Plausibility Among the Circuits: An Empirical Survey of *Bell Atlantic Corp. v. Twombly*[*]

I. INTRODUCTION

Every first-year law student learns that a plaintiff is only required to plead "a short and plain statement of the claim showing that the pleader is entitled to relief."[1] For nearly fifty years, the United States Supreme Court has interpreted this basic procedural rule to mean that a complaint should not be dismissed unless it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[2] Unfortunately for all those law students, this liberal pleading standard is now dead and has been replaced with a new, unclear "plausibility" standard.[3]

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court developed a new plausibility standard to use in deciding whether to grant a 12(b)(6) motion to dismiss.[4] The understanding of this standard is very important to all litigators in the legal community, because it is possible that the Court made it significantly easier to win a 12(b)(6) motion to dismiss. The Court's opinion contains a significant amount of language trying to articulate its new standard, but in the end many questions remain. Did the Court's subsequent decision in *Erickson v. Pardus* make *Twombly* meaningless?[5] What exactly does plausible mean? Does *Twombly* extend to discrimination cases? Does *Twombly* apply outside of the antitrust setting?

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

2. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

3. *See* Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1966, 1969 (2007); Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135, 138 (2007).

4. 127 S. Ct. at 1974. A 12(b)(6) motion to dismiss seeks dismissal of a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

5. *See infra* notes 75-102 and accompanying text.

The Supreme Court is unlikely to answer these questions anytime soon, so it will be the federal circuit courts' obligation to dissect *Twombly* and interpret exactly what is meant by a plausibility standard. Several circuits have already devoted much analysis to *Twombly*, and their opinions provide valuable guidance. This article surveys and analyzes the circuits' opinions in an attempt to provide a resource for practitioners and judges wrestling with the uncertainties in *Twombly*.

II. *BELL ATLANTIC CORP. V. TWOMBLY*

A. Historical Background

Twombly retired a standard that was followed by many courts and was entrenched in the law for over fifty years.[6] Before the Federal Rules of Civil Procedure were enacted, the United States used a very difficult and often inequitable code-pleading system.[7] The Federal Rules were meant to ease the burden on plaintiffs trying to access the court system.[8] With the creation of the Federal Rules, the plaintiff thenceforth only had to give a defendant sufficient notice of his claim and no longer had to plead "ultimate facts."[9]

Conley v. Gibson solidified the liberal pleading standard that was enacted with the Federal Rules of Civil Procedure.[10] *Conley* was a class-action suit brought by African-American railroad employees against their union.[11] The employees alleged in the complaint that the union did not protect their jobs in the same way that the union protected white employees' jobs.[12] The *Conley* Court set forth the famous and oft-quoted language: "[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."[13] Furthermore, the Court reasoned that the

6. *Twombly*, 127 S. Ct. at 1969.
7. A. Benjamin Spencer, *Plausability Pleading*, 49 B.C. L. Rev. 431, 434 (2008).
8. *Id.*
9. *Id.* at 434, 438.
10. 355 U.S. 41, 45-46 (1957).
11. *Id.* at 42.
12. *Id.* at 46.
13. *Id.* at 45-46.

Federal Rules did not require a plaintiff to plead detailed facts.[14] The liberal pleading system was made possible due to the wide range of opportunities that the parties have in discovery and pretrial procedures to uncover more specific details about the disputed facts and issues.[15] Ultimately, the liberal pleading system was meant to lead to a decision on the merits and not a dismissal due to a procedural misstep.[16]

The Court cited to *Conley* at least twelve times in the fifty years after it was decided.[17] Thirty-five years after *Conley*, the Court reinforced its commitment to a liberal pleading standard.[18] The Court specifically rejected a heightened pleading standard and again reasoned that the discovery process and pretrial procedures would "weed out" meritless claims.[19] Furthermore, the Court stated that it was up to Congress and not the courts to require a heightened pleading standard.[20]

In 2002, the Court again reaffirmed its commitment to a liberal pleading standard.[21] The Court stated that the *McDonnell Douglas*[22] standard for summary judgment did not apply at the pleadings stage.[23] "The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement. . . . [W]e have rejected the argument that a Title VII complaint requires greater 'particularity,' because

14. *Id.* at 47.

15. *Conley*, 355 U.S. at 47-48.

16. *Id.* at 48.

17. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1978 (2007) (Stevens, J., dissenting) (citing SEC v. Zanford, 535 U.S. 813, 818 (2002); Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 654 (1999); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 811 (1993); Brower v. County of Inyo, 489 U.S. 593, 598 (1989); Hughes v. Rowe, 449 U.S. 5, 10 (1980) (per curiam); McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 246 (1980); Estelle v. Gamble, 429 U.S. 97, 106 (1976); Hosp. Building Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746 (1976); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam); Haines v. Kerner, 404 U.S. 519, 521 (1972) (per curiam); Jenkins v. McKeithen, 395 U.S. 411, 422 (1969) (plurality opinion)); Dodson, *supra* note 3, at 137.

18. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993); *see* Spencer, *supra* note 7, at 436-37.

19. *Leatherman*, 507 U.S. at 168-69.

20. *Id.*

21. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512-13 (2002); *see* Spencer, *supra* note 7, at 438.

22. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

23. *Swierkiewicz*, 534 U.S. at 511.

this would 'too narrowly constric[t] the role of the pleadings.'"[24] A plaintiff is not required to set forth specific facts in his complaint to prove his prima facie case because discovery may lead to the unveiling of those facts.[25] The liberal pleading standard applies to all civil actions with few exceptions,[26] and Congress can add more exceptions through the Rules Enabling Act if it chooses to do so.[27] Once again, the Court reiterated that the liberal pleading standard is necessary to decide cases on the merits and not on a technicality.[28] The plaintiff's complaint need only to give the defendant fair notice of the plaintiff's claims and the grounds upon which the claims rest.[29]

B. The *Twombly* Opinion

The strong language employed by the Court over the past fifty years indicated that the Court would keep the liberal pleading standard set forth in *Conley* and reinforced in *Leatherman* and *Swierkiewicz*. The Court changed its philosophy, however, when it stated in *Twombly* that the *Conley* standard had earned its retirement.[30] *Twombly* developed a new plausibility standard that displaced the "no set of facts" language from *Conley*. *Twombly* began as an antitrust class-action suit against incumbent local exchange carriers ("ILECs").[31] Under the Telecommunications Act of 1996, the ILECs were required to share their networks with competitive local exchange carriers ("CLECs") in order to prevent the monopolization by the ILECs.[32] The plaintiffs in the case, who were customers of CLEC-provided local phone and internet services, claimed that the ILECs violated section one of the Sherman Act, which

24. *Id.* at 510-11 (alteration in original).

25. *Id.* at 511-12.

26. *See, e.g.*, FED. R. CIV. P. 9(b) (stating a claim must state facts with particularity if it involves fraud or mistake).

27. *See Swierkiewicz*, 534 U.S. at 515.

28. *Id.* at 514

29. *See id.*

30. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1969 (2007).

31. *Id.* at 1962. ILECs, also called "Regional Bell Operating Companies" or "Baby Bells," were offshoot companies that resulted from the divesture of AT&T in 1984. *Id.* at 1962 n.1. Some of the companies included the ILECs named in this case: BellSouth Corporation, Qwest Communications International, Inc. SBC Communications, Inc., and Verizon Communications, Inc. *Id.*

32. *Id.* at 1961.

prohibited the restraint of trade by contract, conspiracy, or trust.[33]

The complaint alleged that the ILECs conspired to restrain trade by engaging in parallel conduct to prevent the growth of the CLECs and by agreeing to refrain from competing against each other.[34] The United States District Court for the Southern District of New York dismissed the complaint, ruling that alleging parallel conduct alone was not sufficient to state a claim under section one of the Sherman Act.[35] The Second Circuit reversed the ruling, and the Supreme Court granted certiorari.[36]

The Supreme Court reversed the Second Circuit and agreed with the district court.[37] In doing so, it changed the landscape of liberal pleading. The Court cited to various other cases in formulating the new plausibility standard.[38] Using these cases, it determined that the plausibility standard required plaintiffs to "nudge[] their claims across the line from conceivable to plausible."[39] While a new probability standard was not created, the complaint was required to plead "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" of the alleged illegal action.[40] A plaintiff's complaint, however, could still succeed even if a judge believed "that a recovery is very remote and unlikely."[41]

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33. *Id.* at 1962.
34. *Id.*
35. *Twombly*, 127 S. Ct. at 1963.
36. *Id.*
37. *Id.* at 1974.
38. *Id.* at 1964-66.

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, 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.

Id. (alteration in original) (citations omitted) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986); Sanjuan v. Am. Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994)). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965 (citing Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 n.1 (2002); Neitzke v. Williams, 490 U.S. 319, 327 (1989); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

39. *Id.* at 1974.
40. *Twombly*, 127 S. Ct. at 1965.
41. *Id.*

The Court reasoned that antitrust litigation involved costly discovery and that the judicial system should not simply rely solely on the discovery process and pre-trial motions to weed out insufficient complaints.[42] There was a fear that the threat of costly discovery alone could possibly push defendants to settle meritless claims.[43] A judge must have the power to require more factual specificity before allowing a potentially massive discovery process to begin.[44] Therefore, "some further factual enhancement" would be needed in addition to mere parallel conduct to push a claim over "the line between possibility and plausibility."[45]

The plaintiffs argued that *Conley* did not reconcile with the Court's new plausibility standard.[46] The Court stated, in response, that the *Conley* standard had been misinterpreted over the past fifty years.[47] It reasoned that under the *Conley* standard, a plaintiff's complaint could pass the initial pleadings stage without showing a "reasonably founded hope" that the plaintiff would be able to make a case.[48] The majority stated that *Conley* had turned the pleadings rule on its head and that the "no set of facts" language "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."[49]

The dissent suggested that the Form 9 complaint[50] for negligence in the Federal Rules of Civil Procedure would not survive under the Court's new plausibility standard.[51] The majority stated, however, that its ruling did not dispense with the Form 9 complaint.[52] Where a plaintiff alleges that a specific act

42. *Id.* at 1966-67.
43. *Id.* at 1967.
44. *Id.*
45. *Twombly*, 127 S. Ct. at 1966.
46. *Id.* at 1968.
47. *Id.* at 1969.
48. *Id.*
49. *Id.*
50. The Form 9 complaint is a sample complaint of negligence included in the appendix of the Federal Rules. *Twombly*, 127 S. Ct. at 1977 (Stevens, J., dissenting). It states, "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." *Id.*
51. *Id.*
52. *Id.* at 1970 n.10 (majority opinion).

was done, at a specific time, and at a specific place, then the complaint will be sufficient to survive a Rule 12(b)(6) motion to dismiss.[53] The Court distinguished the plaintiffs' complaint from the Form 9 complaint, because the plaintiffs did not state any facts "as to which of the four ILECs . . . supposedly agreed, or when and where the illicit agreement took place."[54] According to the majority, based on the facts pled in the Form 9 complaint, a defendant would supposedly know how to answer the allegations.[55] By contrast, the Court reasoned that the ILECs would have no idea where to start in order to answer the plaintiffs' complaint.[56] Ultimately, the plaintiffs did not meet this new plausibility standard, and their complaint had to be dismissed.[57]

III. QUESTIONS AND UNCERTAINTIES IN *TWOMBLY*

It was unclear, and remains unclear, what standard the Court created in saying that a complaint must enter into the realm of plausibility. For nearly fifty years the courts followed the standard set forth in *Conley*, but now that standard has definitely changed. Only time will tell how strict or liberal this new pleading standard will be. It will be up to the federal circuits to interpret the language in *Twombly* until the Supreme Court clarifies the broad language in its opinion. In the meantime, several questions remain.

A. Is *Twombly* Really that Big of a Change in Light of *Erickson v. Pardus*?

The Court may have narrowed its plausibility standard when it handed down *Erickson v. Pardus*[58] shortly after deciding *Twombly*. The Court stated that a liberal pleading standard still existed and that the pleading of specific facts was not necessary.[59] In *Erickson*, the plaintiff claimed that his Eighth Amendment rights were violated because prison officials

53. *Id.*
54. *Id.*
55. *Twombly*, 127 S. Ct. at 1971 n.10.
56. *Id.*
57. *Id.* at 1974.
58. 127 S. Ct. 2197 (2007).
59. *Id.* at 2200.

refused to give him his Hepatitis C medication.[60] The Court held that the complaint was sufficient to survive a motion to dismiss, because it stated that the prison officials withheld necessary medication and that the withholding of that medication was life-threatening.[61] This information alone was sufficient, but the plaintiff bolstered his complaint by making specific allegations in grievance forms that were attached to the complaint.[62] The Court did note that the complaint had to be given a more liberal interpretation because the plaintiff was not represented by counsel.[63] Did this mean that the Court did not apply as strict a standard as it did in *Twombly* simply because a pro se plaintiff was involved?[64] Will there be other exceptions to the plausibility standard? It will be up to the circuits to answer these questions.

B. What is the New Standard?

The new plausibility standard created in *Twombly* is not at all clear. Professor Scott Dodson has defined the new standard as "notice-plus" pleading, but he recognized that the Court did not succeed in articulating exactly what is meant by plausible.[65] In fact, Professor Dodson suggested that the definition of plausible could vary from case to case, depending on the facts, because "[t]he Court relied on commentators' examples."[66] This language could possibly lead to defendants attaching expert opinions to their complaints stating whether the plaintiffs' claims are plausible.[67]

The circuits will have the main burden of defining plausibility. It is clear that merely stating that a defendant committed a tort or violated the Sherman Act will not suffice.[68] There are few indications, however, of what exactly takes a complaint from the realm of possibility to plausibility. It will likely take a circuit split on an important issue, such as

60. *Id.* at 2198.
61. *Id.* at 2200.
62. *Id.*
63. *Erickson*, 127 S. Ct. at 2200.
64. *See infra* notes 86-89 and accompanying text.
65. *See* Dodson, *supra* note 3, at 138, 142.
66. *Id.* at 142.
67. *See id.*
68. *See* Spencer, *supra* note 7, at 442.

employment discrimination, for the Court to clarify this standard.

C. Is *Twombly* Restricted to the Antitrust Setting?

While the majority of courts are applying *Twombly* outside of the antitrust setting, some scholars have argued that *Twombly* was intended to be narrow in its scope.[69] Specifically, Allan Ides argued that in the context of section one of the Sherman Act *Twombly* should be narrowed to claims involving parallel conduct.[70] He reasoned that the Court distinguished *Twombly* from *Swierkiewicz* and did not impose a heightened pleading standard on all section one plaintiffs.[71]

Ides also rejected the notion that the *Twombly* standard should be applied to cases involving "complex" issues.[72] Ides argued if this application were allowed, then the heightened standard could be applied to complex issues of discrimination like that in *Swierkiewicz*.[73] In addition, he argued that the *Erickson* opinion reinforced the idea that *Twombly* did not change the pleading standard and was, in fact, a very narrow decision.[74] While Ides's argument has merit, the majority of courts have already begun to apply *Twombly* outside of the antitrust setting. The real question that will need to be addressed by the circuits is what is the new standard prescribed in *Twombly*?

IV. POLLING THE CIRCUITS

A. Why the Circuits Can Help Clarify the Plausibility Standard

It will likely take a significant amount of time before the Supreme Court will clarify its holding in *Twombly*. The Supreme Court does not decide issues very often and is unlikely

69. 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 F.R.D. 604, 632 (2007).

70. *Id.* at 628.

71. *Id.* at 632.

72. *Id.* at 633-34.

73. *Id.* at 634.

74. *See* Ides, *supra* note 69, at 638-39.

to revisit *Twombly* until a significant circuit split emerges. Therefore, the lower courts will have to interpret what is meant by a plausibility standard. As of November 2008, over ten thousand cases have cited to *Twombly*, and a significant number are applying the plausibility standard outside of the antitrust setting. While a clear consensus has yet to develop in the circuits, very useful language has started to emerge. This could lead to an agreement among the circuits and a better understanding of the plausibility standard. If a consensus emerges, the Supreme Court is unlikely to revisit *Twombly*, and parties can begin to rely on uniform law in drafting their complaints. Until then, circuit law will be very important and useful to parties when attempting to argue what the Supreme Court was articulating in *Twombly*.

B. Did *Erickson v. Pardus* Narrow the Plausibility Standard?

The plausibility standard developed in *Twombly* is very unclear, and some see *Erickson* as narrowing the scope of that standard.[75] While some circuits have taken this view of *Erickson*, the majority of the circuits have not even mentioned *Erickson* when applying the new plausibility standard. The Sixth Circuit indicated that it would lean towards holding that *Erickson* narrowed the scope of *Twombly* and did not require a heightened pleading standard.[76] Just a week after this decision, however, the Sixth Circuit demonstrated that it would follow the "flexible" plausibility standard set forth in *Iqbal v. Hasty*.[77]

In *Midwest Media Property, L.L.C. v. Symmes Township, Ohio*, the Sixth Circuit held that a plaintiff did not have standing to bring a § 1983[78] action against a town's regulation prohibiting off-site advertising.[79] The court ruled:

75. *See* Spencer, *supra* note 7, at 455-57.

76. Lindsay v. Yates, 498 F.3d 434, 440 n.6 (6th Cir. 2007) (stating that *Erickson* reaffirmed the belief that a complaint only needs to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief").

77. Midwest Media Property, L.L.C. v. Symmes Twp., Ohio, 503 F.3d 456, 461-62, 465 (6th Cir. 2007); *see infra* notes 103-35 and accompanying text.

78. 42 U.S.C. § 1983 (2000).

79. *Midwest Media*, 503 F.3d at 465.

> The substantive counts of the complaint did not mention the size and height restrictions, and the counts of the complaint—as well as the pleadings and other submissions before the district court and this court—make it clear that, while plaintiffs challenged several other provisions, they did not challenge the size and height restrictions.[80]

The plaintiffs later petitioned for an en banc hearing, but the court denied the request.[81] A very strong dissent, however, criticized the majority for extending *Twombly* beyond the antitrust setting.[82] The dissent stated that *Twombly* should only be applied when the case is likely to lead to "'sprawling, costly, and hugely time-consuming' litigation."[83] It reasoned that the § 1983 action in *Midwest Media* contained very few factual disputes and did not involve the type of complex business litigation likely to lead to costly discovery.[84] The dissent argued that the majority's heightened pleading contradicted the Supreme Court's holding in *Erickson*, which mandated that a heightened pleading standard is not to be applied across the board.[85]

The Fourth Circuit has stated that the existence of a pro se plaintiff does not undermine the standard set forth in *Twombly*.[86] In *Giarratano v. Johnson*, the pro se plaintiff filed a claim stating that the Virginia Freedom of Information Act was unconstitutional because it prevented prisoners from obtaining information.[87] The Fourth Circuit rejected the notion that *Erickson* allowed a pro se plaintiff to allege that "the exclusion of inmates from the protections of the Freedom of Information Act is not rationally related to any legitimate government interest."[88] While acknowledging *Erickson*, the Fourth Circuit

80. *Id.*

81. Midwest Media Property, L.L.C. v. Symmes Twp., Ohio, 512 F.3d 338, 338 (6th Cir. 2008).

82. *Id.* at 338, 341 (Clay, J., dissenting).

83. *Id.* at 341 n.1 (quoting Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1973 n.6 (2007)).

84. *Id.*

85. *Id.* at 341.

86. Giarratano v. Johnson, 521 F.3d 298, 304 & n.5 (4th Cir. 2008).

87. *Id.* at 300-01.

88. *Id.* at 304 & n.5 (alteration in original)

held the complaint was insufficient because it did not contain "more than labels and conclusions."[89]

The Tenth Circuit has read *Twombly* and *Erickson* together and interpreted them to jointly hold that a plausibility standard is required outside of the antitrust setting.[90] The plausibility standard was applied to a complaint with causes of action for intentional infliction of emotional distress and invasion of privacy.[91] The Tenth Circuit looked to *Iqbal v. Hasty*[92] for guidance and determined that the Supreme Court intended for the plausibility standard to apply outside of the antitrust setting.[93] *Twombly* and *Erickson* "suggest that courts should look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief."[94] Ultimately, the Tenth Circuit held that the complaint did not have enough facts to show that there was a lack of legitimate public interest in the disclosed information to support an invasion of privacy claim.[95] In addition, the Tenth Circuit ruled that news reporting generally does not give rise to intentional infliction of emotional distress, so that cause of action also could not survive a motion to dismiss.[96] The Tenth Circuit did emphasize that the result in this case would have been the same regardless of which pleading standard was applied.[97]

Like the Tenth Circuit, the Seventh Circuit has also read *Twombly* and *Erickson* together, and it applied *Twombly* to an eleven-count complaint.[98] The court interpreted *Erickson* as not requiring a fact-pleading system and only requiring that a complaint give the defendant notice of the cause of action and

89. *Id.* at 304 n.5.

90. Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1215 & n.2 (10th Cir. 2007).

91. *Id.* at 1214-15.

92. 490 F.3d 143 (2d Cir. 2007).

93. *Alvarado*, 493 F.3d at 1215 n.2.

94. *Id.*

95. *Id.* at 1222.

96. *Id.* at 1225.

97. *Id.* at 1215 n.2.

98. Airborne Beepers & Video, Inc. v. AT&T Mobility, L.L.C., 499 F.3d 663, 664-65, 667 (7th Cir. 2007) (applying the *Twombly* and *Erickson* method to claims for breach of contract, a plea for accounting, deceptive and fraudulent practices, breach of fiduciary duty, unfair competition, tortious interference with business relationships, unjust enrichment, RICO violations, illegal retaliation, unlawful discrimination, and intentional infliction of emotional distress).

the ground on which it rests.[99] As the court explained, "[T]aking *Erickson* and *Twombly* together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8."[100] Based on this minimum standard, all eleven causes of action were dismissed.[101]

The holding in *Airborne Beepers* seems to indicate that *Twombly* should be narrowed and that the Tenth Circuit's holding in *Alvarado* was too broad. In fact, the Seventh Circuit did not even mention the word "plausible" when articulating the minimum standard for pleading.[102] It is clear that the majority of the circuits have not interpreted *Erickson* as limiting *Twombly*. *Erickson* has created confusion, however, among scholars and the circuits. Nevertheless, *Erickson* implies that the *Twombly* standard may not be applicable to a complaint filed by a pro se plaintiff.

C. A Flexible Plausibility Standard?

Thus far, the Second Circuit has given the most thorough interpretation of the new plausibility standard set forth in *Twombly*.[103] In *Iqbal v. Hasty*, the Second Circuit stated that *Twombly* was very unclear and that there is a substantial amount of uncertainty as to how to test the adequacy of a pleading.[104] Therefore, the Second Circuit created a flexible plausibility standard.[105] The court identified four factors showing that the Supreme Court intended to create a heightened pleading system.[106]

First, the Court abrogated the *Conley* standard "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

99. *Id.* at 667.
100. *Id.*
101. *Id.* at 667-68.
102. *Id.* at 667.
103. Iqbal v. Hasty, 490 F.3d 143, 158 (2d Cir. 2007).
104. *Id.* at 155.
105. *Id.* at 157-58.
106. *Id.* at 155-56.

relief."[107] While the Court claimed that it was not creating a heightened pleading standard, it was definitely creating a higher threshold than that set forth in *Conley*.[108] A narrow view of the holding in *Twombly* would not make any change in the pleading standard followed in the past.[109] Second, the Court used a variety of language indicating that a sufficient pleading would need to do more than simply put the defendant on notice.[110] Third, the Court did not trust discovery and pretrial procedures to dispose of meritless claims.[111] Fourth, the Court clearly stated that a new "plausibility" standard was the appropriate pleading standard, and the Court used some variation of the word "plausibility" fifteen times throughout the *Twombly* opinion.[112] All of these factors indicated that the Court was instituting a heightened pleading standard.[113]

Conversely, the Second Circuit also noted that five factors showed that the Court may not have been instituting a heightened pleading standard.[114] First, the Court explicitly stated that it was not requiring a heightened pleading standard.[115] Second, the Court seemed to indicate that Form 9 of the Federal Rules would still be sufficient under the new pleading standard to set forth a cause of action for negligence.[116] Using Form 9, it was sufficient that the plaintiff allege that the defendant drove negligently and articulate the time and place of

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107. *Id.* at 155 (quoting *Twombly*, 127 S. Ct. at 1968).

108. *Iqbal*, 490 F.3d at 155.

109. *Id.*

110. For example, the Court required "enough factual matter (taken as true) to suggest that an agreement was made;" "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement;" "facts that are suggestive enough to render a [cause of action] plausible;' . . . a "plain statement" (as specified in Rule 8(a)(2)) with "enough heft" to show entitlement to relief;" and also stated that the line "between the factually neutral and the factually suggestive . . . must be crossed to enter the realm of plausible liability . . . ."

Id. at 156 (internal citations omitted) (quoting *Twombly*, 127 S. Ct. at 1965 & n.5, 1974 (2007)).

111. *Id.*

112. *Id.*

113. *Iqbal*, 490 F.3d at 155.

114. *Id.* at 156-57.

115. *Id.* at 156.

116. *Id.*

the accident.[117] For instance, the Court would not require the plaintiff to state that the defendant was speeding, ran a stop light, or crossed the center line.[118] The Second Circuit seemed to believe that this factor weighed heavily towards the Court not requiring a heightened pleading system.[119] Third, one of the Court's main reasons for requiring a higher standard than in *Conley* was the huge costs and time that discovery would entail in an antitrust suit.[120] The Second Circuit believed that this factor would limit a higher standard for pleading only to cases where costly discovery would pressure cost-conscious defendants into settling.[121] Fourth, the Court indicated that federal courts are equipped to weed out meritless claims through summary judgment and discovery in certain instances.[122] Lastly, the Court indicated in *Erickson* that specific facts were not necessary to give sufficient notice to the defendant of the claim being brought against him.[123]

The Second Circuit balanced all of these factors and determined that the Court could not have meant to apply the new plausibility standard solely in the antitrust setting.[124] The Second Circuit developed a flexible plausibility standard, "which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."[125] The Second Circuit held that it could not apply a heightened pleading standard in cases involving qualified immunity without express permission from the Supreme Court or Congress.[126] A plausibility standard, could be applied to cases involving qualified immunity because it was not a heightened pleading standard.[127] The Second Circuit indicated that a motion for a more definite statement may need to be utilized more often in order for the complaint to

117. *Id.*
118. *Iqbal*, 490 F.3d at 156.
119. *Id.*
120. *Id.* at 156-57.
121. *Id.* at 157.
122. *Id.*
123. *Iqbal*, 490 F.3d at 157.
124. *Id.*
125. *Id.* at 157-58.
126. *Id.* at 158.
127. *Id.*

survive a motion to dismiss.[128] If a complaint survives a motion to dismiss under the plausibility standard, the judge can still tighten the discovery process to prevent pressuring a cost-conscious defendant into settling.[129] Ultimately, the Second Circuit ruled that all but one of the plaintiff's twenty-one causes of action would satisfy the plausibility standard.[130]

Iqbal sought to clear up the vague language in *Twombly*, but it may have added to the confusion. *Iqbal* made it clear that the Second Circuit would not apply a heightened pleading standard.[131] When is a judge supposed to apply the flexible plausibility standard and require a plaintiff to amplify a claim with some factual allegations, and what exactly does plausible mean? Recently, the Second Circuit has acknowledged that its flexible plausibility standard is unclear.[132] Yet it still did not clarify when a plaintiff would have to amplify his claim because *Boykin v. Keycorp* involved a pro se plaintiff.[133] In the end, the Second Circuit did not apply its flexible plausibility standard to any of the twenty-one claims set forth by the plaintiff in *Iqbal*.[134] While the flexible plausibility standard is unclear, other circuits have followed the Second Circuit's approach.[135] This seems to indicate that it will be the exception and not the

128. *Iqbal*, 490 F.3d at 158.

129. *Id.* at 158-59.

130. *Id.* at 177-78. The plaintiff's complaint informed the defendants of the time and place of the alleged violations, therefore satisfying the plausibility standard. *Id.* at 166. The Second Circuit ruled that "[t]he plausibility standard requires no subsidiary facts at the pleading stage to support an allegation of [defendant's] knowledge because it is at least plausible that a warden would know of mistreatment inflicted by those under his command." *Id.* at 170. In addition, subsidiary facts are not necessary to sustain a claim of interference with right to counsel when the complaint alleged that the defendant "knew of and condoned the imposition of substantial restrictions on Plaintiff's right to communicate with counsel." *Id.*

131. *Id.* at 157.

132. Boykin v. KeyCorp, 521 F.3d 202, 213 (2d Cir. 2008).

133. *Id.*

134. *Iqbal*, 490 F.3d at 177-78.

135. Limestone Dev. Corp. v. Vill. of Lemont, Ill., 520 F.3d 797, 803 (7th Cir. 2008) (indicating that the amount of facts necessary to make a claim plausible will depend on the type of case, in this instance a RICO case, and the facts of the case); Weisbarth v. Geauga Park Dist., 499 F.3d 538, 541-42 (6th Cir. 2007) (noting that eight federal districts in the Sixth Circuit have applied *Iqbal*'s flexible plausibility standard and stating that "*Iqbal* interpreted *Twombly* to require more concrete allegations only in those instances in which the complaint, on its face, does not otherwise set forth a plausible claim for relief").

norm for a court to require a claim to be amplified with factual allegations in order to survive a motion to dismiss.

D. How is *Twombly* Being Applied Outside of the Antitrust Setting?

1. Twombly *in Discrimination Cases*

Perhaps the most surprising application of *Twombly* is in discrimination cases. The Sixth Circuit ruled that *Twombly* applied to a housing-discrimination lawsuit but did not require factual specificity.[136] The plaintiffs in *Lindsay v. Yates* alleged that the defendant homeowners refused to sell to them because of their race.[137] Specifically, the plaintiffs pled that an agreement had been signed and that the homeowners retracted the contract only after meeting the plaintiffs, who were African-American.[138] The district court dismissed the plaintiffs' complaint, because the plaintiffs failed to plead facts establishing that the house remained on the market after the homeowners retracted the contract.[139]

The Sixth Circuit held that the plausibility standard applied in the racial-discrimination setting, but that the district court erred by requiring the plaintiffs to allege facts necessary to prove a prima facie case at the pleadings stage of the litigation.[140] The Sixth Circuit reasoned that *Swierkiewicz* made it clear that the *McDonnell Douglas* standard "is an evidentiary standard, not a pleading requirement."[141] In addition, the Sixth Circuit stated that the Supreme Court did not intend to overrule *Swierkiewicz* when it handed down *Twombly*.[142] The Sixth Circuit ruled that the plaintiffs pled "sufficient facts giving rise to a 'reasonably founded hope that the discovery process will reveal relevant evidence' to support their claims"[143] by alleging that "the [defendants] advertised their house for sale, that [the plaintiffs] executed a purchase agreement to buy the house, and

136. Lindsay v. Yates, 498 F.3d 434, 440 & n.6 (6th Cir. 2007).
137. *Id.* at 437.
138. *Id.*
139. *Id.* at 438.
140. *Id.* at 438, 440.
141. *Yates*, 498 F.3d at 440.
142. *Id.* at 440 n.6.
143. *Id.* (quoting Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007)).

that nearly two weeks after signing the purchase agreement . . . — and one day after [the defendant] learned they were black— the [defendants] terminated the contract."[144] The Sixth Circuit held that the plaintiffs' claim was sufficient to withstand a Rule 12(b)(6) motion to dismiss.[145]

The Eleventh Circuit has applied the plausibility standard to the area of employment discrimination in *Watts v. Florida International University*.[146] The plaintiff, Watts, was fired for recommending to a patient that a church might be a good bereavement support group.[147] Due to his termination, Watts was unable to finish his graduate program.[148] Watts sued, alleging that his former employer fired him because of his religious beliefs.[149] The district court dismissed his First Amendment free-exercise-of-religion claim, stating that Watts had not alleged that the termination had "substantially burdened his observation of a central religious belief."[150] The Eleventh Circuit disagreed with this standard and held that Watts had to "allege that the government has impermissibly burdened one of his 'sincerely held religious beliefs.'"[151]

The Eleventh Circuit addressed this question: "With what specificity must sincerity be pleaded?"[152] The court looked to *Twombly* to answer this question.[153] The Eleventh Circuit ruled that *Twombly* "'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of' the necessary element."[154] After reviewing *Twombly*, the court ruled that "the question is whether Watts has alleged enough facts to suggest, raise a reasonable expectation of, and render plausible the fact that he sincerely held the religious belief that got him fired."[155] Watts pled in his complaint that he believed "a patient who

144. *Id.* at 440.
145. *Id.*
146. 495 F.3d 1289, 1295-96 (11th Cir. 2007).
147. *Id.* at 1292.
148. *Id.*
149. *Id.* at 1291.
150. *Id.* at 1294.
151. *Watts*, 495 F.3d at 1294 (quoting Frazee v. Ill. Dept. of Employment, 489 U.S. 829, 834 (1989)).
152. *Id.* at 1295.
153. *Id.*
154. *Id.* at 1295-96.
155. *Id.* at 1296.

professes a religion is entitled to be informed if the counselor is aware of a religious avenue within the patient's religion that will meet the appropriate therapy protocol for the patient."[156] The Eleventh Circuit held that Watts "certainly alleged 'enough factual matter . . . to suggest' that his religious belief was sincerely held, . . . and 'identifying facts that are suggestive enough to render [the sincerity of his belief] plausible.'"[157]

The Seventh Circuit may have applied the *Twombly* plausibility standard to a Title VII employment-discrimination complaint.[158] The EEOC alleged that the defendant retaliated against an employee because he "opposed [a] practice made . . . unlawful [and forbidden by Title VII]."[159] In addition, the complaint laid out details that the employee reported to the human-resources director that a female supervisor gave a fellow employee preferential treatment due to their inappropriate sexual relationship.[160] The complaint alleged that the employee was fired for making this report.[161] The Seventh Circuit ruled that the complaint needed more details of specific conduct by the employee that led to the illegal retaliation and that the details were "critically important to the case and might facilitate a quick resolution on the merits."[162]

The Seventh Circuit insisted that it was not adopting a heightened pleading standard but only "insist[ing] upon easily provided, clearly important facts."[163] In fact, the Seventh Circuit suggested that the Supreme Court may have dismissed the plaintiff's suit in *Twombly* because he pled too much detail.[164] The concurrence disagreed with this statement,[165] and the Seventh Circuit's language appears to contradict its statement that it was not applying a new pleading standard.[166] While the majority claimed that the plaintiff's complaint would

156. *Watts*, 495 F.3d at 1296.

157. *Id.* (last alteration in original) (quoting Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007)).

158. E.E.O.C. v. Concentra Health Servs., Inc., 496 F.3d 773, 775 (7th Cir. 2007).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 781.

163. *Concentra Health*, 496 F.3d at 782.

164. *Id.* at 777-78 n.1.

165. *Id.* at 783 n.1 (Flaum, J., concurring).

166. *Id.* at 777-78 & 777 n.1 (majority opinion).

have failed under pre-*Twombly* standards, the concurrence and the language in the opinion make it appear that the new plausibility standard influenced the majority opinion.[167]

The Third Circuit has also applied the plausibility standard to the employment-discrimination setting.[168] In *Wilkerson v. New Media Technology Charter School, Inc.*, a terminated charter-school teacher brought a Title VII action claiming that she was fired for retaliation and her religious beliefs.[169] The teacher pled that she was fired because of her "'Christian religious beliefs,' 'her refusal to engage in the 'libations' ceremony,' and her 'complaints related to the ceremony.'"[170] The court relied on *Phillips v. County of Allegheny*[171] in articulating its opinion.[172] In *Phillips*, the Third Circuit acknowledged that the *Twombly* opinion was very unclear.[173] Nevertheless, the Third Circuit summarized the plausibility standard:

> "[S]tating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest" the required element. This "does not impose a probability requirement at the pleading stage," but instead "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of" the necessary element.[174]

Thus, based on the Third Circuit's interpretation, the teacher's claims in *Wilkerson* were sufficient to satisfy *Twombly*'s plausibility standard.[175]

Other circuits have chosen not to extend *Twombly* to the discrimination setting.[176] The defendant in *Skaff* argued that the

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167. *Id.* at 777-78 (majority opinion) & 783 (Flaum, J., concurring).

168. Wilkerson v. New Media Tech. Charter Sch., Inc., 522 F.3d 315, 322 (3d Cir. 2008) ("The plausibility paradigm announced in *Twombly* applies with equal force to analyzing the adequacy of claims of employment discrimination.").

169. *Id.* at 318-19.

170. *Id.* at 322.

171. 515 F.3d 224 (3d Cir. 2008).

172. *Wilkerson*, 522 F.3d at 322.

173. *Phillips*, 515 F.3d at 234.

174. *Id.* (citations omitted).

175. *Wilkerson*, 522 F.3d at 322.

176. *See, e.g.*, Skaff v. Meridien N. Am. Beverly Hills, L.L.C., 506 F.3d 832, 841-42 (9th Cir. 2007).

plaintiff was required to plead accessibility barriers with specific detail and support those claims with evidence.[177] The Ninth Circuit ruled that claims brought under the Americans with Disabilities Act did not have a heightened pleading standard.[178] It limited *Twombly* to the antitrust setting and held that a heightened pleading standard could only exist if it was explicit in a statute or rule.[179] The court cited *Swierkiewicz* and *Leatherman* in support of its rejection of the notion that a heightened pleading standard could be applied in the discrimination setting.[180] The court explained that the defendant had an array of discovery devices that it could use in order to obtain more specificity from the plaintiff.[181]

The Supreme Court stated in *Twombly* that it was not overruling *Swierkiewicz*.[182] It is clear, however, that *Twombly* is being applied in the discrimination setting. This could be the most controversial area in which to apply the plausibility standard. While the circuits seem to agree that a fact-pleading system is not required in this setting, it appears that there now exists a higher standard than what previously existed under *Conley*. The Supreme Court will have to specifically limit *Twombly* in this area, much like it did in *Erickson* when a pro se plaintiff filed a complaint, in order to prevent an extension of *Twombly* into the discrimination setting.

2. Twombly *as Applied Outside Antitrust*

The circuits have been applying *Twombly* to various settings outside of antitrust that are not quite as controversial as an application in the discrimination setting. The Sixth Circuit has extended *Twombly* to due process and equal protection claims under the Fourteenth Amendment.[183] In *Eidson v. Tennesee Department of Children's Services*, the plaintiff claimed a continuing-violation theory under the Fourteenth

177. *Id.* at 841.
178. *Id.* at 841-42.
179. *Id.*
180. *Id.*
181. *Skaff*, 506 F.3d at 842.
182. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1973-74 (2007).
183. *See* Eidson v. Tenn. Dept. of Children's Servs., 510 F.3d 631 (6th Cir. 2007); Assoc. of Cleveland Fire Fighters v. City of Cleveland, 501 F.3d 545 (6th Cir. 2007).

Amendment.[184] The Sixth Circuit held that "a complaint containing a statement of facts that merely creates a *suspicion* of a legally cognizable right of action is insufficient," and the plaintiff's complaint did not meet that standard.[185] The court reasoned that the complaint was too vague and only set forth an allegation that a government agent occasionally monitored him.[186] These factual allegations were not sufficient to raise a right to relief for deprivation of liberty without due process above the speculative level.[187]

The Sixth Circuit also extended *Twombly* to an equal protection claim under the Fourteenth Amendment.[188] The plaintiffs' complaint alleged that the city did not grant residency exemptions for three firefighters but granted those same exemptions to other similarly situated employees.[189] The complaint also alleged that the city granted residency exemptions arbitrarily.[190] The majority held that this was not "enough to raise a right to relief above the speculative level" because the plaintiffs did not mention any discriminatory treatment.[191] The dissent did not agree that *Twombly* altered the pleading standards and stated that if any doubt lingered, *Erickson* clearly established that a new pleading standard had not been developed.[192]

Recently, the Third Circuit applied *Twombly* to a class action against an employer for unjust enrichment and breach of contract.[193] The Third Circuit suggested that it would follow *Twombly*, stating that "it is no longer sufficient to allege mere elements of a cause of action; instead 'a complaint must allege facts suggestive of [the proscribed] conduct.'"[194] Yet the court stated that it would continue to apply the standard of review it

184. *Eidson*, 510 F.3d at 637.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Assoc. of Cleveland Fire Fighters*, 502 F.3d at 550.

189. *Id.* at 547-48 (majority opinion) & 554 (Moore, J., concurring in part and dissenting in part).

190. *Id.*

191. *Id.* at 550 (majority opinion) (quoting Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007)).

192. *Id.* at 555 (Moore, J., concurring in part and dissenting in part).

193. Umland v. PLANCO Fin. Servs., Inc., 542 F.3d 59, 62-63, 64 (3d Cir. 2008).

194. *Id.* at 64 (alteration in original) (quoting *Twombly*, 127 S. Ct. at 1969 n.8).

followed before *Twombly* was decided: "We accept the complaint's allegations as true, read those allegations in the light most favorable to the plaintiff, and determine whether a reasonable reading indicates that relief may be warranted."[195] Based on this holding, it seems the Third Circuit was already applying a plausible pleading standard before *Twombly* or is simply reading *Twombly* as maintaining the status quo. Other circuits have also applied *Twombly* to various causes of action.[196]

V. CONCLUSION

It is clear that *Twombly* has left many questions lingering about what exactly is required of plaintiffs when they submit a complaint. The plausibility standard put into place by the Supreme Court is murky at best, and the decision in *Erickson* added to the confusion. The circuits have begun to dissect *Twombly* and have consistently applied it to various causes of action outside the antitrust setting. The Second Circuit has probably done the most in examining *Twombly*, but other circuits need to examine this problem in greater depth. The majority of cases simply cite to *Twombly* without any explanation of the standard. The circuits need to develop a bright-line rule on plausibility. Until this is done, complaints will be examined on a case-by-case basis without any consistency in interpreting plausibility. The circuits have the duty of clarifying *Twombly* until the Supreme Court decides to do so itself.

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195. *Id.*

196. *In re* Katrina Canal Breaches Litig., 495 F.3d 191, 196, 205 (5th Cir. 2007) (extending *Twombly* to actions seeking recovery on insurance policies); Jennings v. Auto Meter Prods., Inc., 495 F.3d 466, 472-73 (7th Cir. 2007) (extending *Twombly* to a RICO cause of action); Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177-79 (10th Cir. 2007) (extending *Twombly* to an appeal from an arbitration award).