</sup> 355 U.S. 41 (1957).

<sup>14</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007) (observing that the oft-quoted "no set of facts" language in *Conley* consistently fails to "be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the [*Conley*] Court quite reasonably understood as amply stating a claim for relief").

<sup>15</sup> *Conley*, 355 U.S. at 45–46.

event related not to the factual sufficiency of a plaintiff's allegations, but rather to the legal sufficiency of a plaintiff's claim.

4. Though there are currently several proposals to abrogate the Supreme Court's holdings in *Twombly* and *Iqbal*, all are probably futile unless they also alter a plaintiff's obligations under Federal Rule of Civil Procedure 11. In other words, the problem for plaintiffs brought to the fore by *Twombly* and *Iqbal* does *not* relate to the Court's plausibility standard per se. Rather, the problem—if there is a problem—lies in the requirement that a plaintiff's factual allegations (or “contentions”) “have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery,”<sup>16</sup> coupled with the limited ability to engage in formal discovery before the commencement of the action.

5. Despite widespread dissatisfaction with the current federal pleading scheme and the fact that it might differ from the practice in some states, the federal scheme, if properly understood and applied, does not unreasonably interfere with a plaintiff's right to a jury trial under the Seventh Amendment,<sup>17</sup> and raises no choice-of-law issue under *Erie Railroad Co. v. Tompkins*.<sup>18</sup> Still, an argument can be made that dismissals for failure to state a claim due to a failure to comply with more stringent federal pleading requirements should not be given claim preclusive effect in state courts with less stringent requirements.

This Article contains a brief and general discussion of the more significant rules governing federal pleading. It then attempts to explain the applicable standard in terms of the three ways in which a complaint properly may be dismissed for failure to state a claim: factual insufficiency, legal insufficiency, and insufficiency of proof. The Article then addresses two particularly troublesome and recurring problems: the proper disposition of the frivolous complaint, and the possible disparity between federal and state pleading requirements. But contrary to its title, the goal of this Article is not to show that its author indeed has federal pleading all figured out.<sup>19</sup> Rather, the goal is to reach a broader understanding of federal pleading practice, an understanding that hopefully will lead to a more informed normative

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<sup>16</sup> FED. R. CIV. P. 11(b)(3).

<sup>17</sup> U.S. Const. amend. VII.

<sup>18</sup> 304 U.S. 64 (1938).

<sup>19</sup> Actually, the title of this Article, which was written mostly because everyone else teaching civil procedure was writing on this subject, is this author's idea of humor. And not to be presumptuous, but the author actually looks forward to the almost inevitable response, “No you don't!”

debate as to where the line for pleading sufficiency should be drawn and how that line might be moved, if desirable.

## II. PLEADING FUNDAMENTALS AND GROUNDS FOR DISMISSAL

Federal pleading, like federal procedure generally, is governed primarily by the *Federal Rules of Civil Procedure*. But the rules related to pleading are sparse and, to a large extent, vague.

With respect to stating a claim, the primary rule is Rule 8(a), which provides: “A pleading that states a claim for relief must contain: . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . .”<sup>20</sup> Rule 8 also provides: “[e]ach allegation must be simple, concise, and direct”;<sup>21</sup> “[n]o technical form is required”;<sup>22</sup> and “[p]leadings must be construed so as to do justice.”<sup>23</sup> But though the *Rules* further provide that the defense of failure to state a claim upon which relief can be granted, if timely raised by a defendant,<sup>24</sup> results in the dismissal of that claim,<sup>25</sup> the *Rules* give no further guidance as to precisely how or why a claim may be considered insufficient.

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<sup>20</sup> FED. R. CIV. P. 8(a)(2). Rule 8(a) also requires “a short and plain statement of the grounds for the court’s jurisdiction” and “a demand for the relief sought.” FED. R. CIV. P. 8(a)(1), (3). But the jurisdictional statement usually relates more to, well, jurisdiction than it does to stating a claim *per se*. For the latest word from the Supreme Court as to the meaning of “jurisdiction” in this context and how it differs from claim-processing rules, see *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010). Similarly, the statement of the relief requested relates primarily to other matters, and, in any event, any deficiencies in this regard are rarely significant. See, e.g., FED. R. CIV. P. 54(c) (“A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.”).

<sup>21</sup> Fed. R. Civ. P. 8(d)(1).

<sup>22</sup> *Id.*

<sup>23</sup> FED. R. CIV. P. 8(e); see also FED. R. CIV. P. 1 (“These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”)

<sup>24</sup> Though the defense of failure to state a claim is typically raised in a preanswer motion to dismiss, see FED. R. CIV. P. 12(b)(6), it may be raised in the answer, by a motion for judgment on the pleadings, a motion for summary judgment, or even at trial, see FED. R. CIV. P. 12(h)(2). But if the defense is not raised before the conclusion of the trial, it is waived. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510–11 (2006) (“[Defendant’s] failure to speak to the issue prior to the conclusion of the trial on the merits would preclude vacation of the . . . judgment . . . .” (citation omitted)).

<sup>25</sup> See FED. R. CIV. P. 12(b)(6) (providing a means to dispose of a claim even though “dismissal” is not found in the text of the rule). Actually, it would be more accurate to say that the successful assertion of this defense results in the *disposition* of that claim, for it results in a dismissal only if asserted through a motion to dismiss. See Bradley Scott Shannon, *Action Is an Action Is an Action*, 77 WASH. L. REV. 65, 116–46 (2002) (explaining that “dismissal” has a much narrower definition under the *Federal Rules of Civil Procedure* than its common usage). Overwhelmingly, though, the motion to dismiss is the means by which this defense is asserted.

A review of relevant case law, though, reveals essentially three ways in which an action properly may be dismissed for failure to state a claim—i.e., three different types of problems or defects that can render a complaint insufficient as a matter of law. This Article will refer to these three problems as factual insufficiency, legal insufficiency, and insufficiency of proof.<sup>26</sup> By investigating what makes a complaint insufficient, perhaps one can reach some understanding as to what makes a complaint sufficient and, more importantly, where to draw the line.<sup>27</sup>

### *A. Factual Insufficiency*

In order to understand what must be included in a complaint, one should reexamine the text of Rule 8(a).<sup>28</sup> Rule 8(a) provides that a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>29</sup> What, exactly, does this mean? In legal parlance, to “show” generally means to prove.<sup>30</sup> But what does the rest of this rule require?

At least one thing is clear: whatever Rule 8(a) might require by way of a “showing,” it need not—indeed, it must not—be long and complicated. For the rule expressly provides that a plaintiff’s statement of the claim, whatever else it is, must be “short and plain.”

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<sup>26</sup> One could use different terminology here, and could even divide up this area in a completely different manner. For example, Allan Ides has argued that in order to state a valid claim under Rule 8(a)(2), a complaint must have what he calls “transactional sufficiency,” “procedural sufficiency,” and “substantive sufficiency.” Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 FED. RULES DECISIONS 604, 606–14 (2007). Moreover, this Article makes no claim that every pleading problem falls neatly into one (and only one) of these three categories. Nonetheless, these categories at least provide a starting point for discussion.

<sup>27</sup> Some have argued—perhaps correctly—that the standard for sufficiency under Rule 8 is not the same as the standard for insufficiency under Rule 12(b)(6), and that a complaint might be found sufficient for purposes of the former but not the latter. *See, e.g.,* *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999) (“Where the plaintiff has gone astray is in supposing that a complaint which complies with Rule 8(a)(2) is immune from a motion to dismiss. This confuses form with substance. Rule 8(a)(2) specifies the conditions of the formal adequacy of the pleading. It does not specify the conditions of its substantive adequacy, that is, its legal merit.”). But following *Twombly* and *Iqbal*, the current practice seems to be to challenge even the marginal complaint and, for the sake of clarity, this Article will assume that the standards are the same for both. Accordingly, the focus of this Article will be on those allegations that must be included in a complaint to enable it to withstand a motion to dismiss for failure to state a claim.

<sup>28</sup> *Cf. United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (“The task of resolving the dispute over the meaning of [this statute] begins where all such inquiries must begin: with the language of the statute itself.”).

<sup>29</sup> FED. R. CIV. P. 8(a)(2).

<sup>30</sup> *See* BLACK’S LAW DICTIONARY 1413 (8th ed. 2004) (defining “show” as meaning: “To make (facts, etc.) apparent or clear by evidence; to prove”).

Thus, whether one considers the Official Forms governing complaints<sup>31</sup> or the Supreme Court's repeated rebuffs to calls for heightened pleading outside of the context of Rule 9,<sup>32</sup> the message is always the same: very little is required in order for a complaint to survive a motion to dismiss for failure to state a claim.<sup>33</sup> Indeed, in *Twombly*, the Court went out of its way to make it clear that this was still true.<sup>34</sup>

But *how* little? Is it possible for a complaint to be *too* short and plain? Yes. And the reason (again) is that Rule 8(a) also requires a showing that the plaintiff is "entitled to relief." What does this mean?

The Supreme Court has long recognized that the complaint must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."<sup>35</sup> Thus, showing that one is entitled to relief is about notice, though not simply notice that an action has been commenced against the defendant, for that the summons accomplishes.<sup>36</sup> Rather, Rule 8(a) (again) requires that the plaintiff give notice as to the nature of the claim and the grounds upon which

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<sup>31</sup> See FED. R. CIV. P. Forms 10–21. Though the Official Forms following the *Rules* "suffice under these rules and illustrate the simplicity and brevity that these rules contemplate," FED. R. CIV. P. 84, they have historically been mostly ignored by practitioners. But renewed interest in Form 11 has been generated as a result of its discussion in *Twombly* (at which time it was designated as Form 9). See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007) (contrasting the adequacy of Form 9 with the inadequacy of the plaintiffs' complaint in that case).

<sup>32</sup> See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) ("Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts." (footnote omitted)); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("We think that it is impossible to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules.").

<sup>33</sup> Remarkably, though, despite the clarity of this language, many (if not most) federal-court complaints are not entirely plain, and the vast majority are nowhere near short.

<sup>34</sup> See 550 U.S. at 569 n.14 ("In reaching [the conclusion that the plaintiffs' complaint was insufficient], we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished 'by the process of amending the Federal Rules, and not by judicial interpretation.'" (quoting *Swierkiewicz*, 534 U.S. at 515)); *id.* at 570 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

<sup>35</sup> *Conley v. Gibson*, 355 U.S. 41, 47 (1957). One might observe that although the Court might be correct from an interpretive perspective—after all, the Court is also the author of the *Rules*, at least in theory—Rule 8(a)(2) mentions neither "notice" nor "grounds." Some have been confused on this point. See, e.g., *McMahon*, *supra* note 4, at 856 ("Seizing on the word 'grounds' in Rule 8, the Court held that 'a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" (alteration in original) (quoting *Twombly*, 550 U.S. at 555)).

<sup>36</sup> See FED. R. CIV. P. 4(a)(1)(E) (requiring that the summons "notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint").



the claim rests. And why? Viewing the pleading rules as a whole, one reason—perhaps the primary reason—appears to be to enable the defendant to properly respond to the complaint—i.e., to give the defendant a reasonable opportunity not only to admit or deny the plaintiff's allegations,<sup>37</sup> but also to allege any merits-based affirmative defenses (including failure to state a claim),<sup>38</sup> compulsory counterclaims,<sup>39</sup> and third-party claims.<sup>40</sup> Another, related reason is to give the defendant a reasonable opportunity to assert any preanswer motions to dismiss.<sup>41</sup> In particular, the plaintiff's complaint should provide enough information to enable the defendant to identify those actions that may be eliminated at the pleading stage.<sup>42</sup> Thus, though the line might be difficult to draw, virtually everyone agrees that "fair notice" requires at least some level of detail as to the nature of the plaintiff's claims.

As a result, there is no doubt that a statement of a claim that consists only of an allegation that the defendant is liable to the plaintiff and provides no information beyond the request for relief,

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<sup>37</sup> See FED. R. CIV. P. 8(b)(1) ("In responding to a pleading, a party must . . . admit or deny the allegations asserted against it by an opposing party."). Of course, it is not as though a defendant would be *unable* to respond even to the most general complaint, at least in a sense. For example, if a plaintiff were to allege only that "you are liable to me in an amount to be determined at trial," a defendant probably would be entitled to respond with a general denial. But such a response might well be false, at least in part, and would do nothing to remove factual contentions from consideration at trial.

<sup>38</sup> See *id.* ("In responding to a pleading, a party must . . . state in short and plain terms its defenses to each claim asserted against it . . .").

<sup>39</sup> See FED. R. CIV. P. 13(a)(1) ("A pleading must state as a counterclaim any claim that—at the time of its service—the [defendant] has against [the plaintiff] if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the [plaintiff's] claim . . .").

<sup>40</sup> See FED. R. CIV. P. 14(a)(1) ("A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to [the defendant] for all or part of the [plaintiff's] claim against [the defendant]"). Of course, some might argue that any problems caused by a lack of detail in a complaint eventually could be resolved by amending the answer. But though this might be true to some extent, it seems that the primary purpose of permitting a defendant to amend its answer cannot be to deal with matters that could have been pleaded by the plaintiff at commencement, but were not. Moreover, there are other possible reasons for providing notice of the grounds upon which one's claim rests, including the need to ascertain the preclusive reach of any adjudication on the merits and to enable the defendant to determine whether it is entitled to a trial by jury. See Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 273 (1942) ("[Pleadings] must sufficiently differentiate the situation of fact which is being litigated from all other situations to allow application of the doctrine of *res judicata*, whereby final adjudication of this particular case will end the controversy forever. As a natural corollary, they will also show the type of case, so that it may be assigned to the proper form of trial . . .").

<sup>41</sup> See FED. R. CIV. P. 12(b) (describing seven defenses that may be asserted through a preanswer motion to dismiss, including failure to state a claim).

<sup>42</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) ("[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" (omission in original) (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1216, at 234 (3d. ed. 2004))).

would be considered insufficient.<sup>43</sup> But what if a plaintiff alleged a bit more? For example, what if a plaintiff also alleged that the defendant was negligent, or (to recall *Twombly*), that the defendant violated federal antitrust law? Such an allegation would provide more information, but most would still consider it insufficient.<sup>44</sup> And the reason, again, is that this allegation does not sufficiently *show* that this *particular* plaintiff is entitled to the relief requested of this *particular* defendant. And if the mere naming of a recognized cause of action is insufficient, then surely the mere recitation of the *elements* of such a cause of action *also* would be insufficient.<sup>45</sup>

So what more is needed? It appears that facts are the answer<sup>46</sup> though the *Rules*—quite intentionally—fail to mention the word “facts,” and there is ultimately no meaningful distinction between facts and law.<sup>47</sup> But what *sort* of facts? It would not seem unreasonable to require a plaintiff to plead enough facts to prove each element of at least one recognized cause of action.<sup>48</sup> After all, the

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<sup>43</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (“[T]he pleading standard Rule 8 . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”). There might be some disagreement, though, as to the proper means of dealing with such a complaint. See *infra* notes 65–71 and accompanying text.

<sup>44</sup> It might be observed that such a “claim” would *not* be rendered insufficient because such causes of action do not exist, for they do. This is not to say, though, that the nonexistence of any particular cause of action cannot create a ground for the dismissal of an action; it can. But that is a different problem than the problem being discussed here, and is the subject of a later discussion. See *infra* Part II.B.

<sup>45</sup> See *Iqbal*, 129 S. Ct. at 1949 (“A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” (quoting *Twombly*, 550 U.S. at 555)); *id.* (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” (citing *Twombly*, 550 U.S. at 555)).

<sup>46</sup> See *Twombly*, 550 U.S. at 555 n.3 (“Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.”); see also Clark, *supra* note 40, at 278 (“The notice in mind is . . . that of the general nature of the case and the circumstances or events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or transaction to be litigated . . . and to tell the court of the broad outlines of the case . . .”). As will be seen, though, *nonconclusory* (as opposed to factual) allegations might be more accurate; understanding that the distinction between nonconclusory and conclusory is no clearer than the distinction between fact and law.

<sup>47</sup> See, e.g., Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003) (explaining why law and fact are not two distinct categories).

<sup>48</sup> Though this does not appear to be the standard that the Court has adopted—indeed, as will be explained, it appears that the Court has adopted a less-stringent standard—it does appear that a firm understanding of the elements of a recognized cause of action is the starting point. See, e.g., *Iqbal*, 129 S. Ct. at 1947 (“[W]e begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination . . .”). And whether one likes this standard or not, this approach would be sufficient. See Steinman, *supra* note 3, at 1298 (“As long as a complaint contains nonconclusory allegations for every element of a claim for relief, it passes muster regardless of whether the judge might label the allegations implausible.”); see also 2 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 8.04[1][c], at 8-37 (3d ed. 1997) (“Because a complaint may be attacked on plausibility grounds if there is no factual support for a crucial element of a claim, what the rule is, in the abstract, as to whether a pleader

motion to dismiss for failure to state a claim is part of the same procedural continuum as motions for summary judgment and for judgment as a matter of law, meaning (in theory) that the standard for each should be essentially the same, with the primary difference being the nature of the "facts" being considered. Thus, whether the "facts" at issue appear in the form of allegations (as they would under Rule 12(b)(6)), "paper" evidence—e.g., affidavits and certain discovery responses—as they would under Rule 56), or evidence admitted at trial (as they would under Rule 50), the question at each juncture seemingly should be whether a reasonable juror could find in favor of the plaintiff.<sup>49</sup> Such a standard also would not seem to be particularly onerous, in that the district court is required to assume that all of the plaintiff's factual (or nonconclusory) allegations are true.<sup>50</sup>

In any event, and regardless of what the Supreme Court might have meant in *Twombly* and *Iqbal*, this is not quite what it said. Instead, the Court said that a plaintiff's claim must be "plausible."<sup>51</sup> Whatever this term means<sup>52</sup>—and that has been the subject of considerable debate<sup>53</sup>—it *cannot* mean that a plaintiff's allegations must be *believable*, for (again) a plaintiff's allegations *must* be believed.<sup>54</sup> That is not what factual sufficiency is about (or supposed

must state facts as to every element that is a part of the claim is irrelevant. Failure to do so may render a complaint subject to attack for failing to plead a 'plausible' claim.").

<sup>49</sup> See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–52 (1986) (describing the relevant standard at summary judgment in these terms and essentially equating it to the judgment as a matter of law standard at trial).

<sup>50</sup> See, e.g., *Iqbal*, 129 S. Ct. at 1949 (observing that, except for legal conclusions, "a court must accept as true all of the allegations contained in a complaint").

<sup>51</sup> See *id.* ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Twombly*, 550 U.S. at 570)).

<sup>52</sup> Cf. McMahon, *supra* note 4, at 864 ("Unfortunately, the Supreme Court did not include a definition of 'plausible' in the *Twombly* decision.").

<sup>53</sup> For example, Professor Ides argues that a complaint must have transactional sufficiency, meaning it "[m]ust be premised on a factual transaction and not simply on an abstract invocation of the law"; procedural sufficiency, meaning it "[m]ust describe the factual transaction with sufficient clarity to give the opposing party 'fair notice' of the underlying event and of the nature of the claim arising out of that event"; and substantive sufficiency, meaning it "[m]ust allege facts sufficient to show that the pleader is entitled to relief, which is to say that the pleading must state a claim on which relief can be granted." Ides, *supra* note 26, at 607. There are several other and sometimes conflicting approaches, but the resolution of these various approaches is beyond the scope of this Article.

<sup>54</sup> This point, though well established, can hardly be emphasized enough, and will be discussed again in Part III.A. It is true that the Court has held that *conclusory* allegations are not entitled to this presumption, see, e.g., *Iqbal*, 129 S. Ct. at 1949, and one can fairly debate whether any particular allegation is conclusory or not (and perhaps the Court's own analysis has not been entirely clear in this regard). But even the *Iqbal* Court made it quite plain: "[i]t is the conclusory nature of [a plaintiff's] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." *Id.* at 1951; accord Hartnett, *supra* note 5, at

to be about). Rather: “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>55</sup> Thus, “[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”<sup>56</sup>

So why did the Supreme Court find the *Twombly* and *Iqbal* complaints deficient? It was not because they were too short; to the contrary, in both cases, the complaints were quite long, and much longer (for example) than that set forth in Official Form 11. It was also not because the plaintiffs included conclusory allegations in their complaints, for that seems almost unavoidable (and such appear to be included in Form 11 as well). Instead, the problem was that they did not contain sufficient nonconclusory (and nonneutral) allegations indicative of liability.<sup>57</sup> Essentially, the plaintiffs in both cases failed to allege sufficient specific facts in support of an element of their respective causes of action (or, more precisely, sufficient nonconclusory allegations to “permit the court to infer more than the mere possibility of misconduct”<sup>58</sup>). And because their claims were *factually insufficient*, they were subject to dismissal for failure to state a claim.

Is the *Twombly/Iqbal* “plausibility” standard the proper standard by which to assess the sufficiency of a complaint for the purpose of a motion to dismiss for failure to state a claim? Though most have

483 (“[N]o Justice interprets *Twombly* to empower a judge to disregard factual allegations simply because the judge finds them implausible.”).

<sup>55</sup> *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). Again, this standard seems to require less than what is demanded of a plaintiff at summary judgment or at trial. *See id.* (“The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” (quoting *Twombly*, 550 U.S. at 556)); *Twombly*, 550 U.S. at 556 (“And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and ‘that a recovery is very remote and unlikely.’” (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974))).

<sup>56</sup> *Iqbal*, 129 S. Ct. at 1950; *accord id.* at 1959 (Souter, J., dissenting) (“Under *Twombly*, the relevant question is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible.”). Of course, as with the distinction between conclusory and nonconclusory, *see supra* text accompanying note 46, the distinction between possible and plausible is not entirely clear. And as *Iqbal* itself seems to demonstrate, reasonable jurists might disagree as to the sufficiency of any particular complaint (even assuming agreement as to the appropriate standard).

<sup>57</sup> *See, e.g., Iqbal*, 129 S. Ct. at 1950 (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”). One must acknowledge the possibility, though, that the Court in those cases might have failed to properly apply its own analysis, an analysis that was largely unaided by prior lower-court determinations (understanding that it also might be impossible to separate completely abstract statements of the law from legal analysis).

<sup>58</sup> *Id.*

argued “no,” the answer does not seem quite so clear. On the one hand, the standard imposed in these cases does seem to be higher than that imposed previously, at least in the minds of most lawyers. On the other hand, the current standard does not necessarily seem to represent an incorrect (or even inferior) interpretation of rule text, particularly when considering the federal pleading scheme as a whole.<sup>59</sup> But regardless of how this debate regarding the normative propriety of the Court’s “plausibility” standard is resolved—and that is decidedly *not* the purpose of this Article<sup>60</sup>—one might keep in mind that if factual insufficiency truly is the problem with a plaintiff’s complaint, then there is not much of a problem, at least not in most cases. This is because factual insufficiency is usually easily cured, given the extremely liberal standard for amending complaints.<sup>61</sup> Only if, after being given a reasonable opportunity to amend, a plaintiff is unwilling or unable to cure the deficiency may an action be dismissed on this ground.<sup>62</sup> This means—and this is important—that *dismissals on this basis should be exceedingly rare*. Thus, though considerable time and energy has been devoted to ascertaining precisely what is or is not plausible, in the vast majority of cases, the plaintiff should be able to satisfy almost any pleading standard that a district court might reasonably impose.<sup>63</sup> In cases like *Twombly* (and perhaps *Iqbal*), then,

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<sup>59</sup> That said, to the extent the standard articulated in *Twombly* and *Iqbal* differs from what the Court held previously, the Court probably should have explained why, after seventy years, its current understanding as to the meaning of Rule 8 is superior. Along this line, the Court’s attempt in *Twombly* to justify its interpretation—seemingly after the fact—based on the high cost of discovery and the potential to extort a settlement, *see* 550 U.S. at 557–60, arguably falls short. Though these concerns might have some validity as a policy matter, the Court provides no evidence that they were behind the language used by the original drafters of the *Rules*.

<sup>60</sup> Some additional thoughts on this subject nonetheless will be offered later in this Article. *See infra* Part III.A.

<sup>61</sup> As recently amended, Rule 15(a)(1) provides:

A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or  
(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

FED. R. CIV. P. 15(a)(1). This means, in essence, that a plaintiff is now given one free shot at amending its complaint should the defendant move to dismiss for failure to state a claim or include such a defense in its answer. And even if the plaintiff fails to meet the twenty-one-day deadline imposed by Rule 15(a)(1), it still may seek leave to amend from the district court, which the court “should freely give . . . when justice so requires.” FED. R. CIV. P. 15(a)(2). *See also* *Foman v. Davis*, 371 U.S. 178, 182 (1962) (elucidating this standard).

<sup>62</sup> Some fail to recall, for example, that this possibility was raised at the conclusion of the Court’s opinion in *Iqbal*. *See* 129 S. Ct. at 1954 (“The Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint.”).

<sup>63</sup> *Cf. Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (“[I]t should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some

the more interesting (and more important) question is *why* the plaintiffs in those cases were unable to meet the Court's plausibility standard.<sup>64</sup>

One last thought relates to the proper means of attacking a factually insufficient complaint. A defendant, of course, need not do anything with respect to an insufficient complaint, and need not do anything at the pleading stage.<sup>65</sup> But if a defendant *does* want to challenge the factual sufficiency of a complaint, what is the proper procedural course? Some have suggested that, rather than move to dismiss pursuant to Rule 12(b)(6), a defendant concerned with the sufficiency of a complaint instead should move for a more definite statement pursuant to Rule 12(e),<sup>66</sup> and there is language in some Supreme Court opinions that might be read as suggesting this

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indication of the loss and the causal connection that the plaintiff has in mind."'). Admittedly, there are some portions of *Twombly* and *Iqbal* that still might be cause for concern. For example, in *Iqbal*, the Court stated, "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." 129 S. Ct. at 1950. This might be read as conferring considerable discretion on the courts in this context. Moreover, the *Iqbal* Court instructed that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* This presumes an ability to properly separate the conclusory from the nonconclusory, a somewhat dubious proposition. Finally, it is true that an unnecessarily high pleading standard, as well as an ambiguous pleading standard—both of which are more likely to result in a need to replead—impose additional, unnecessary costs. But again, it is not the purpose of this Article to suggest precisely what the federal pleading standard should be.

<sup>64</sup> A few others have asked the same question. See, e.g., Saritha Komatireddy Tice, *Recent Developments: A "Plausible" Explanation of Pleading Standards*: Bell Atlantic Corp. v. *Twombly*, 127 S. Ct. 1955 (2007), 31 HARV. J.L. & PUB. POL'Y 827, 831 n.46 (2008) ("Because leave to amend is given liberally, the plaintiffs' failure to cure this defect here is even more perplexing."). Of course, the *Twombly* plaintiffs *did* amend their complaint before dismissal. See *Twombly*, 550 U.S. at 550 (citing the plaintiffs' amended complaint). So the key question (again) is why those plaintiffs were nonetheless unable to meet the Court's standard. See *infra* Part II.C.

<sup>65</sup> See *supra* note 24 and accompanying text.

<sup>66</sup> See, e.g., *Has The Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 95 (2009) (statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania) ("The architecture of *Iqbal's* mischief . . . is clear. The foundation is the Court's mistaken conflation of the question of the legal sufficiency of a complaint, which is tested under Rule 12(b)(6), with the question of its sufficiency to provide adequate notice to the defendant, which is tested under Rule 12(e)."). Rule 12(e) provides:

A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

FED. R. CIV. P. 12(e).

approach.<sup>67</sup> But it should be acknowledged that not every pleading deficiency may be cured by a motion for a more definite statement. A motion for a more definite statement is "limited . . . to instances in which the challenged pleading 'is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.'"<sup>68</sup> It is possible for a complaint to be sufficient for the purpose of framing a responsive pleading and yet fail to state a claim upon which relief can be granted. Each rule has its own office. Moreover, so long as a plaintiff, in order to state a claim, must show that it is entitled to relief, the failure to do so must constitute a failure to state a claim. There does not appear to be any requirement that a defendant move for a more definite statement, rather than a dismissal, with respect to a complaint that fails to state a claim. To the contrary, "[i]f the movant believes the opponent's pleading does not state a claim for relief, the proper course is a motion under Rule 12(b)(6) even if the pleading is vague or ambiguous."<sup>69</sup> In other words, to argue that a motion for a more definite statement is the sole remedy for the factually insufficient complaint is to suggest that factual insufficiency can never result in a failure to state a claim, and that seems incorrect.<sup>70</sup> Finally, there is, to some extent, little practical difference between these procedures, in that the burden imposed on the plaintiff (amendment of the complaint), as well as the penalty for failure to

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<sup>67</sup> See, e.g., *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957) ("Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues."); see also *Twombly*, 550 U.S. at 590 n.9 (Stevens, J., dissenting) ("The remedy for an allegation lacking sufficient specificity to provide adequate notice is, of course, a Rule 12(e) motion for a more definite statement." (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002))).

<sup>68</sup> 5C WRIGHT & MILLER, *supra* note 42, at 309 (quoting former Rule 12(e)); *accord id.* § 1375, at 306 ("[T]he only legitimate purpose of a Rule 12(e) motion is to aid the movant in responding to an objectionable pleading."); see also 2 MOORE ET AL., *supra* note 48, ¶ 12.36[1], at 12-121 ("Rule 12(e)'s standard is plainly designed to strike at unintelligibility rather than lack of detail."); *id.* at 12-122 ("[P]roper pleading under Rule 8 requires a pleading to contain allegations of each element of the claim. If it does not, and if the deficiency is not so material that the pleading should be dismissed under Rule 12(b)(6), a more definite statement is appropriate.").

<sup>69</sup> 5C WRIGHT & MILLER, *supra* note 42, § 1237, at 309; *accord id.* ("[E]ven if the pleading is so sketchy that it cannot be construed to show a right to relief, the proper attack is by a motion under Rule 12(b)(6) rather than Rule 12(e)."); see also *id.* at 311 ("Thus, the class of pleadings that are appropriate subjects for a motion under Rule 12(e) is quite small.").

Perhaps an analogy may be made to Rule 12(f) and the motion to strike. If a complaint were to contain "any redundant, immaterial, impertinent, or scandalous matter," FED. R. CIV. P. 12(f), a motion to strike would be an appropriate procedure. But if such a complaint were also to be insufficient as a matter of law, there does not appear to be any reason why a defendant could not instead move to dismiss for failure to state a claim.

<sup>70</sup> It is somewhat unclear whether that is the view of Professor Burbank, see *supra* note 66 and accompanying text, but again, such a view seems suspect, as the weight of authority is to the contrary.

adequately respond to the deficiency in question (dismissal of the action), are essentially the same.<sup>71</sup>

### *B. Legal Insufficiency*

The second way in which an action may be dismissed under Rule 12(b)(6) is for *legal* insufficiency. A good example of legal insufficiency can be found in Judge Richard Posner's opinion for the court in *Kirksey v. R.J. Reynolds Tobacco Co.*<sup>72</sup> In *Kirksey*, the plaintiff attempted to allege a personal-injury claim against two cigarette manufacturers.<sup>73</sup> The defendants moved to dismiss for failure to state a claim, arguing that the plaintiff's claim was either preempted by federal law or unrecognized under Illinois state law.<sup>74</sup> The plaintiff responded that Rule 8(a)(2) requires little in the way of facts, and nothing in the way of legal theories.<sup>75</sup> Though the court of appeals essentially agreed, it held, in affirming the dismissal of the plaintiff's action, that apparent compliance with Rule 8 was insufficient.

This confuses form with substance. Rule 8(a)(2) specifies the conditions of the formal adequacy of a pleading. It does not specify the conditions of its substantive adequacy, that is, its legal merit. . . .

It is true that a claim should not be dismissed out of hand just because it is so novel that it cannot be fitted into an existing legal category . . . . But a claim that does not fit into an existing legal category requires more argument by the plaintiff to stave off dismissal, not less, if the defendant

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<sup>71</sup> See 5B WRIGHT & MILLER, *supra* note 42, § 1356, at 371–72 (“[R]epeated refusals by the plaintiff to conform to the dictates of Rule 8 and Rule 10 as to the proper form or content of the pleading may result in a dismissal for failure to state a claim.”).

Some have alternatively argued that in lieu of a dismissal for failure to state a claim, a plaintiff with a factually insufficient complaint might be ordered to reply to the defendant's answer pursuant to Rule 7(a)(7). But there are problems with this argument as well. For one thing, “[a] clear showing of necessity or of extraordinary circumstances of a compelling nature will usually be required before the court will order a reply.” 2 MOORE ET AL., *supra* note 48, ¶ 7.02[7][b], at 7–12. A deficient complaint does not seem to be the sort of “necessity” contemplated under this procedure, given that there is already a different procedure for dealing with that problem. Perhaps more importantly, a reply presupposes an answer, and it is precisely to avoid preparing an answer that a defendant asserts the defense of failure to state a claim in a preanswer motion. Finally, as with the use of Rule 12(e), it does not appear that the use of a reply in this context would accomplish anything that could not be accomplished by a motion to dismiss.

<sup>72</sup> 168 F.3d 1039 (7th Cir. 1999).

<sup>73</sup> *Id.* at 1040.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1040–41.



moves to dismiss on the ground that the plaintiff's claim has no basis in law. The plaintiff has to show that while her claim has no basis in *existing* law, or at least the law's current pigeonholes, it lies in the natural line of the law's development and should now be recognized as a part of the law.<sup>76</sup>

Thus, in addition to *factual* sufficiency, a claim must be *legally* sufficient. Legal sufficiency is important because a plaintiff that fails to rely on any recognized legal theory cannot possibly win at trial or at any other stage in the proceedings.<sup>77</sup>

It should now be apparent that the problem in both *Twombly* and *Iqbal* was *not* legal insufficiency. For in both cases, the plaintiffs attempted to plead recognized causes of action.<sup>78</sup>

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<sup>76</sup> *Id.* at 1041–42.

<sup>77</sup> As noted previously, *see supra* text accompanying note 27, the *Kirksey* court seemed to suggest that the standard for sufficiency under Rule 8 might be lower than that required under Rule 12(b)(6). But it is not at all clear that this is true, for it is difficult to see how the pleading of a legally insufficient claim shows that the plaintiff is entitled to relief. It is also difficult to see how a vague or ambiguous complaint could be found sufficient under Rule 8, for if it could, how could such a complaint be challenged under Rule 12(e)? It might well be, then, that the standard for sufficiency under Rule 8 is actually *higher*, not lower, than that required under Rule 12(b)(6).

<sup>78</sup> *See* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947–49 (2009) (describing “the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548 (2007) (describing “[l]iability under § 1 of the Sherman Act, 15 U.S.C. § 1”).

Professor Ides explains *Twombly* in somewhat different terms. He argues that the problem was one of substantive sufficiency, which “requires that the facts alleged comprise a claim on which relief can be granted, i.e., the factual allegations must be sufficient to show ‘that the pleader is entitled to relief.’” Ides, *supra* note 26, at 611 (quoting FED. R. CIV. P. 8(a)(2)). Professor Ides of course agrees that the plaintiffs in that case were at least trying to plead a claim based on a recognized cause of action. The problem was that the nonconclusory facts alleged in the plaintiffs’ complaint did not adequately plead such a claim. *See id.* at 627 (“An ‘agreement’ is a material element of a § 1 claim. Therefore, a sufficient outline or adumbration of a § 1 claim must include allegations supportive of that material element.”). Though this seems to be a correct appraisal, one might observe that “substantive” sufficiency, as he uses that phrase, seems to include a factual as well as a legal component—i.e., a complaint, in order to survive a motion to dismiss, must be based on a recognized cause of action *and* must include sufficient nonconclusory allegations. It seems useful, however, to distinguish the situation in *Twombly* from that in *Kirksey*, in which there was no such underlying cause of action. Thus (again), this Article argues that the problem in the former was factual insufficiency, whereas the problem in the latter was legal insufficiency.

Having said this—and not to resurrect any sort of hard fact/law distinction—it does not seem particularly useful to recast what are essentially factual insufficiency problems in terms of legal insufficiency. For example, Professor Ides argues, “[i]n essence, [the *Twombly* plaintiffs] pled themselves out of court by filing a complaint that alleged a claim unrecognized by the Sherman Act, namely, a claim of anticompetitive parallel conduct.” *Id.* at 631. Though this is one way to view the world, it does not appear that this was the approach the plaintiffs in that case were trying to take, as it seems that the plaintiffs in that action knew that parallel conduct alone would not suffice at trial. Instead, it appears that they were hoping that discovery would provide whatever additional detail might have been missing from their complaint.

By contrast, the famous “no set of facts” passage from the Supreme Court’s decision in *Conley v. Gibson*<sup>79</sup> did relate to legal insufficiency.<sup>80</sup> In *Conley*, the Court began:

Once again Negro employees are here under the Railway Labor Act asking that their collective bargaining agent be compelled to represent them fairly. In a series of cases beginning with *Steele v. Louisville & Nashville R. Co.*, this Court has emphatically and repeatedly ruled that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race and has held that the courts have power to protect employees against such invidious discrimination.<sup>81</sup>

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<sup>79</sup> 355 U.S. 41, 45–46 (1957).

<sup>80</sup> Arguably, though, it was not a part of any *holding* by that Court, as many seem to believe. See, e.g., Emily Sherwin, *The Story of Conley: Precedent by Accident*, in CIVIL PROCEDURE STORIES 295, 295 (Kevin M. Clermont ed., 2d ed. 2008) (describing this passage in that manner). In *Conley*, the defendants moved to dismiss on three grounds: “(1) the National Railroad Adjustment Board had exclusive jurisdiction over the controversy; (2) the Texas and New Orleans Railroad, which had not been joined, was an indispensable party defendant; and (3) the complaint failed to state a claim upon which relief could be given.” *Conley*, 355 U.S. at 43. The district court granted the motion to dismiss on the jurisdictional ground, *id.* at 43–44, and, presumably because it lacked subject-matter jurisdiction over the action, “did not pass on the other reasons advanced for dismissal,” *id.* at 45. The Court of Appeals for the Fifth Circuit, “apparently relying on the same ground,” affirmed the judgment of the district court. *Id.* at 44. The Supreme Court held that “it was error for the courts below to dismiss the complaint for lack of jurisdiction.” *Id.* But rather than remand for lower court consideration of the other grounds for dismissal, the Court found “it timely and proper . . . to consider them here.” *Id.* at 45.

Whether the Supreme Court should have proceeded to express its view as to the indispensable-party and failure-to-state-a-claim issues is debatable. On the one hand, these other issues were “briefed and argued by both parties and the respondents urge[d] that the decision below be upheld, if necessary, on these other grounds.” *Id.* On the other hand, the Supreme Court often considers it beneficial, and sometimes even demands, that issues first be considered by lower courts. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 120–21 (1976) (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”). Additionally, although (as indicated) the Court generally may affirm the judgment of the court of appeals on any basis, in *Conley*, the Court did *not* affirm; it reversed. Be that as it may, there is little doubt that the Court’s discussion of the sufficiency of the plaintiffs’ complaint was dicta, for it had nothing to do with the Court’s judgment, which, strictly speaking, related only to subject-matter jurisdiction. The Court’s discussion of the failure-to-state-a-claim issue seemingly could not count even as an alternative holding, as, by itself, it was insufficient in that the Court could not have reversed on the basis of that issue alone. Though some might read this portion of the Court’s opinion as indicative of what the Court might hold in the future, and though later courts (perhaps even the Supreme Court) might have so held, what the *Conley* Court said as to this issue has no binding precedential value. For this reason alone, it is somewhat surprising that the *Twombly* Court (which never refers to this language as a holding and assiduously seems to avoid the term “overrule”) went to the trouble to “retire” this language. See *Twombly*, 550 U.S. at 562–63 (noting that *Conley*’s “no set of facts language” has “puzzl[ed] the profession for 50 years” and “earned its retirement”).

<sup>81</sup> *Conley*, 355 U.S. at 42 (footnote omitted) (citation omitted).

When the Court finally addressed the failure-to-state-a-claim issue, it stated:

under the general principles laid down in the *Steele*, *Graham*, and *Howard* cases the complaint adequately set forth a claim upon which relief could be granted. *In appraising the sufficiency of the complaint we follow, of course, the accepted rule 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.* Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit. This Court squarely held in *Steele* and subsequent cases that discrimination in representation because of race is prohibited by the Railway Labor Act. The bargaining representative's duty not to draw "irrelevant and invidious" distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit.<sup>82</sup>

Only *later* in its opinion did the *Conley* Court discuss the problem at issue in *Twombly* and *Iqbal*: factual insufficiency.

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<sup>82</sup> *Id.* at 45-46 (emphasis added) (footnotes omitted) (quoting *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203 (1944)).

The respondents *also* argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. *To the contrary, all the Rules require 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.* The illustrative forms appended to the Rules plainly demonstrate this. Such simplified “notice pleading” is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that “all pleadings shall be so construed as to do substantial justice,” we have no doubt that petitioners’ complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.<sup>83</sup>

When properly viewed as relating to *legal* insufficiency,<sup>84</sup> it is somewhat surprising that the *Twombly* Court decided to “retire” the *Conley* Court’s “no set of facts” language, for it does not seem to say anything controversial. It has long been—and presumably still is—the law that an action must not be dismissed if the facts alleged in the complaint would entitle the plaintiff to relief under some recognized legal theory, irrespective of whether any particular legal theory has been pleaded.<sup>85</sup> The problem is that the *Twombly* Court—

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<sup>83</sup> *Id.* at 47–48 (emphasis added) (footnotes omitted). In contrast to the “no set of facts” language, *this* portion of the *Conley* opinion was quoted by the *Twombly* Court with approval. *Twombly*, 550 U.S. at 555.

<sup>84</sup> A few others have also made this observation. *See, e.g.,* Burbank, *supra* note 66, at 12 (“[T]he *Conley* Court’s use of the ‘no set of facts’ language was intended to address only those situations in which, no matter how compelling the facts alleged, the law did not provide relief.”); Sherwin, *supra* note 80, at 315–16 (arguing that the way to make sense of the *Conley* opinion is to note that the “no set of facts” language “refers only to determining whether any legal claim could exist, not to testing how detailed its factual statement need be”).

<sup>85</sup> *See* 2 MOORE ET AL., *supra* note 48, ¶ 8.04[3], at 8–40 (“Rule 8(a)(2) does not require a claimant to set forth any legal theory justifying the relief sought on the facts alleged, but does require sufficient factual averments to show that the claimant may be entitled to some relief.”). It seems, though, that at least some factual detail must be alleged in the complaint to enable a district court to reasonably decide this issue. In other words, just as a challenge to legal

erroneously—read this passage as relating to *factual* insufficiency. As that Court stated:

This “no set of facts” language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard.

On such a focused and literal reading of *Conley*’s “no set of facts,” a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some “set of [undisclosed] facts” to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. It seems fair to say that this approach to pleading would dispense with any showing of a “reasonably founded hope” that a plaintiff would be able to make a case; Mr. Micawber’s optimism would be enough.

Seeing this, a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. . . .

We could go on, but there is no need to pile up further citations to show that *Conley*’s “no set of facts” language has been questioned, criticized, and explained away long enough.

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sufficiency “requires more argument by the plaintiff to stave off dismissal, not less,” *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1042 (7th Cir. 1999), it also might require more in the way of factual allegations. See 2 MOORE ET AL., *supra* note 48, ¶ 12.34[1][b], at 12-79 (“[T]he pleading must at least set forth sufficient information for the court to determine whether some recognized legal theory exists on which relief could be accorded the pleader. If it fails to do so, a motion under Rule 12(b)(6) will be granted.”). In this sense, the fact/law distinction again begins to blur somewhat, in that a plaintiff’s ability to plead a valid claim—i.e., one based on a recognized cause of action or legal theory—depends to some extent on the plaintiff’s ability to marshal sufficient, relevant facts. Thus, it might be true that the federal rules governing legal sufficiency “are *in general* adequate because judgments on the validity of claims do not require any discovery.” Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J. L. & POL’Y 61, 61 (2007) (emphasis added). But there are probably a few cases in which discovery would lead to claims of which the plaintiff was previously unaware.

To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.<sup>86</sup>

If this portion of *Conley* is read as applying to factual insufficiency, then the *Twombly* Court's rejection of that language is surely correct. For it is also the law that a plaintiff cannot allege anything short of impossibility and have it suffice as a factual matter.<sup>87</sup> A complaint can only be evaluated based on those allegations that are pleaded, not on what a plaintiff might some day prove, which cannot be known or predicted by the court or even the defendant. But (again), that is not the context in which this passage arises.<sup>88</sup>

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<sup>86</sup> *Twombly*, 550 U.S. at 561–63 (alteration in original) (footnote omitted) (citations omitted); see also *id.* at 553 (“Although the Court of Appeals took the view that plaintiffs must plead facts that ‘include conspiracy among the realm of “plausible” possibilities in order to survive a motion to dismiss,’ it then said that ‘to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.’” (quoting *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005))).

<sup>87</sup> This also supplies part of the reason why the factual insufficiency of a complaint can serve as a basis for a dismissal for failure to state a claim. Many have described the futility of demanding greater particularity in pleadings and they are correct in that plaintiffs frequently do not have an entirely clear view of their cases at commencement and in that the admission of material allegations by defendants is rare. See, e.g., Clark, *supra* note 40, at 274 (discussing the difficulties lawyers have to confront when faced with a demand for greater specificity in pleadings). But such arguments also seem to presume that every complaint contains a legally sufficient claim and that presumption seems unwarranted. A plaintiff should not be able to hide a legally insufficient claim behind a factually insufficient statement of that claim. Such claims should be eliminated at the pleading stage, not at summary judgment.

<sup>88</sup> Similarly, the *Twombly* Court is undoubtedly also correct regarding the “breadth of opportunity to prove what an adequate complaint claims,” and the idea that “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” 550 U.S. at 563. But contrary to the *Twombly* Court's explanation, that is not at all what the *Conley* Court stated, let alone held.

If a complaint is found to be legally insufficient, is there anything that a plaintiff can do to avoid dismissal? Probably not, for unlike the factual insufficiency context, wherein the opportunity to amend potentially will save many deficient complaints, there seems to be little a plaintiff can do when the law fails to provide for the relief

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Incidentally, as the *Twombly* Court correctly observed that, a similar misreading (or overreading) of precedent appears to have occurred with respect to another venerable pleading decision: *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). The precise issue before the *Swierkiewicz* Court was “whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp. v. Green*.” *Swierkiewicz*, 534 U.S. at 508. The Court held that “an employment discrimination complaint need not include such facts and instead must contain only ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” *Id.* (quoting FED. R. CIV. P. 8(a)(2)). In support of its holding, the Court observed, “it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case,” *id.* at 511, and because “the precise requirements of a prima facie case can vary depending on the context,” *id.* at 512. Though the Court went on to state that the plaintiff’s complaint “easily satisfies the requirements of Rule 8(a),” *id.* at 514, it is not at all clear that the Court’s analysis as to the sufficiency of the plaintiff’s complaint in the absence of any “prima facie case” requirement (an issue that does not appear to have been decided by any lower court in that case) may fairly be characterized as a holding. *Id.* Stated another way: if the issue before the Court is whether a complaint must include *Y*, and the Court decides that a complaint need not include *Y*, that would constitute a holding. If the Court were to go further and state that the reason why *Y* need not be included is that a complaint need only include *X*, that also seemingly would constitute a holding (particularly when *X* consists of little more than a recitation of the relevant procedural rule). But whether a statement by the Court that the complaint at issue actually included *X* properly could be regarded as a holding is far from clear. Indeed, given the precise nature of the defendant’s motion in that case, one could fairly conclude that the defendant had all but conceded sufficiency in all other respects. *See* SUP. CT. R. 14(1)(a) (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”); *cf. Yee v. City of Escondido*, 503 U.S. 519, 528 (1992) (“Petitioners suggest that the statutory procedure for changing the use of a mobile home park is in practice ‘a kind of gauntlet,’ in that they are not in fact free to change the use of their land. Because petitioners do not claim to have run that gauntlet, however, this case provides no occasion to consider how the procedure has been applied to petitioners’ property, and we accordingly confine ourselves to the face of the statute.” (citations omitted)).

The same analysis appears to apply with respect to the Court’s reasoning in *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993) (“We granted certiorari to decide whether a federal court may apply a ‘heightened pleading standard’—more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure—in civil rights cases alleging municipal liability under Rev. Stat. § 1979, 42 U.S.C. § 1983. We hold it may not.”).

By contrast, in *Twombly* (as well as in *Iqbal*), the issue related to the precise nature of the appropriate pleading standard in the absence of any sort of heightened pleading requirement. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942–43 (2009) (“This case . . . turns on a narrower question: Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights.”); *Twombly*, 550 U.S. at 553 (“We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct . . .”).

Thus, contrary to the views of some of the Court’s critics, the Court’s explanation of the pleading standard demanded under Rule 8 and its attempt to distinguish that demanded under Rule 9 might not be entirely inconsistent with prior precedent.

requested.<sup>89</sup> One might try waiting as long as the applicable statute of limitation will allow for the law to change, or being judicious in one's choice of forum if that would result in a different source of substantive law. But aside from that, a plaintiff seemingly has little choice but to somehow convince the district court that the cause of action underlying its claim, though novel, should be recognized.<sup>90</sup>

### C. Insufficiency of Proof

The final way in which an action may be dismissed for failure to state a claim is *insufficiency of proof*.<sup>91</sup> What does this mean in the context of pleading and the sufficiency of a complaint?

There is a wonderful old case out of Utah found in Stephen Yeazell's civil procedure textbook,<sup>92</sup> *Reid v. San Pedro, Los Angeles and Salt Lake Railroad Co.*,<sup>93</sup> that well illustrates the point. In *Reid*, a rancher was pasturing cattle on land adjacent to a railroad.<sup>94</sup> The plaintiff alleged that a fence constructed by the railroad company to keep livestock off the tracks was "broken and in poor repair and become down so that cattle had an easy passage through [it]."<sup>95</sup> At the same time, a gate that had been installed for the convenience of the landowner also had been left open.<sup>96</sup> Tragically, "a three year old heifer of the plaintiff strayed on the right of way of said defendant

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<sup>89</sup> This presumes that one can distinguish the situation where a plaintiff might have a valid claim but has failed to sufficiently state it, from the situation where a plaintiff is *unable* to state a recognized claim because none exists.

<sup>90</sup> See *Kirksey*, 168 F.3d at 1042 (speculating that the plaintiff's lawyer's problem in that case "is that he really cannot think of a viable legal basis for his client's claim, that he hopes that the current legal ferment in the world of tobacco litigation will brew him up a theory at some future date if only he can stave off immediate dismissal under Rule 12(b)(6)").

Of course, there might be any number of other, extrajudicial things that a plaintiff might do in this situation—for example, one might consider approaching a legislator—but those that do not involve the commencement of a civil action are beyond the scope of this Article.

<sup>91</sup> A qualification is in order here. Actually, it does not appear that insufficiency of proof is, per se, a ground for dismissal, at least not under Rule 12(b)(6). Strictly speaking, an action may be dismissed for failure to state a claim only for factual or legal insufficiency. See Epstein, *supra* note 85, at 61 ("The present Federal Rules of Civil Procedure allow a plaintiff's case to be attacked either for its legal or factual sufficiency."). Insufficiency of proof, though, might be a ground for dismissal under Rule 11. For a discussion of that issue, see *infra* Part III.A. As will be discussed, insufficiency of proof can lead to a dismissal for failure to state a claim only indirectly, in that it can prevent a plaintiff from alleging sufficient facts to survive a motion to dismiss, i.e., factual insufficiency. See *supra* Part II.A. But not all instances of factual insufficiency are caused by insufficiency of proof. For example, factual insufficiency also can result when a plaintiff is unaware of the proper pleading standard, or for some reason refuses to allege sufficient information. It therefore seems helpful conceptually to distinguish insufficiency of proof, particularly given its current importance.

<sup>92</sup> STEPHEN C. YEAZELL, CIVIL PROCEDURE 553 (7th ed. 2008).

<sup>93</sup> 118 P. 1009 (Utah 1911).

<sup>94</sup> *Id.* at 1010.

<sup>95</sup> *Id.* at 1009.

<sup>96</sup> *Id.*



company” and the railroad company’s train “ran on and over said heifer,” resulting in her untimely death.<sup>97</sup> Under the prevailing law, if the heifer escaped through the fence, the railroad company was liable, whereas an escape through the gate was the rancher’s responsibility.<sup>98</sup>

A jury returned a verdict in favor of the rancher.<sup>99</sup> The railroad company appealed on the ground that “the evidence is insufficient to support the verdict because it fails to show where and under what circumstances the cattle sued for got upon the right of way.”<sup>100</sup> The Supreme Court of Utah agreed:

There is no direct evidence as to where the cow got on to the right of way. It is conceded, however, that she was killed in the immediate vicinity of the gate mentioned, and, as shown by the evidence, about one mile from the point where the fence inclosing the right of way was down and out of repair. The inference, therefore, is just as strong, if not stronger, that she entered upon the right of way through the open gate as it is that she entered through the fence at the point where it was out of repair. . . . [T]he burden was on [the rancher] to establish the liability of the defendant by a preponderance of the evidence. It is a familiar rule that where the undisputed evidence of the plaintiff, from which the existence of an essential fact is sought to be inferred, points with equal force to two things, one of which renders the defendant liable and the other not, the plaintiff must fail. So in this case, in order to entitle respondent to recover, it was essential for her to show by a preponderance of the evidence that the cow entered upon the right of way through the broken down fence. This the respondent failed to do.

We are of the opinion that the verdict rendered on the first cause of action is not supported by the evidence, and that the trial court should have directed a verdict for appellant on that cause of action in accordance with appellant’s request.<sup>101</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *See id.* at 1010 (“Under this statute, if the cow entered upon the right of way through the open gate, [the railroad company] cannot be held liable for her loss; there being no evidence of negligence on the part of trainmen at the time she was killed.”).

<sup>99</sup> *See id.* (“A trial was had which resulted in a verdict for [the rancher] on each of the four causes of action.”).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* It probably did not help the rancher’s case that by the time the case reached the supreme court, the heifer had become a mere “cow.”

In modern terms, one might say that the evidence presented at trial provided no basis upon which a reasonable juror could find in favor of the rancher. Thus, one can only surmise that the verdict in favor of the rancher was based on speculation, or perhaps sympathy.<sup>102</sup>

Though *Reid* involved the propriety of a jury verdict following the admission of evidence at trial, one might consider what the result might have been if the rancher had included similar allegations in her complaint, and the railroad company had moved to dismiss for failure to state a claim (assuming something akin to that procedure existed at that time and in that place). For example, what if the rancher had alleged that the heifer escaped either through the fence or the gate; that she had no evidence indicating whether the fence, as opposed to the gate, was the more likely exit, but that the railroad company was nonetheless liable for the heifer's death?<sup>103</sup> Should a motion to dismiss such an action be granted?

It seems that the answer must be yes. And the reason, at least in a sense, is insufficiency of proof. For even assuming the allegations in the rancher's complaint are true, the rancher cannot prevail, as the rancher has not shown that she is entitled to the relief requested—or, in the words of the *Twombly* and *Iqbal* Courts, that her claim is “plausible.”<sup>104</sup> The problem is not legal insufficiency, for even the railroad company conceded that it would be liable upon sufficient proof that the heifer escaped through the fence. The problem also is not factual insufficiency, at least not in the usual sense, for the rancher appears to have alleged as much in the way of nonconclusory facts as is found in any of the Official Form complaints. Rather, the problem lies in the fact that the rancher has no way of determining (and therefore no way of proving) how the heifer escaped, and cannot (truthfully) allege otherwise. She therefore would be unable to

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<sup>102</sup> Of course, the *Reid* situation should be contrasted with the more typical situation at trial in which a defendant's motion for a directed verdict (or today, at least in federal court, for judgment as a matter of law) must be denied despite the fact that the jury might well reject the plaintiff's evidence and find in favor of the defendant. Cf. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 n.8 (2007) (“[It is an] unobjectionable proposition that, when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to . . . prove his claim to the satisfaction of the factfinder.”). The difference is that, in the more typical situation, a reasonable juror *could* find in favor of the plaintiff, whereas in *Reid*, a reasonable juror could not.

<sup>103</sup> Actually, this is essentially what the rancher *did* allege. See *Reid*, 118 P. at 1009 (stating in her complaint that she “does not know, and therefore is unable to state, whether the fence was down or the gate left open”). Even on appeal, the rancher argued that “[i]t is immaterial whether the heifer strayed on through an inviting open gate or an enticing open fence. . . .” *Id.* at 1010 (internal quotation marks omitted).

<sup>104</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570).

"nudge[]" her claim "across the line from conceivable to plausible."<sup>105</sup>

And this brings us back to *Twombly*. The principal problem for the plaintiffs in *Twombly* was the failure to allege an actual agreement by the defendants to restrain trade. But if that was the problem, why did the plaintiffs not seek leave to amend?<sup>106</sup> The answer is somewhat uncertain, but presumably they were not aware of any actual agreement of this nature, meaning leave to amend would have been futile.<sup>107</sup> And the reason it would have been futile was (and is) Rule 11, and specifically, Rule 11(b)(3). Rule 11(b)(3) requires that the "factual contentions [alleged in a complaint] have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."<sup>108</sup> What this means, essentially, is that, in order to successfully state a claim in federal court, a plaintiff generally must have the goods (so to speak) *ab initio*, upfront, at the commencement of the action.<sup>109</sup> Thus (and contrary to what many seem to believe),

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<sup>105</sup> *Twombly*, 550 U.S. at 570. One might say that Reid pleaded herself out of court, and that might be true in the sense that "the face of the complaint exposed the inadequacy of the claim." *Ides*, *supra* note 26, at 632. But one alternatively could argue that Reid was never *in* court, in the sense that there was nothing she could remove from her complaint to cure the insufficiency. Rather, the problem was that she could not allege that the heifer more likely than not exited via the fence.

<sup>106</sup> See *supra* notes 61–63 and accompanying text (discussing amendment as the typical solution to factual insufficiency).

<sup>107</sup> See Tice, *supra* note 64, at 831 ("Why did the plaintiffs not simply amend their complaint to allege [an] agreement [to conspire] directly . . . ? Barring attorney incompetence, the answer must be that the plaintiffs did not believe that such an amended pleading would have succeeded." (footnote omitted)).

<sup>108</sup> FED. R. CIV. P. 11(b)(3); see also FED. R. CIV. P. 11(b)(1) (proscribing complaints "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation"); FED. R. CIV. P. 11(b)(2) (requiring claims to be "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"). This does *not* mean that a plaintiff must plead evidence, whatever that phrase might mean. A plaintiff may attach and adopt by reference documents to a complaint, see FED. R. CIV. P. 10(c), and may verify its complaint, see FED. R. CIV. P. 11(a) ("Unless a rule or statute specifically states otherwise, a pleading need not be verified . . ."), but it is not required to do so. But this does not detract from the point that whatever *is* pleaded generally must have evidentiary support.

Incidentally, this requirement probably supplies part of the reason why a plaintiff's allegations are assumed to be true. For at the pleading stage, no one, aside from the plaintiff, knows the full nature or extent of the plaintiff's evidence supporting its allegations; everyone else simply is required to assume that it exists. This stands in sharp contrast to the procedure at summary judgment and at trial, where a plaintiff's allegations (except to the extent admitted by the defendant) are essentially disregarded, and the focus turns to "paper" evidence (in the case of summary judgment) or actual, admitted evidence (in the case of judgment as a matter of law).

<sup>109</sup> Of course, Rule 11(b)(3) alternatively permits a plaintiff to allege that it is "likely" that its allegations will have evidentiary support after further investigation or discovery, a provision that was designed to provide some relief for plaintiffs that lack sufficient evidence at commencement. See FED. R. CIV. P. 11(b)(3). Regrettably, it seems unlikely that a plaintiff will, on the one hand, lack sufficient evidentiary support for its allegations, and yet, on the other

one may *not* allege facts based solely on wishful thinking, and on what one hopes to obtain during discovery.<sup>110</sup> Rather, a claim that is lacking in evidentiary support is a claim that simply may not be pleaded, at least not properly.<sup>111</sup> Perhaps this has not always been the standard, but this has been the law in the federal courts since at least 1993, the year this portion of Rule 11 was amended to read as it does today, if not 1983, the year this rule was given its current “bite.”<sup>112</sup>

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hand, be able certify that it is “likely” it will be able to obtain such support at some point in the future. As Carl Tobias explains:

[Rule 11’s] “duty of candor,” requiring litigants who make assertions that may lack evidentiary support to identify specifically that possibility, can be very burdensome, particularly for parties with limited access to information involving their allegations or few resources for gathering, assessing, and synthesizing that material which is accessible. When pertinent information is in the defendants’ minds or files, for example, plaintiffs will encounter great difficulty in specifically delineating contentions which are likely to be substantiated after reasonable opportunity for additional investigation or discovery, before they have had that opportunity. Even if the plaintiffs do not participate in unalloyed speculation, they would still experience problems designating those allegations which probably will have support, identifying them with sufficient particularity, and ascertaining what is a reasonable opportunity.

Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171, 203 (1994) (footnotes omitted). As a result, such allegations are probably rare (and again, would have to be specifically so identified).

<sup>110</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (“Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”).

<sup>111</sup> Of course, a lack of evidentiary support for an element of a plaintiff’s claim will probably also prevent that plaintiff from pleading nonconclusory allegations relating to that element. But for reasons to be developed, it appears that the bigger problem for plaintiffs in this situation is not (or should not be) the standard for pleading per se, but rather Rule 11.

<sup>112</sup> See GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 2(A), at 1-5 (4th ed. 2008) (“Although [Rule 11] was originally adopted in 1938, it had no real bite for 45 years, until August 1983.”). Originally, Rule 11 provided in pertinent part:

The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served.

*Id.* § 4(A), at 2-5 to -6. In 1983, the “good ground to support” language was stricken and in its place the plaintiff (or its attorney) was required to certify:

[T]hat to the best of [his or her] knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

*Id.* at 2-5. The most recent significant amendment to Rule 11 occurred in 1993. This eliminated the “well grounded in fact” language in favor of what became Rule 11(b)(3): “[T]he allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or

Thus, for plaintiffs that lack the evidence they need to “show” that they are entitled to the relief requested (and cannot show that they are likely to obtain such evidence later), the importance of Rule 11(b)(3) probably cannot be overstated.<sup>113</sup> With respect to federal pleading, it is the proverbial elephant in the (court)room.

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discovery.” *Id.* at 2-3. Though the “allegations” portion of this passage was later eliminated as redundant, *see id.* at 2-1 (“[T]he factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery”), this is essentially how the rule reads today.

Whether the 1993 amendments to Rule 11 resulted in a significant change in pleading standards is unclear. The 1983, “well grounded in fact” standard “was satisfied if a reasonable person in the signer’s position would have believed the factual allegations to be true.” *Id.* § 2(A)(1), at 1-9. On the other hand, “the use of the words ‘evidence’ and ‘evidentiary support’” in the current version of Rule 11 “impart the notion of admissibility—i.e., that admissible evidence will be forthcoming at least at some point in the pretrial process.” *Id.* § 2(A)(4), at 1-33. Regardless, there is no question but that pleading standards changed somewhat dramatically (if indirectly) following the 1983 amendments to Rule 11.

Thus, for those who argue that the *Twombly* and *Iqbal* Courts are not interpreting the law of pleading as it used to be interpreted, one might fairly ask, to which era are they speaking? If they are speaking of the law as it applied in, say, *Conley*, the appropriate response might be yes, but that law has changed. Thus (for example), in his dissenting opinion in *Twombly*, Justice Stevens stated, “This case is a poor vehicle for the Court’s new pleading rule, for we have observed that ‘in antitrust cases, where “the proof is largely in the hands of the alleged conspirators,” . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 586–87 (2007) (Stevens, J., dissenting) (omission in original) (quoting *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976)). Obviously, the case cited by Justice Stevens in support of this proposition predates 1983. Of course, if what these critics really mean is that they liked the former law better (or that it was in some normative sense superior), they might again be correct, though that is a different argument.

Incidentally, there has been some debate regarding the source of the Court’s choice of the word “plausible” in this context, and some have argued (persuasively) that it derives from substantive antitrust law. *See, e.g.*, Edward Brunet, *The Substantive Origins of “Plausible Pleadings”: An Introduction to the Symposium on Ashcroft v. Iqbal*, 14 LEWIS & CLARK L. REV. 1, 3 (2010) (“In antitrust doctrine, the word plausible has been used to assess antitrust pleadings and proof in a manner that has less to do with the form of an allegation—‘procedural plausibility’—and, in contrast, more to do with a substantive evaluation of proof or allegation advanced by a claimant.”). But it might be observed that this same word also was used in connection with the 1983 and 1993 amendments to Rule 11. *See, e.g.*, Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 632 (1987) (“[T]he 1983 amendments . . . conflict with the liberal pleading regime of the Federal Rules by demanding greater specificity in pleading and by discouraging the pleading of novel legal theories.”).

<sup>113</sup> It is also important to keep in mind, though, that for plaintiffs that *do* have sufficient evidence, Rule 11(b)(3) poses no impediment. In other words, it is important to recall the distinction between factual insufficiency and insufficiency of proof. For example, Professor Hoffman argues that “an allegation that is implausible may also be said to violate Rule 11(b)(3).” Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1254 (2008). Though this might have been true in *Twombly* and *Iqbal*, it is by no means true in many (if not most) other cases, cases in which a complaint might be deemed insufficient but in which the plaintiff possesses sufficient evidence of a claim.

Incidentally, there is now some question as to whether *Twombly* and *Iqbal* apply to answers as well as complaints. Generally speaking, the answer seems to be “no,” in that the

And there is one more piece to the puzzle. Why did the plaintiffs in *Twombly* lack evidentiary support for their claim, to the point where they were unable to plead such a claim consistent with Rule 11? The answer might be that such evidence simply does not exist, and undoubtedly that is true in many cases in which the plaintiff is unable to satisfy the burden imposed by this rule. But we also know (or strongly suspect) that there are some cases, perhaps many cases, in which such evidence lies in the hands of others, including the defendant. Why does a plaintiff in this situation not simply obtain that evidence before commencement? That would be prudent if it were possible; but in many cases, it is not. The reason is that the *Federal Rules of Civil Procedure* generally do not provide for preaction discovery.<sup>114</sup> As a result, there are few opportunities for obtaining such evidence before filing the complaint, and even fewer means of compelling production of such evidence. Thus, just as Rule 11 prevents a plaintiff from pleading a claim lacking sufficient evidentiary support, the inability to conduct sufficient preaction discovery is largely responsible for preventing some plaintiffs from satisfying Rule 11.

Somewhat surprisingly, following *Twombly* and *Iqbal*, this inability to conduct preaction discovery has received only limited attention, and the impact of Rule 11 has received almost none.<sup>115</sup> Instead, most have accused the Supreme Court of dramatically changing federal pleading standards, and of “amending” Rule 8 by judicial decision.<sup>116</sup> But unlike Rule 11, Rule 8 has not changed appreciably since its inception,<sup>117</sup> and though reinterpretations of

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“showing” requirement contained in Rule 8(a)(2) does not appear in those portions of Rule 8 relating to responsive pleadings. See FED. R. CIV. P. 8(b)–(c). Nonetheless, Rule 8(b)(5) requires that “[a] party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state . . . .” *Id.* 8(b)(5). Moreover, in addition to the more general commands of Rule 11, see *supra* note 109, Rule 11(b)(4) requires that “the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.” FED. R. CIV. P. 11(b)(4).

<sup>114</sup> See, e.g., Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 227 (2007) (“According to the prevailing understanding, [Rule 27] is not meant for investigating the facts in advance of drafting a complaint.”). Incidentally, unlike Rule 11, this “rule” against preaction discovery has remained essentially unchanged since 1938.

<sup>115</sup> The same is true of the *Twombly* and *Iqbal* opinions themselves, in which the Court says very little about either (and what it does say seems to suggest an incomplete understanding of the law in this area, see *infra* notes 148–51 and accompanying text).

<sup>116</sup> See *supra* note 6 and *infra* note 153 and accompanying text.

<sup>117</sup> See 5 WRIGHT & MILLER, *supra* note 42, § 1201, at 85 (“Rule 8 has been amended only twice since its promulgation and those alterations were of a relatively minor nature.”). Though Rule 8 has been further amended since 2004, those amendments were extremely minor.

longstanding legal text are not without precedent,<sup>118</sup> such reinterpretations are relatively rare, and the Court gave no indication that it was doing so in either *Twombly* or *Iqbal*.<sup>119</sup> Moreover, the Supreme Court already has penultimate control over the content of the Rules,<sup>120</sup> and it is well aware that formal amendment is the better way of effecting this sort of change.<sup>121</sup> It is, therefore, simply implausible (pun intended) that the Court intended to do much more than clarify a plaintiff's obligations in this regard and thereby invigorate Rule 12(b)(6) practice, however unartfully it might have done so. In other words, what the Court appears to have done here, in the pleading context, is essentially what it did more than thirty years ago in the summary-judgment area with *Celotex*, *Liberty Lobby*, and *Matsushita*, cases that similarly involved no rewriting of rule text.<sup>122</sup> But even if *Twombly* and *Iqbal* did bring about a change in federal pleading standards, they did so only with respect to those complaints suffering from insufficiency of proof. For (again), most factually insufficient complaints may be rendered sufficient by amendment, and the legally sufficient complaint did not become insufficient as a result of these cases.

Of course, the foregoing discussion fails to answer the question: whether the *Rules*, and particularly Rule 11, currently set forth the "appropriate" pleading standard. Do they? That depends on one's perspective. There are advantages to a regime in which little in the

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<sup>118</sup> See, e.g., *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (reinterpreting the Rules of Decision Act).

<sup>119</sup> See Steinman, *supra* note 3, at 1320 ("Nothing in the reasoning of either *Twombly* or *Iqbal* suggests that the Court has now claimed for itself the power to amend the Rules via its adjudicative decision making.").

<sup>120</sup> See 28 U.S.C. §§ 2072, 2074 (2006) (describing the federal rulemaking process as between the Supreme Court and Congress).

<sup>121</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (stating that the only process for broadening the scope of a federal rule is by amendment and not judicial interpretation). Indeed, even the Court's critics presumably would have to concede that the Supreme Court could not amend a rule by judicial decision, for aside from Congressional abrogation, the rules themselves, at least by implication, seem to provide the sole means by which amendment may be accomplished.

Incidentally, a similar criticism—arguably more well founded—was directed toward the 1983 amendments to Rule 11. See Note, *Plausible Pleadings*, *supra* note 112, at 634 ("The 1983 amendments to rule 11 have altered the standard for sufficient pleading. Although they do not explicitly change that standard, the amendments articulate a standard for avoiding sanctions that requires a complaint to specify legal and factual bases to a fuller extent than that necessary to survive a motion to dismiss." (footnotes omitted)).

<sup>122</sup> This is not to say that the *Twombly* and *Iqbal* decisions did not upset some lawyers' understandings regarding pleading sufficiency; as mentioned previously, it appears that they have. See *supra* note 6. But the same was true of the summary-judgment trilogy with respect to the law governing motions for summary judgment. See, e.g., 11 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 56.03[1] at 56-23 to -24 (3d ed. 2010) ("Courts and commentators quickly perceived the trilogy as ushering in a 'new era' for more favorable judicial attitudes toward summary judgment.").

way of evidence would be needed before the commencement of an action. There would also be disadvantages. The same is true of the current regime. For even though the vast majority of plaintiffs are able to plead sufficient facts even under the constraint imposed by Rule 11(b)(3), some are not.

But critics of the current regime should realize that, regardless of whether the limitation imposed by Rule 11(b)(3) is a good or a bad idea, this limitation prevents a plaintiff from properly pleading *any* claim for which evidence is lacking, *regardless* of how Rule 8 is interpreted. For example, a plaintiff that lacked evidence of a defendant's negligence could not plead "negligence," even if that were all Rule 8 required.<sup>123</sup> Thus, for those who are dissatisfied with the results in cases like *Twombly* and *Iqbal*, the amendment of Rule 11, and/or greatly enhanced opportunities for preaction discovery—and *not* the amendment of Rule 8, or the abrogation of (or return to) some Supreme Court precedent—appears to be the proper solution. Indeed, unless this lack-of-evidence-at-commencement "problem" is addressed, it is not entirely clear what else *could* be done. The reason, again, is that insufficiency of proof has a double effect. As virtually everyone has realized, it will prevent a plaintiff from satisfying anything beyond the most liberal pleading standard.<sup>124</sup> But insufficiency of proof will also prevent a plaintiff from satisfying *any* pleading standard that includes sufficiency of proof as a prerequisite.<sup>125</sup>

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<sup>123</sup> It is true that the defense of failure to state a claim may be waived by the defendant. But this does not mean that the obligations imposed by Rule 11 are optional; on the contrary, they appear to be quite mandatory. See FED. R. CIV. P. 11. The same arguably could be said of Rule 8 and the pleading of a claim, which is written in mandatory terms. See FED. R. CIV. P. 8.

<sup>124</sup> See, e.g., Hartnett, *supra* note 5, at 474 ("[The major criticism is] that the Court imposed a heightened specificity standard of pleading and that plaintiffs will lack the evidence to plead these specifics prior to discovery.").

<sup>125</sup> For example, a bill was recently introduced in the U.S. House of Representatives calling for the enactment of a new section to title 28 of the *United States Code* that would provide in pertinent part:

A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.

Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 2078(a) (2009). Arguably, there are several problems with this proposal; for example, if the "no set of facts" language indeed relates to legal insufficiency (as this Article suggests), then it is superfluous, in that it is a proposition with which everyone already agrees. But more to the point, regarding the last sentence and its proposed treatment of the "factual contents of the complaint," it seems that one



One last point regarding insufficiency of proof: some have argued that a plaintiff that is faced with a motion to dismiss for failure to state a claim and is unable to plead sufficient facts due to a lack of evidence should be permitted to conduct limited discovery (dubbed by some as “plausibility discovery”<sup>126</sup>) for this purpose. For example, Professor Hartnett argues, “discovery can proceed prior to the filing of a 12(b)(6) motion and during its pendency.”<sup>127</sup>

With all due respect to those advocating this approach, the argument in support of “plausibility discovery,” on balance, seems wanting. Most significantly, it appears fairly clear that the drafters of the *Rules*, principally through Rule 11, have already made the decision as to where to draw the line regarding whether and to what extent a plaintiff must have the evidence needed to prove its case before commencement. To put the matter more bluntly: Rule 11(b)(3) flatly contradicts the notion of “plausibility discovery.” The structure of the *Rules* generally also seems to belie this approach. The principal concern of a motion to dismiss for failure to state a claim is whether a plaintiff should be allowed to proceed (and therefore to engage in such things as discovery); indeed, this defense may be asserted before the defendant is required to answer the complaint.<sup>128</sup> Moreover, the idea of conducting discovery for the purpose of adding additional information to the complaint traditionally has been regarded as anathema to the modern pleading scheme.<sup>129</sup> Finally, there is the matter of timing. Rule 26(d)(1) provides that a party generally “may

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does not even reach this issue unless, consistent with Rule 11, one can plead sufficient facts in the first instance. In other words, for plaintiffs lacking sufficient evidence, permitting plaintiffs to plead more generally (or in a more conclusory fashion) will not help, for a claim lacking evidentiary support will continue to lack evidentiary support. And the same is true, it seems, with most, if not all, of the alternative proposals currently being circulated. For a collection (and discussion) of such proposals, see Edward A. Hartnett, *Responding to Twombly and Iqbal: Where Do We Go from Here?*, 95 IOWA L. REV. BULL. 24 (2010).

<sup>126</sup> Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 68 (2010).

<sup>127</sup> Hartnett, *supra* note 5, at 507.

<sup>128</sup> See FED. R. CIV. P. 12(b) (stating that a motion asserting any of the defenses enumerated in the rule must be made before pleading if a responsive pleading is allowed).

<sup>129</sup> See, e.g., 5C WRIGHT & MILLER, *supra* note 42, § 1376, at 327 (“Once discovery has begun, there is no real value in requiring the plaintiff to go back and insert the results of that process in the complaint . . .”). Though this criticism was lodged with respect to discovery conducted in response to a motion for a more definite statement, the same reasoning would seem to apply here. See *id.* (stating that courts’ occasional practice of granting motions for a more definite statement to allow the pleader the opportunity for more discovery “is a dubious procedure” and has little value). Following discovery, a plaintiff might amend its complaint to add a claim (or perhaps even to delete a claim), but not, ordinarily, to bolster a claim it has already attempted to plead.

not seek discovery from any source before the parties have conferred as required by Rule 26(f).<sup>130</sup> Rule 26(f)(1) provides that the parties generally are not required to confer as to discovery until “21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).”<sup>131</sup> And Rule 16(b)(2) provides that the court is not required to issue a scheduling order until “the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.”<sup>132</sup> Given that a responsive pleading (such as an answer) generally must be served by a defendant within twenty-one days of being served with process,<sup>133</sup> and that a preanswer motion to dismiss “must be made before pleading if a responsive pleading is allowed,”<sup>134</sup> the Rules obviously contemplate that discovery generally should not proceed until after any preanswer motions to dismiss are resolved.<sup>135</sup> In any event, for some or all of these reasons, the *Iqbal* Court (though perhaps in dicta) rejected this possibility.<sup>136</sup>

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<sup>130</sup> FED. R. CIV. P. 26(d)(1).

<sup>131</sup> FED. R. CIV. P. 26(f)(1).

<sup>132</sup> FED. R. CIV. P. 16(b)(2).

<sup>133</sup> FED. R. CIV. P. 12(a)(1)(A).

<sup>134</sup> FED. R. CIV. P. 12(b).

<sup>135</sup> See FED. R. CIV. P. 12(i) (“If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion [for judgment on the pleadings] must be heard and decided before trial unless the court orders a deferral until trial.”). Though Rule 12(i) does not say how far before trial such motions must be heard and decided, there is a very strong presumption that they be resolved promptly. For example, it would make little sense—indeed, it would be unfair—to compel a defendant to engage in extensive discovery as to the merits in an action where jurisdiction is lacking. Cf. FED. R. CIV. P. 6(c)(1) (generally permitting the service of a motion and notice of hearing in as few as fourteen days before the date of the hearing). Though Rule 12(i) further provides for the possibility of a deferred ruling on such motions, such a deferral is exceptional, and presumably would be granted only in those rare situations in which the defense is inextricably intertwined with the merits—something that does not occur in the failure to state a claim context. Thus, even proponents of “plausibility discovery,” who are only seeking a deferral until the completion of such discovery, would probably concede that a deferral until trial is inappropriate.

<sup>136</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009) (“Because respondent’s complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.”); see also Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 882–83 (2010) (“To be sure, investigation through discovery can reveal useful information, but investigation is not in itself the purpose of adjudication. That purpose is to furnish remedies for substantive law violations.”); McMahon, *supra* note 4, at 866 (“The Second Circuit’s casual suggestion that a district court might wish to order some discovery before considering a motion addressed to a pleading fundamentally misconceives the nature of the demurrer and undermines the procedural jurisprudence of Rule 12(b)(6) motions—jurisprudence that was as well settled as the ‘no set of facts’ rule until *Twombly*.”); Lisa Pondrom, Comment, *Predicting the Unpredictable Under Rule 11(b)(3): When Are Allegations “Likely” to Have Evidentiary Support?*, 43 UCLA L. REV. 1393, 1394 (1996) (“Discovery plays a central role in contemporary federal civil procedure. But under the Federal Rules of Civil Procedure, a pleader gains access to discovery only if a valid complaint is on file with the court.”).

The argument against “plausibility discovery” also seems to apply to other efforts to

This does not mean, of course, that “plausibility discovery” is completely unattractive as a normative matter, and that the rules governing discovery could not be amended to provide for this possibility; they could. But such rules would be in tension (to put it mildly) with Rule 11, and would run up against the policy concerns identified by the Court in *Twombly* and *Iqbal*. Again, a more systemic overhaul probably would be required.

### III. TWO LOOSE ENDS

Before concluding, this Article will now turn to two areas of special concern, particularly following *Twombly* and *Iqbal*: the proper treatment of frivolous complaints, and the possible disparity between federal and state pleading standards and the conflicting results that might be produced under each.

#### A. Frivolous Complaints

The first area of concern relates to the frivolous complaint, more specifically the “factually frivolous” complaint (i.e., a complaint that consists of allegations “sufficiently fantastic to defy reality as we know it”).<sup>137</sup> To use Justice Souter’s example in *Iqbal*, what if a plaintiff were to allege claims “about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel”?<sup>138</sup> If the defendant in such an action were to move to dismiss the action for failure to state a claim, what should be the result? Should the motion be granted?

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circumvent Rule 11. For example, Judge McMahon argues:

[T]here are claims where important factual information is particularly within the control of the defendant. This makes it harder for the plaintiff to allege enough facts to meet the plausibility standard. To assess the issue of “plausibility” in such cases, it is probably useful for district judges to invoke Rule 8(e) of the Federal Rules, which states, “Pleadings must be construed so as to do justice.”

McMahon, *supra* note 4, at 867 (footnotes omitted). But it is one thing to construe a pleading so as to do justice; it is quite another to permit discovery in the name of justice when the *Rules* provide to the contrary.

<sup>137</sup> *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting). Such a complaint might be roughly distinguished from the legally frivolous complaint, which consists of allegations that are true, but that neither states a recognized claim nor is backed by a “nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.” FED. R. CIV. P. 11(b)(2).

<sup>138</sup> *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting). Those who have dealt with pro se complaints will recognize that such hypotheticals are not so hypothetical.

Most lawyers—as well as most judges—would probably say “yes.”<sup>139</sup> But though few would disagree with that result—after all, everyday experience suggests that such allegations are absurd and patently false—such a ruling arguably would be incorrect. The primary reason relates (again) to the principle that at this stage in the proceedings, the plaintiff’s allegations must be assumed to be true.<sup>140</sup> And if the allegations in Justice Souter’s hypothetical complaint *are* true, the plaintiff might well have stated a valid claim.<sup>141</sup> Another problem with such an interpretation of Rule 12(b)(6) is that it lends credence to the notion that the word “plausibility” as used by the Supreme Court in *Twombly* and *Iqbal* means (essentially) believability. But the issue at this stage in the proceedings is *not* whether a court “believes” that a claim has been stated; rather, the issue is whether a claim *has* been stated. The credibility of the plaintiff is simply not relevant. Under Rule 12(b)(6), therefore, a motion to dismiss for failure to state a claim seemingly must be denied, for the underlying complaint could not be regarded as deficient, assuming it included sufficient detail and otherwise stated a legally sufficient claim. As the Supreme Court explained in a somewhat different context:

Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. . . . What Rule 12(b)(6) does not countenance are dismissals based on a judge’s disbelief of a complaint’s factual allegations. District court judges looking to dismiss claims on such grounds must look elsewhere for legal support.<sup>142</sup>

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<sup>139</sup> Indeed, Justice Souter, in his dissenting opinion in *Iqbal*, implied as much, *see id.* (discussing the “sole exception” to the standard that a court shall take the alleged facts as true), and no other Justice took issue with that conclusion.

<sup>140</sup> *See, e.g., id.* at 1951 (opinion of the Court) (“To be clear, we do not reject [the plaintiff’s] bald allegations on the ground that they are unrealistic or nonsensical.”); *see also supra* note 54 and accompanying text.

<sup>141</sup> And in any event, how are we to know? Maybe the plaintiff *did* go to Pluto; it is going to be true someday. And let us not forget that truth very often is stranger than fiction. For example, how many of us foresaw the Court’s holding in *Twombly*, let alone *Iqbal*?

<sup>142</sup> *Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989).

The same would also seem to be true with respect to a plaintiff that relies on the second part of Rule 11(b)(3)—that certain “factual contentions” alleged in the complaint, “if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.” FED. R. CIV. P. 11(b)(3). Just as a court (at least for Rule 12(b)(6) purposes) must accept as true a plaintiff’s nonconclusory allegations generally, it seems that it also must accept as true any allegations as to which evidentiary support is not yet in the possession of the plaintiff, but is likely to be in the future. *Moreover*, it also seems that the invocation of this portion of Rule 11(b)(3) should insulate a plaintiff from the argument that its complaint is factually insufficient; of course it is, for the very reason that the plaintiff is not yet

Does this mean, then, that there is nothing a court may do with such a complaint? Must such a plaintiff be allowed to proceed? No. But rather than a dismissal pursuant to Rule 12(b)(6), it seems that the better procedure would be a motion for sanctions under Rule 11. A motion for sanctions under Rule 11 may be initiated either by a party or by the court itself,<sup>143</sup> and the possible nonmonetary penalties for violation of this rule include the dismissal of the action.<sup>144</sup> Such a proceeding would provide the plaintiff with the opportunity to prove the seemingly impossible, though without the assumption as to the truthfulness of its allegations as provided under Rule 12(b)(6).<sup>145</sup> The result would be the same—the action would be dismissed—though without the theoretical difficulties posed by a dismissal for failure to state a claim.<sup>146</sup>

To summarize: the appropriate standard for determining whether a plaintiff has adequately stated a claim—frivolous or not—is sufficiency, not believability. The insufficient complaint may be attacked pursuant to Rule 12(b)(6); the unbelievable complaint may not. But the unbelievable complaint may be attacked pursuant to Rule 11, though not for unbelievability per se, but rather for lack of evidentiary support.<sup>147</sup> Neither the insufficient nor the frivolous

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in possession of anything more specific. Any other interpretation of Rule 11(b)(3) would effectively prevent a plaintiff from utilizing this procedure.

<sup>143</sup> See FED. R. CIV. P. 11(c)(2)–(3) (addressing the initiation of sanctions by motion or the court's initiative).

<sup>144</sup> See, e.g., 2 MOORE ET AL., *supra* note 48, ¶ 11.24[2], at 11-67 (discussing the dismissal of an action as a severe sanction).

<sup>145</sup> In other words, though a plaintiff's nonconclusory allegations must be taken as true for purposes of Rule 12(b)(6), they need not be taken as true if challenged under Rule 11 (understanding that the defendant presumably would have the burden of proving otherwise). See Note, *Plausible Pleadings*, *supra* note 112, at 635 ("Rule 11 authorizes sanctions for claims that are not 'grounded in fact.' This provision is important because pretrial motions under other rules might fail to screen out such claims. Courts deciding motions to dismiss under rule 12 must assume that all facts alleged are true." (footnotes omitted)).

<sup>146</sup> Tobias Wolff makes a somewhat similar argument, albeit not in the frivolous context. See *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 317 (2009) (statement of Tobias Barrington Wolff, Professor of Law, University of Pennsylvania Law School) (discussing the application of Rule 11(b)(3) to test the evidentiary support of plaintiff's allegations).

Incidentally, it might be observed that a district court might still get it wrong in this context, in that a plaintiff might tell a ridiculously fantastic story that is actually true. Subatomic physics (among other subjects) provides several examples. But this sort of error unfortunately inures in adjudication generally; it is tolerated because it is ultimately unavoidable.

<sup>147</sup> Thus, for example, Professor Steinman is mostly correct when he writes that "[t]he inquiry [at the pleading stage] is not whether the plaintiff has or was likely to uncover evidence to support the allegations in the complaint." Steinman, *supra* note 3, at 1301 (emphasis omitted). This is true for purposes of Rule 12(b)(6), but it is not true with respect to Rule 11. Similarly, Professor Steinman writes that "a summary judgment motion is the device for testing pretrial whether the plaintiff has sufficient evidence to support its claims." *Id.* at 1330; *accord*

complaint should be allowed to proceed. But they are different subsets of a larger universe. Not all frivolous complaints are insufficient, at least not in the Rule 12(b)(6) sense, just as not all insufficient complaints are frivolous. Of course, in either situation, the defendant challenging the complaint in question had better be correct (or, more accurately, must himself comply with the requirements imposed by Rule 11), for a baseless motion by a defendant in either context should not only be denied, but should subject that party to sanctions as well.

Regrettably, not only did the *Twombly* and *Iqbal* Courts fail to make this distinction, but it is also not entirely clear that they appreciated it. For example, in *Twombly*, the Court stated, “Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”<sup>148</sup> But under Rule 11(b)(3), a plaintiff’s “factual contentions” (unless qualified in the manner specified in that rule) are required to have evidentiary support *when pleaded*.<sup>149</sup> Because of this misunderstanding, one almost gets the sense that the Court’s plausibility standard, perhaps inadvertently, is intended to serve as a sort of proxy for a plaintiff’s obligations under Rule 11. Consider, again, *Twombly*: the essential problem for the plaintiffs in that case was that they had no specific evidence of any

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Hoffman, *supra* note 113, at 1254 (“Rule 11 is a certification and sanctioning rule and not normally the vehicle for dismissing insufficient claims. That is what Rule 12(b)(6) and Rule 56 are for.”). Again, this seems to be true, but only in part. A motion for summary judgment is the proper procedure for determining whether there is a “genuine issue as to any material fact,” FED. R. CIV. P. 56(c)(2); a motion for sanctions is the proper procedure for determining whether the plaintiff’s allegations “have evidentiary support,” *id.* 11(b)(3). Of course, Professor Steinman is quite correct that a plaintiff that pleads claims that lack evidentiary support—and gains nothing in discovery—also would be vulnerable at summary judgment, just as it would be at trial. But that is of little solace to the defendant hoping to avoid needless expense.

<sup>148</sup> Bell Atl. Corp. v. Twombly, 550 U.S. 554, 556 (2007).

<sup>149</sup> There are several other examples. For instance, in *Twombly*, the Court noted “the unobjectionable proposition that, when a complaint adequately states a claim, it may not be dismissed based on a district court’s assessment that the plaintiff *will fail to find evidentiary support for his allegations* or prove his claim to the satisfaction of the factfinder.” *Id.* at 564 n.8 (emphasis added). Again, this might be true for the purpose of a motion to dismiss for failure to state a claim (and related proceedings), but not for purposes of Rule 11. Similarly, Justice Stevens in dissent stated, “This case is a poor vehicle for the Court’s new pleading rule, for we have observed that ‘in antitrust cases, where “the proof is largely in the hands of the alleged conspirators,” . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.’” *Id.* at 586–87 (Stevens, J., dissenting) (omission in original) (quoting Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746 (1976)). But as discussed previously, Rule 11 generally proscribes the allegation of *all* claims lacking evidentiary support, *including* those where “the proof is largely in the hands of the alleged conspirators,” *id.*, and regardless of what discovery (if it were allowed) might reveal. See FED. R. CIV. P. 11(b)(3).

agreement by the defendants to restrain trade. But rather than sanction the plaintiffs for violating their obligation under Rule 11(b)(3), the Court imposed a pleading standard that, for the very same reason—lack of evidence—the plaintiffs could not meet. The same appears to be true in *Iqbal*, wherein the Court stated, “respondent’s complaint does not contain any factual allegation sufficient to plausibly suggest petitioners’ discriminatory state of mind.”<sup>150</sup> The *Iqbal* Court actually seemed to be saying that it doubted the plaintiff had any specific evidence as to these defendants’ state of mind.<sup>151</sup>

Does this mean, then, that Rule 11 plays as significant a role in actions such as *Twombly* and *Iqbal* as it does in frivolous actions? It seems that it must, and the reason relates to the quantum of proof required under that rule. Rule 11(b)(3) generally requires that a plaintiff’s factual contentions have “evidentiary support.” What does that mean? It cannot mean *any* evidentiary support, for the uncorroborated (and fantastic) testimony of a mentally ill individual cannot be regarded as sufficient; if it were, there would be no basis for dismissing even the factually frivolous complaint. That cannot be correct. But the same also must be true of seemingly nonfrivolous actions like *Reid*. If a plaintiff’s evidence is such that the plaintiff cannot possibly win at trial, such evidence is every bit as insufficient as evidence of time travel.

So how much more evidentiary support is needed? It seems, once again, that the standard must be sufficient evidence from which a reasonable juror could find or infer sufficient facts to find in favor of the plaintiff. No lesser standard makes sense, particularly given the fallback provision, which alternatively allows a plaintiff to allege (if true) that its factual contentions “will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”<sup>152</sup>

Of course, the fact that the Court might have failed to appreciate the import of Rule 11 does not necessarily mean that the Court’s interpretation of Rule 8 was incorrect, or that the “showing” required under that rule does not also serve some other purpose. But the imposition of a more stringent pleading standard than that required under Rule 8, if that (as many believe) is what the Court has done,<sup>153</sup>

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<sup>150</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009).

<sup>151</sup> Benjamin Spencer advances a somewhat similar argument. See A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 192–97 (2010) (discussing the *Iqbal* court’s skepticism towards factual allegations and its effect on the assumption-of-truth rule).

<sup>152</sup> FED. R. CIV. P. 11(b)(3).

<sup>153</sup> See Hartnett, *supra* note 5, at 474 (“Scholarly reaction to *Twombly* has been largely critical, with most complaining that the Court imposed a heightened specificity standard of

seems like a poor way of addressing the problems caused by an insufficiency of proof. As Professors Clermont and Yeazell cogently observe, “Rule 11 now punishes those who make allegations without an evidentiary basis for doing so; indeed, one could have less disruptively attained an equivalent of the *Twombly* and *Iqbal* regime by aggressively rereading Rule 11 rather than Rule 8.”<sup>154</sup> The *Twombly* Court’s concerns regarding the high cost of discovery and the possibility of extorted settlements, though dubious as justifications for reinterpreting Rule 8, were precisely the concerns of the drafters of the amendments to Rule 11. But few seem interested in pursuing Rule 11 to its logical conclusion.<sup>155</sup> Instead, most courts and commentators seem almost oblivious to its terms, or at least have exhibited some degree of willful blindness to its obligations.

### *B. The Divergence of Federal and State Pleading Standards*

Another problem, brought to the fore following *Twombly* and *Iqbal*, relates to the divergence (or potential divergence) of federal and state pleading standards. Many states have pleading rules similar to Rule 8.<sup>156</sup> Many of these purportedly rely on the portion of *Conley* that was repudiated in *Twombly*.<sup>157</sup> Moreover, many states do not have anything similar to Rule 11(b)(3). And even if they did, any such rule could be amended at any time.<sup>158</sup> Of course, the fact that federal and state procedural rules might be different is not, of itself, a serious problem; though it might be more convenient if they were the same, there are very few legal requirements along this line. But a difficulty potentially arises due to the fact that a dismissal for failure

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pleading and that plaintiffs will lack the evidence to plead these specifics prior to discovery.”).

<sup>154</sup> Clermont & Yeazell, *supra* note 6, at 849 (footnotes omitted).

<sup>155</sup> For example, if plaintiffs truly had evidentiary support for their claims at commencement (and defendants truly had evidentiary support for their denials), there would be little need for summary judgment, as any such motion (at least to the extent it turned on the evidence) would have to be denied.

<sup>156</sup> For a survey of the extent to which states have adopted the *Federal Rules of Civil Procedure* (with a particular emphasis on pleading rules), see John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986). For a more recent survey (that also includes a consideration of the 1983 and 1993 changes to Federal Rule of Civil Procedure 11, see John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354 (2003) [hereinafter Oakley, *A Fresh Look*].

<sup>157</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 578 (2007) (Stevens, J., dissenting) (“Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates . . .”).

<sup>158</sup> See Oakley, *A Fresh Look*, *supra* note 156, at 355 (“While the federal model of civil procedure remains substantially influential at the state level, it is no longer true that many state systems of civil procedure replicate the federal model.”).



to state a claim is generally regarded as being “on the merits” or “with prejudice”—i.e., it precludes the assertion of the same claim in a later action, just as surely as an adverse decision on a motion for summary judgment or at trial.<sup>159</sup> The problem is that a complaint might be found deficient in a federal court, yet if filed in a state court and tested under state procedural rules, might survive a motion to dismiss for failure to state a claim.

Some have argued that this potential disparity in treatment creates a problem under *Erie*, such that a federal court in a diversity action might be required to adopt certain state pleading standards. But such an argument seems untenable, for if *Hanna v. Plumer*<sup>160</sup> still means anything, the fact that federal and state laws might seem to conflict in this area raises no such issue.<sup>161</sup> Still, this potential disparity in treatment seems troubling. Short of rules unification, is there any solution to this problem?

Perhaps. To the extent that state pleading rules are more liberal than the federal rules, one might expect some plaintiffs that previously might have commenced their actions in federal court to commence their actions in a state court. This is not a complete solution, though, for subject-matter jurisdiction of some actions lies exclusively in the federal district courts,<sup>162</sup> and to the extent jurisdiction is concurrent, removal by defendants to a federal district court likely remains an option.<sup>163</sup>

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<sup>159</sup> See, e.g., *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981) (stating that the dismissal of an action under Rule 12(b)(6) constitutes a judgment on the merits).

<sup>160</sup> 380 U.S. 460 (1965).

<sup>161</sup> One leading treatise concludes:

Since the Supreme Court's decision in *Hanna v. Plumer*, it no longer can be doubted that the rules regarding the standard of specificity to be applied to federal pleadings, . . . the special requirements for pleading certain matters, the allocation of the burden of pleading among the parties, and the signing of pleadings by an attorney of record or an unrepresented party, all are governed by the federal rules and not by the practice of the courts in the state in which the federal court happens to be sitting.

5 WRIGHT & MILLER, *supra* note 42, § 1204, at 104–05 (footnote omitted); see also *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (reconfirming that applicable and valid federal rules apply in federal court). For somewhat similar reasons, there also appears to be no reverse-*Erie* problem, nor a problem under the Seventh Amendment. See, e.g., *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 327 n.8 (2007) (“In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury’s judgment without violating the Seventh Amendment.”).

<sup>162</sup> See, e.g., 28 U.S.C. § 1333 (2006) (“Admiralty, maritime, and prize cases”).

<sup>163</sup> See, e.g., 28 U.S.C. § 1441 (“Actions removable generally”). In order to avoid removal, Georgene Vairo argues that such plaintiffs will attempt to “craft their complaints to make them removal-proof.” Georgene Vairo, *Will Iqbal Case Play a Role in Forum Selection?*, NAT’L L.J., Jan. 25, 2010, at 18. There are limits, though, to the extent to which plaintiffs realistically can do so.

But even as to those actions adjudicated in federal court, a plaintiff that is dismissed for failure to state a claim might find some relief. The answer, if there is one, lies in the reasons why dismissals for failure to state claim traditionally have been given claim-preclusive effect. Legal insufficiency presents the easiest example. If an action is dismissed for legal insufficiency, dismissal with prejudice seems appropriate, for both federal and state courts should reach the same result. There is no reason to give such a plaintiff a second chance. The same appears to be true with respect to factual insufficiency, though the reasoning here is somewhat more difficult. Given the liberality of the federal rules governing amended pleadings, in most actions, only the most obstinate plaintiffs will fail to comply with the court's demands.<sup>164</sup> Though a state court might have a less demanding pleading standard, the "federal courts' interest in the integrity of their own processes" also might justify according claim-preclusive effect to such a dismissal.<sup>165</sup>

But what about a dismissal for failure to state a claim based on factual insufficiency where the inability to plead sufficient facts is caused by an insufficiency of proof, that is, by the strictures imposed by Rule 11(b)(3), such as occurred in *Twombly* and perhaps in *Iqbal*? Should such a dismissal be granted with prejudice if a state-court plaintiff would not be so constrained? Arguably not; rather, such a disparity in the rules seemingly should be regarded as a matter of policy imposed by the federal courts that need not be imposed on any other system. Accordingly, such a dismissal might be regarded as binding on other federal courts—for surely it should be given preclusive effect across all federal district courts—but not necessarily binding on a state court with more liberal pleading requirements. It might be treated, in other words, as more of a technical requirement, and one that does not necessarily go to the merits of a plaintiff's claim. For under these circumstances, the federal district court would be deciding only that the plaintiff was unable to plead sufficient facts—and even then, only because it then lacked supporting evidence.<sup>166</sup> The court would not be deciding that, even if given the

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<sup>164</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. d (1982) ("Such a result is warranted by the ease with which pleadings may be amended . . . and by the unfairness of requiring the defendant to submit to a second action . . . when no such amendment is sought, or when no appeal has been taken from an erroneous denial of leave to amend.").

<sup>165</sup> *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001).

<sup>166</sup> Cf. RESTATEMENT (SECOND) OF JUDGMENTS § 20(2) (generally denying claim-preclusive effect to judgments that rest "on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit"). Perhaps one might also consider that when the defense of failure to state a claim is asserted postpleading, the reason usually is either legal insufficiency or (more likely) that the plaintiff, even postdiscovery, has insufficient supporting evidence.

opportunity to conduct discovery, the plaintiff has no case, or that the plaintiff has willfully failed to comply with the court's demands.<sup>167</sup>

One might also consider this problem from the perspective of Federal Rule of Civil Procedure 41, the rule governing dismissals generally. Under Rule 41, a plaintiff may voluntarily dismiss its action by notice if it does so "before the opposing party serves either an answer or a motion for summary judgment."<sup>168</sup> This means that a voluntary dismissal remains an option after the filing of a motion to dismiss for failure to state a claim. But a plaintiff in the typical factual or legal insufficiency situation is unlikely to avail itself of this procedure, as in either situation, a voluntary dismissal would be pointless. If the problem is factual insufficiency, it almost certainly could be cured within the confines of the *current* action, whereas if the problem is legal insufficiency, it would be incurable. By contrast, if the problem is insufficiency of proof, a plaintiff might well avail itself of this procedure, for such a dismissal generally is without prejudice,<sup>169</sup> and the plaintiff (again) might well fare better in a state court. And if such a plaintiff may avoid the claim-preclusive effect of a dismissal for failure to state a claim merely by voluntarily dismissing its action, it arguably makes little sense to give a dismissal for failure to state a claim such an effect in essentially the same procedural context.<sup>170</sup>

#### IV. CONCLUSION

At bottom, current federal civil pleading practice has more to do with the limited opportunities for investigation before commencement and the obligation to have evidentiary support for one's allegations

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Whether the complaint was factually sufficient or the plaintiff's claims had sufficient evidentiary support at commencement is typically regarded as irrelevant.

<sup>167</sup> Of course, a complaint utterly lacking in evidentiary support could subject the plaintiff to a dismissal pursuant to Rule 11, and presumably such a dismissal could be made with prejudice as to all courts. But a less egregious violation of Rule 11 presumably would call for a less serious sanction. Similar reasoning seemingly should apply in the Rule 12(b)(6) context.

<sup>168</sup> FED. R. CIV. P. 41(a)(1)(A)(i).

<sup>169</sup> See FED. R. CIV. P. 41(a)(1)(B).

<sup>170</sup> Of course, if a federal district court had subject-matter jurisdiction of the first action, a subsequent state-court action probably (though not certainly) could be removed to the same or another federal district court. This might seem to expose a plaintiff to a series of dismissals, state-court filings, and removals (at least until the applicable statute of limitations expires). But Rule 11, by its terms, is inapplicable to papers filed in state court. See JOSEPH, *supra* note 112, § 5(A)(2), at 2-22 to -23 ("Rule 11 does not apply to . . . pleadings, written motions or other papers served or filed in a state court action . . ."). Thus, it is at least arguable that a state-court complaint that was sufficient when filed would remain sufficient following removal, even if insufficient if filed in federal court.

and less to do with pleading standards. Unless and until there are changes to the former, little can be done with the latter.

In the meantime, it would probably be better if concerns regarding the strength of a plaintiff's evidence were resolved through Federal Rule of Civil Procedure 11, rather than Rule 8 and a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). The "short and plain statement of the claim showing that the pleader is entitled to relief" should contain enough information to serve its limited purposes, but no more.

Renewed consideration also should be given to the proper preclusive effect of the motion to dismiss for failure to state a claim. In particular, when a dismissal is based solely on a plaintiff's inability to plead sufficient facts due to a lack of supporting evidence, perhaps the dismissal should not be given claim-preclusive effect, for in that situation there has been no constructive adjudication of the underlying merits, nor does there appear to be any significant federal policy justifying this result.

