

# A Fresh Look at Plausibility Pleading

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*The plausibility pleading regime of Twombly and Iqbal has generated continuing controversy and concern over its effects on the ability of plaintiffs, particularly certain categories of civil rights plaintiffs, to bring cases in federal court. This Article assesses the effects of plausibility pleading by undertaking a novel thought experiment: What would plaintiffs' filing and pleading decisions look like in a world with no pleading standard at all? In other words, what if there were no motions to dismiss for failure to state a claim and every filed case reached discovery? This Article shows that in this hypothetical world, plaintiffs usually either file factually detailed, plausible complaints or do not file at all. In short, pleading standards generally will not affect whether the plaintiff files suit or the court dismisses the complaint. Perhaps most surprisingly, this is true even for cases in which information asymmetries favor the defendants. Plaintiffs' attorneys, not judges, are the gatekeepers to court, and pleading practices are driven not by doctrine but by settlement strategy. This analysis generates empirical predictions, which find support in a wide range of qualitative (though admittedly inconclusive) evidence. Further, this thought experiment may turn the normative critique of Twombly and Iqbal on its head: Plausibility pleading may advance, rather than undermine, the "liberal ethos" of the Federal Rules of Civil Procedure. Plausibility pleading can make it easier for plaintiffs with risky but worthwhile cases to have their day in court.*

INTRODUCTION .....	694
I. A THEORY OF PLEADING, LITIGATION, AND SETTLEMENT .....	700
A. Pleading with No Pleading Standard.....	701
B. The Role of Lawyers and Lawyering.....	706
C. Asymmetric Information .....	713
D. Spite, Indignation, and Optimism.....	716
E. Nuisance Suits .....	717
F. Class Actions and Shoot-the-Moon Cases.....	723
II. JUDICIAL PERCEPTIONS OF PLEADING .....	730
III. SOME EVIDENCE IN SUPPORT OF THE THEORY .....	732
A. Everything New Is Old Again .....	733
B. Practitioner Surveys .....	734
C. Cross Jurisdictional Practice.....	737

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D. Pro Se and IFP Plaintiffs.....	739
E. Settlement Patterns.....	740
F. Case Law .....	741
IV. THE “LIBERAL ETHOS” IN MODERN PRACTICE .....	746
A. “On the Merits” Rather Than a “Game of Skill” .....	748
B. When to Hold and When to Fold .....	751
CONCLUSION .....	756

## INTRODUCTION

When *Bell Atlantic Corp v Twombly*<sup>1</sup> and *Ashcroft v Iqbal*<sup>2</sup> put to pasture the venerable regime of “notice pleading” in federal civil procedure and introduced the concept of “plausibility pleading,”<sup>3</sup> the result was “shockwaves throughout the legal community—for academics, practitioners, and judges alike.”<sup>4</sup> After over fifty years of near dormancy, the scholarly literature on pleading exploded.<sup>5</sup> The academic reaction to *Twombly* and *Iqbal* reflected a sense of concern—even alarm—at an apparent revolution in pleading and court practice.<sup>6</sup> And seven years after *Iqbal*, the turmoil still reverberates.

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<sup>1</sup> 550 US 544 (2007).

<sup>2</sup> 556 US 662 (2009).

<sup>3</sup> See Douglas G. Smith, *The Twombly Revolution?*, 36 *Pepperdine L Rev* 1063, 1063–65 (2009).

<sup>4</sup> Adam N. Steinman, *The Pleading Problem*, 62 *Stan L Rev* 1293, 1305 (2010) (citations omitted). See also Smith, 36 *Pepperdine L Rev* at 1063 (cited in note 3) (“No decision in recent memory has generated as much interest and is of such potentially sweeping scope as the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*.”); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 *Ind L J* 119, 122 (2011) (noting a near consensus “among academic observers that the *Iqbal/Twombly* pleading standard marks a sharp break with the past”); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 *Am U L Rev* 553, 554 (2010) (characterizing *Twombly* as “[s]eemingly without prior warning”); Richard A. Epstein, *Twombly, after Two Years: The Procedural Revolution in Antitrust That Wasn’t* \*4 (GCP, July 2009), archived at <http://perma.cc/4424-Z6GY> (characterizing the *Twombly* decision as “out of the blue”); A. Benjamin Spencer, *Plausibility Pleading*, 49 *BC L Rev* 431, 431 (2008) (stating that *Twombly* was “a startling move by the U.S. Supreme Court”).

<sup>5</sup> See Paul Stancil, *Balancing the Pleading Equation*, 61 *Baylor L Rev* 90, 137–38 (2009):

Until recently, the scholarly literature on pleading standards was remarkably thin, with only a few significant pieces written from the 1930s through the early 2000s. Widespread scholarly interest in pleading is a remarkably recent phenomenon, tracing its birth to the Supreme Court’s 2007 opinion in *Bell Atlantic Corp. v. Twombly*.

I cannot begin to survey the literature on *Twombly*. For a survey, see Steinman, 62 *Stan L Rev* at 1296–97 nn 10, 12–13 (cited in note 4).

<sup>6</sup> See, for example, Steinman, 62 *Stan L Rev* at 1310 (cited in note 4) (“The conventional wisdom is that *Twombly* and *Iqbal* herald a new era for federal pleading standards.”);

This continuing tumult is due to two fundamental factors. First, the stakes are understood to be extraordinarily high. Scholars tend to describe the pleading requirements of the Federal Rules of Civil Procedure (FRCP) as making judges the gatekeepers to the federal courts.<sup>7</sup> And if “pleading is the key to the courthouse door,”<sup>8</sup> then changing pleading standards means changing the number of plaintiffs who will be turned away from court.

As originally envisioned by the drafters of the FRCP, and as affirmed in the seminal case *Conley v Gibson*,<sup>9</sup> the gatekeeping function of federal judges was minimal: they used a standard of notice pleading, which required only that a pleading give the defendant notice of the plaintiff’s grievance.<sup>10</sup> Notice pleading reflected a deliberate break from prior pleading regimes, whose cumbersome requirements were seen as traps for the unwary.<sup>11</sup> Rather than having courts decide cases based on the niceties of pleading, the “liberal ethos” of the FRCP required only the barest of allegations, so that cases could be decided “on the merits, by jury trial, after full disclosure through discovery.”<sup>12</sup>

Today, though, notice pleading in federal court is no more, and plausibility pleading reigns: the plaintiff must allege

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Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L J 1, 28 (2010) (calling *Twombly* a “radical departure from prior practice”); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us about Judicial Power over Pleadings*, 88 BU L Rev 1217, 1235 (2008) (noting that a majority of scholars agree that “*Twombly* amounts to a sea of change in the traditional pleading standard”).

<sup>7</sup> See, for example, Benjamin P. Cooper, *Iqbal’s Retro Revolution*, 46 Wake Forest L Rev 937, 942 (2011); Kevin M. Clermont and Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L Rev 821, 824 (2010).

<sup>8</sup> Steinman, 62 Stan L Rev at 1295 (cited in note 4).

<sup>9</sup> 355 US 41 (1957).

<sup>10</sup> *Id.* at 47.

<sup>11</sup> See William W. Dawson, ed, *Rules of Civil Procedure for the District Courts of the United States with Notes as Prepared under the Direction of the Advisory Committee and Proceedings of the Institute on Federal Rules* 301 (ABA 1938) (quoting Major Edgar Bronson Tolman).

<sup>12</sup> Richard L. Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 Colum L Rev 433, 439 (1986). The development of the regime of fact pleading, which preceded the adoption of the FRCP, as well as the development of simplified pleading systems (including the Field Code in the nineteenth century), which culminated in the adoption of the FRCP in 1938, may be of interest to the reader. For an account, see, for example, *id.* at 433–44; *Twombly*, 550 US at 573–76 (Stevens dissenting); Stancil, 61 Baylor L Rev at 109–12 (cited in note 5); Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the Conley-Iqbal Dilemma*, 114 Penn St L Rev 1191, 1196–1205 (2010); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U Pa L Rev 441, 447–52 (2010).

“enough facts to state a claim to relief that is plausible on its face.”<sup>13</sup> And the liberal ethos of the FRCP has become something else—what Professor A. Benjamin Spencer calls the “restrictive ethos,” which eschews discovery and trial in favor of dispositions at the pleading stage.<sup>14</sup>

Scholars have expressed concern for civil rights plaintiffs (and especially for employment discrimination plaintiffs), who often lack direct evidence of the defendants’ motives at the outset of litigation.<sup>15</sup> In this way, the argument goes, *Twombly* and *Iqbal* create a “paradox of pleading”: “[c]ivil rights plaintiffs . . . cannot state a claim because they do not have access to documents or witnesses they believe exist; and they cannot get access to those documents or witnesses without stating a claim.”<sup>16</sup>

As a doctrinal matter, this is surely true. But what effects have come to pass? While many observers predicted large, observable changes in either filing or dismissal rates, others were less sure.<sup>17</sup> For example, Professor Paul Stancil surmised that “the vast majority of litigated cases already satisfy the heightened [pleading] standard.”<sup>18</sup> Thus, scholars have been careful to caution that discerning the effects of *Twombly* and *Iqbal* is ultimately an empirical matter, and careful observation is necessary to inform our understanding of pleading.<sup>19</sup>

This brings us to the second factor fueling the continued ferment on pleading standards: despite a large body of empirical work on *Twombly* and *Iqbal*, the quantitative evidence on the effects of plausibility pleading on plaintiffs is inconclusive to date.

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<sup>13</sup> *Twombly*, 550 US at 570.

<sup>14</sup> A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 Geo Wash L Rev 353, 358–66 (2010).

<sup>15</sup> See Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U Pa L Rev 517, 519–20, 533–35 (2010); Reinert, 86 Ind L J at 123 (cited in note 4) (“Particular attention has been paid to the impact of the *Iqbal* and *Twombly* rules on civil rights litigation, where informational asymmetry is often at its highest point but where federal courts and federal law have played an important historical role.”).

<sup>16</sup> Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 Stan L Rev 905, 927 (2010). See also Hatamyar, 59 Am U L Rev at 602 (cited in note 4) (noting that *Twombly* and *Iqbal* have a “potentially negative effect on access to justice”). Justice John Paul Stevens made a similar argument for antitrust cases in his *Twombly* dissent. *Twombly*, 550 US at 586–87 (Stevens dissenting).

<sup>17</sup> Note that throughout this Article, “dismissal” refers to dismissal for failure to state a claim on which relief can be granted.

<sup>18</sup> Stancil, 61 Baylor L Rev at 168 (cited in note 5).

<sup>19</sup> See, for example, Hoffman, 88 BU L Rev at 1222 (cited in note 6); Miller, 60 Duke L J at 2 (cited in note 6); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 Lewis & Clark L Rev 157, 158 (2010).

The best meta-analysis of this literature is by Professor David Engstrom, who notes serious problems with the reliability of results due to various selection effects in the data and collects results from the literature consistent with the number of affected cases being anywhere from zero to a substantial fraction of all cases.<sup>20</sup> While this literature will continue to mature and will serve as the ultimate arbiter of the effects of plausibility pleading, right now the time is ripe for a fresh approach to both the theory and the data animating our analysis of pleading.

In this Article, rather than focus on pleading *doctrine* or on *quantitative* evidence, I develop a theory of pleading *practice* and consider *qualitative* evidence. I make a case for reconsidering what effects we ought to expect plausibility pleading to have.

In doing so, this Article raises the following questions: What if federal judges are not the gatekeepers to civil litigation in the federal courts? What if, in practice, the gatekeeping standard has nothing to do with FRCP 8, *Conley*, *Twombly*, or *Iqbal*? What if, for more cases than we expect, neither notice pleading nor plausibility pleading affects how pleadings are written, let alone whether complaints are dismissed? And what if, for most of the cases for which pleading standards make a big difference, it is plausibility pleading, and not notice pleading, that better reflects the liberal ethos of the FRCP?

My analytical approach is to attempt to capture, in a simplified way, essential features of the practice of pleading and litigation and then to consider how we might expect pleading standards to affect litigation behavior. I undertake a novel thought experiment: What if there were no pleading standard at all, such that no complaints could ever be dismissed for failure to state a claim? In this hypothetical pleading regime, I argue, rational plaintiffs will still (usually) have the incentive either to file factually detailed complaints or not to file at all. Pleading standards do

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<sup>20</sup> See David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 *Stan L Rev* 1203, 1230–34 (2013). The latter number is due to the fact that now-Professor Jonah B. Gelbach estimates only a lower bound for the share of cases negatively affected and finds that the lower bound is significantly different from zero. Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 *Yale L J* 2270, 2331–32, 2338 (2012). Thus, while this finding does not indicate that a substantial fraction of all cases are in fact affected, it is consistent with such a possibility. For further discussion of selection effects in this literature, see generally William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to Bell Atlantic v. Twombly*, 42 *J Legal Stud* 35 (2013). See also Theodore Eisenberg and Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 *Cornell L Rev* 193, 202–07 (2014).

not dictate plaintiffs' strategies for filing and pleading. Instead, filing and pleading practices reflect plaintiffs' judgments about the costs and benefits of litigation and the best means of obtaining settlements.

The basic argument, which is detailed in Part I.A, is straightforward. Litigation is expensive, and this has two key consequences for civil practice: First, both plaintiffs and defendants prefer to settle rather than to litigate. Second, plaintiffs will not bother to file suits if they do not stand a good chance of winning. Because of this, defendants are willing to settle with plaintiffs whose cases are strong enough to justify a lawsuit, but defendants would prefer not to settle with plaintiffs whose claims are weak; such plaintiffs will abandon their claims if they cannot obtain settlements without suing.

If defendants cannot perfectly discern plaintiffs with serious claims from others, plaintiffs with strong claims need a way to credibly signal the strength of their cases. Civil procedure itself provides just such a mechanism: pleading! Through factually detailed pleading, a plaintiff communicates the strength of her case and thereby facilitates settlement. Under this view, the contents of pleadings in federal practice are driven not by the prospect of motions to dismiss but by the impetus to settle. Judges serve a minimal gatekeeping function because plaintiffs and their lawyers are the primary gatekeepers to the courts.<sup>21</sup> In this way, I offer a functional theory of pleading, according to which *Twombly* and *Iqbal* are best understood as effecting a subtle, rather than dramatic, change in law and practice.<sup>22</sup>

The remaining portions of Part I then consider possible limits on this analysis. Perhaps surprisingly, the most often cited concern with plausibility pleading standards—asymmetry of information favoring defendants<sup>23</sup>—does not affect my central thesis.

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<sup>21</sup> Of course, the role of plaintiffs' attorneys as gatekeepers to the civil justice system has long been recognized. See, for example, Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 *Judicature* 22, 22 (July–Aug 1997) (“Lawyers, particularly contingency fee lawyers, are gatekeepers who control the flow of civil cases into the courts.”). The relevance of this fact to pleading practice, however, has received scant attention.

<sup>22</sup> This theory complements doctrinal arguments by Professors Adam Steinman and Robert G. Bone, as well as others. See Steinman, 62 *Stan L Rev* at 1314–27 (cited in note 4); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 *Iowa L Rev* 873, 882–90 (2009).

<sup>23</sup> See, for example, Spencer, 49 *BC L Rev* at 481–82 (cited in note 4) (lamenting that a plausibility pleading standard forecloses “discovery . . . for such complainants in

In contrast, pro se and in forma pauperis (IFP) plaintiffs may be affected by pleading standards; so too may claims involving asymmetry of costs or unusually high stakes.

Part II then considers how the practices of screening for merit by plaintiffs' attorneys and detailed pleading may influence the behavior of judges. Because detailed pleadings signaling merit are the norm even under the most liberal pleading standard, judges will see pleadings lacking detail as aberrant and as signaling a lack of merit. If judges feel pressure to control their caseloads or to resolve litigation inexpensively, they may tend to dismiss such complaints regardless of the (ostensible) pleading standard.

Part III discusses the positive, empirical implications of this theory and finds support for these implications in familiar, if somewhat old-fashioned, sources of data: aggregate court statistics, practitioner surveys, state law surveys, and doctrine. While I deliberately eschew the growing, but currently inconclusive, statistical literature on the effects of *Twombly* and *Iqbal* (including my own work in this area),<sup>24</sup> I hasten to note that as the results from this literature become clearer over time, these results will either confirm or reject the predictions of this theory. For now, though, the evidence I survey strongly supports the view that plausibility pleading has wrought no major change in practice.

Part IV considers potential normative implications of this theory of pleading. It raises the possibility that plausibility pleading embraces rather than rejects the liberal ethos of the FRCP. As my thought experiment makes clear, neither notice pleading nor plausibility pleading has much effect on the reality that most cases are resolved neither by jury trial nor after full disclosure through discovery. Thus, the liberal ethos of resolving cases "on the merits, by jury trial, after full disclosure through discovery"<sup>25</sup> will always, regardless of pleading standards, be little more than an unrealized ideal—with one exception: we surely want cases resolved on the merits. The challenge to honor the liberal ethos is a challenge to design procedure to resolve cases on the merits in an environment in which trial (and even completed discovery) will always be the exception. As I argue herein, most of the cases that are affected by pleading standards involve

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circumstances where the needed supporting facts lie within the exclusive possession of the defendants").

<sup>24</sup> See generally, for example, Hubbard, 42 *J Legal Stud* 35 (cited in note 20).

<sup>25</sup> Marcus, 86 *Colum L Rev* at 439 (cited in note 12).

cases less likely to be resolved on the merits. Consistent with this goal, however, special care may need to be reserved for pro se and IFP plaintiffs in the application of pleading standards.

Perhaps more provocatively, I argue that plausibility pleading may *benefit* plaintiffs with risky but worthwhile claims. While the concern that plausibility pleading hurts plaintiffs because of information asymmetries is chimerical, there remains the concern that the vague plausibility pleading standard confers discretion to judges and, in exercising this discretion, judges may (consciously or unconsciously) give play to antiplaintiff biases. If so, does the plausibility standard hurt plaintiffs? Not necessarily. If anything, the effect is likely the reverse. After all, if a judge holds an antiplaintiff bias, this bias will affect the case sooner or later. As a plaintiffs' attorney, when would you rather have the judge reveal her bias: early on, when you can cut your losses, or later, after you have spent tens or hundreds of thousands of dollars litigating the case? Put another way, would you rather have the judge reveal her bias by dismissing your complaint for failure to state a claim, or by granting summary judgment to the defendant at the close of discovery? In the modern world of expensive discovery and extensive judicial control over fact-finding through summary judgment and other means, giving plaintiffs an early signal of judicial bias reduces the expected cost of litigation for plaintiffs, empowering plaintiffs to bring claims that would otherwise be too risky given the cost. In a world of high litigation costs, plausibility pleading serves the liberal ethos of the FRCP.

To be clear, I make no claim that plausibility pleading is an unvarnished good. Its likely effects are multifaceted, and there are some obstacles to settlement on the merits that pleading rules simply cannot address, such as litigation driven primarily by highly asymmetric costs. But as my theory of pleading makes clear, the effects of plausibility pleading, both for good and for ill, are likely modest. Whether courts' objective is to impose a new "restrictive ethos" or to update the "liberal ethos" to account for modern realities, they will have to look elsewhere to effect large changes.

#### I. A THEORY OF PLEADING, LITIGATION, AND SETTLEMENT

Let us undertake a thought experiment: imagine a pleading regime in which no complaint can be dismissed for failure to state a claim, so long as it names a defendant and describes



some kind of injury. I call this hypothetical regime “no pleading standard”—although this may not be far from the original conception of notice pleading.<sup>26</sup>

Since it is costly to prepare a lengthy complaint with factual details and legal background, one might expect that under no pleading standard, complaints would be short, sparsely pleaded documents that would surely be dismissed if *Twombly* were to suddenly appear. This conclusion would be too hasty. While detailed pleading is costly, so is litigation. I argue that in general, even under a regime of *no* pleading standard: (1) only a plaintiff who has facts establishing a plausible claim will file a lawsuit, and (2) when the plaintiff files suit, she will plead those facts in (some) detail.

In Part I.A, I present the argument in basic form. In subsequent sections, I elaborate on the basic argument, showing both its surprisingly broad applicability and its limitations.

#### A. Pleading with No Pleading Standard

Litigation is expensive; thus, a plaintiff will not bother to file suit if she does not stand a decent chance of winning. But a plaintiff will not believe that she has a good chance of winning unless she has in mind some *facts* that persuade her that she can win the suit. And again, because litigation is expensive, the plaintiff would prefer to settle rather than to undertake the lengthy process of litigation and trial. Thus, she has every incentive to *signal* the strength of her case by communicating her facts to the potential defendant if doing so will encourage the defendant to settle.

The defendant, also concerned about litigation costs, would prefer to settle rather than to go to trial with a plaintiff who brings a strong claim, but the defendant is wary of a plaintiff with a weak claim bluffing her way to a settlement. The defendant will be reluctant to settle absent some assurance that the plaintiff's claim is strong enough that it is worth paying a settlement. Thus, it is essential that the plaintiff with a plausible claim *credibly* communicate her facts to the defendant.

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<sup>26</sup> Dean Charles Clark, the primary architect of the FRCP, toyed with the idea of abolishing pleading standards altogether, as the English had done in their Equity Rules of 1912, which abolished the demurrer. In testimony in 1938 on the new rules governing pleading, he remarked, “We don’t go as far as the English rules, which I personally think we should eventually.” Dawson, *Rules of Civil Procedure* at 240 (cited in note 11) (quoting Clark’s statement about FRCP 12 to the Institute on Federal Rules of the American Bar Association).

The plaintiff does so through pleading, which is a nearly ideal mechanism for making a credible signal: a complaint is made in writing, made publicly available, and signed under penalty of sanctions against both the plaintiff and her lawyer.<sup>27</sup> And a *factually detailed* complaint is costly to prepare, insofar as it takes the time and effort of attorneys (and others) to gather relevant information and present the information as factual allegations in a coherent pleading.<sup>28</sup> In other words, a factually detailed, plausible complaint makes the plaintiff's case credible by backing up her claims with her money and reputation. Crucially, nothing in this argument depends on the existence, let alone strictness, of a pleading standard.

A simple model formalizes this intuition somewhat. There is a (potential) plaintiff and a (potential) defendant. The plaintiff has been injured and the defendant may be liable for the injury. The plaintiff can file a lawsuit seeking a judgment in the amount  $J$  against the defendant. If the plaintiff sues and the parties do not settle, it will cost the plaintiff  $C$  to litigate. Before deciding whether to sue, the plaintiff must assess the information available to her in order to make a judgment about her likelihood of winning the lawsuit. If we call this probability  $p$ , then the *expected judgment* is simply the judgment amount times the probability that she wins the judgment:  $pJ$ . Given this expected judgment, the plaintiff will be willing to sue and go to trial if the expected judgment from litigating exceeds the costs of litigating:

$$\begin{aligned} \text{Probability of win} \times \text{Judgment amount} & & (1a) \\ \geq \text{Cost of litigation} & & \end{aligned}$$

$$pJ \geq C \quad (1b)$$

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<sup>27</sup> See, for example, FRCP 11; 28 USC § 1927. FRCP 11 requires that “factual contentions have evidentiary support,” lest the pleading party or its attorneys face sanctions. FRCP 11(b)(3). By pleading detailed facts, a plaintiff could preempt any threat of a motion for FRCP 11 sanctions. Pleading parties thus have yet another incentive to plead facts in support of legal claims regardless of the pleading standard. See Randal C. Picker, Twombly, Leegin, and the Reshaping of Antitrust, 2007 S Ct Rev 161, 176.

<sup>28</sup> There are also the fees associated with filing the complaint, but these fees are modest in US practice. To file a civil suit in federal court, for example, the plaintiff must pay both the filing fee and the administrative fee. Currently, those fees sum to \$400. See 28 USC § 1914 (setting a \$350 filing fee for a civil action in US district courts); *District Court Miscellaneous Fee Schedule* (Administrative Office of the United States Courts, Aug 20, 2014), archived at <http://perma.cc/Y9LR-4LVZ> (setting a \$50 administrative fee for initiating a civil action in US district courts).

If not, then it is not worth pursuing litigation; the plaintiff stands to lose more in litigation costs than she stands to win in judgment.<sup>29</sup>

From this, one can immediately see that for any claim for judgment amount  $J$  that costs  $C$  to litigate, only a plaintiff with a relatively strong case (a higher probability  $p$  of winning) will be willing to sue:

$$p \geq C/J \quad (2)$$

Importantly, the facts available to the plaintiff determine  $p$ . A plaintiff who lacks facts implying a relatively high likelihood of success will abandon her claim, unless she can convince the defendant to settle. Such a plaintiff might approach the defendant and demand a settlement without filing a lawsuit, but a rational defendant will anticipate this possibility and will know that if he refuses settlement, the plaintiff will simply abandon her claim rather than hale him into court.

This, in turn, creates a problem for a plaintiff who has a strong claim. She, too, would prefer to settle out of court rather than to sue, because litigation is costly. But a defendant may refuse to settle if the defendant cannot reliably distinguish between this plaintiff and another plaintiff with a weaker claim. Thus, it benefits the plaintiff with the strong case to file a lawsuit and use the complaint as a credible signal of her willingness to pursue litigation. Detailed pleading is costly, but it allows the plaintiff with a strong claim to separate herself from the plaintiff with a weak claim. By doing this, she brings the defendant to the settlement table.<sup>30</sup>

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<sup>29</sup> This is a standard result of the canonical Landes-Posner-Gould model. Note that although this discussion assumes risk neutrality, nothing turns on this assumption. (Technically, if the plaintiff is risk-averse, then the criterion for willingness to litigate is whether the certainty equivalent of  $(pJ - C)$  is greater than zero. See Andreu Mas-Colell, Michael D. Whinston, and Jerry R. Green, *Microeconomic Theory* 185–86 (Oxford 1995). Risk aversion will only amplify the plaintiff-screening effect that I describe: because litigation is risky, risk-averse plaintiffs may avoid it even if the expected judgment exceeds the monetary cost.

<sup>30</sup> *American Nurses' Association v Illinois*, 783 F2d 716, 723–24 (7th Cir 1986) (Posner):

Plaintiffs' lawyers, knowing that some judges read a complaint as soon as it is filed in order to get a sense of the suit, hope by pleading facts to "educate" (that is to say, influence) the judge with regard to the nature and probable merits of the case, and also hope to set the stage for an advantageous settlement by showing the defendant what a powerful case they intend to prove.

Applying some numbers to this model makes it more concrete. Litigating in federal court can be expensive even for plaintiffs bringing relatively modest claims. A rule of thumb is that a party ought to be prepared to spend \$100,000 to litigate in federal court.<sup>31</sup> Now imagine a plaintiff with a somewhat large claim of \$250,000.<sup>32</sup> Plugging these numbers into Expression 2 reveals that a plaintiff in this scenario will be willing to sue only if:

$$p \geq 100,000/250,000 \quad (3a)$$

$$p \geq 0.4 \quad (3b)$$

Hence, this plaintiff is willing to sue if she believes that her likelihood of winning the judgment is at least 40 percent. Let's say that our hypothetical plaintiff believes that her chances are at least this good. Why does she believe this? There could be any number of reasons that our plaintiff could give, depending on the circumstances: "I had a contract with the defendant, payment was due to me last month, and I never received payment." "I was struck by a car, and the defendant looks like the guy who was driving that car." "My boss was always mean to me, even though I always did a good job. After I complained about his treatment of women in my office, I was fired."

These reasons for believing that she has a decent chance of winning might be good reasons, or they might not be. These reasons might be a far cry from what it would take for the plaintiff to ultimately prevail on the merits. But any plaintiff who is able to answer the (hypothetical) question "Why do you think you

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<sup>31</sup> Although I am told this \$100,000 figure from time to time by practitioners, I make no claim that this rule of thumb is well-documented. And because the argument here depends on how much the plaintiff must be *prepared to spend*, not how much the plaintiff *actually spends*, the available empirical data are not that helpful. In Part I.B, however, I refine this exercise in a way that allows use of actual litigation expenditures, and I redo the exercise with numbers based on a large empirical survey of practitioners' actual litigation expenses. In any case, as casual manipulation of the numbers in the example above reveals, the basic qualitative result holds for a wide range of litigation costs. In Part I.F, I separately discuss those cases in which the amount that the plaintiff must be prepared to spend (relative to the stakes) is much smaller than the typical case described here.

<sup>32</sup> Most civil cases in federal court have lower stakes than this. According to a recent survey, plaintiffs' attorneys estimate that the median stakes in federal civil actions are \$160,000. Emery G. Lee III and Thomas E. Willging, *National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* \*42 (Federal Judicial Center, Oct 2009), archived at <http://perma.cc/FVU8-GNKG>. For further discussion, see notes 40–42 and accompanying text.

have a 40 percent chance of winning this lawsuit?” can articulate *facts* that justify her belief in her case. Indeed, such a plaintiff would hardly expect to obtain a settlement without first articulating to the defendant her basis for demanding relief. And although the courts have refused to articulate the plausibility standard in terms of percentages, a 40 percent chance of prevailing is well above whatever numerical threshold one might assign; a plaintiff with a 40 percent chance of winning hardly has an “implausible” case.

Now we see why the presence or absence of a pleading standard will generally make little difference. A plaintiff with a low chance of prevailing will not bother to sue. And a plaintiff with a relatively strong shot at winning will already have in her possession probative, favorable, and articulable facts—that is, “enough facts to state a claim to relief that is plausible on its face.”<sup>33</sup> At least in cases broadly representative of the bulk of federal civil litigation, there will be no difference between a regime of notice pleading, plausibility pleading, or no pleading standard, because even under no pleading standard, the only cases that will be filed will be cases in which the plaintiff pleads facts stating a plausible claim. And even if, in the absence of plausibility pleading, plaintiffs plead with less detail, those same plaintiffs would be able to respond to a plausibility pleading regime by pleading in greater detail—precisely because they would not be willing to sue (under any pleading regime) unless they had facts making their claims plausible in the first place.

Of course, the example above, while perhaps representative of “typical” federal litigation, hardly captures all the scenarios that might arise. There are a number of factors that may complicate the analysis in important ways. I identify five sets of factors:

- (1) The role of lawyers and lawyering: Given that litigation is divided into stages and settlement often occurs early in litigation, a plaintiff may find it worthwhile to sue even if she is unwilling to spend the cost of taking the case all the way to trial. Further, many litigation decisions are made by plaintiffs’ attorneys, and many plaintiffs’ attorneys are compensated on a contingency basis. Other plaintiffs may act *pro se* or benefit from subsidized legal fees or legal aid. These plaintiffs may have a very different cost-benefit calculus than plaintiffs paying their own way.

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<sup>33</sup> *Twombly*, 550 US at 570.

(2) Asymmetric information: Many cases involve asymmetric information, in which the defendant may know much more about the merits of the case than the plaintiff knows. Asymmetry of information lies at the heart of concerns over the “paradox of pleading.”

(3) Spite, indignation, or optimism: Some plaintiffs may misjudge their chances in court due to irrational optimism, or they may not care about weighing costs and benefits but rather may simply want their day in court.

(4) Nuisance suits: The analysis above assumes that the plaintiff’s expected payoff from litigation will be based on the expected judgment she would obtain in court. It is conceivable, though, that a plaintiff might sue despite litigation costs that exceed her expected judgment, if the defendant would be willing to pay a sufficiently large nuisance settlement—a settlement the defendant pays to avoid *its* litigation costs.

(5) Shoot-the-moon cases: Some cases may have such high stakes that they are cost justified for the rational plaintiff even if  $p$  is very small—so small that the facts used to justify the belief in  $p$  would not be enough to survive a motion to dismiss in a regime with plausibility pleading.

Below, I address these factors, distinguishing those that do not alter the results above from those that do.

#### B. The Role of Lawyers and Lawyering

So far, lawyers have been absent from the basic framework above. Considering the lawyer’s role requires two key adjustments to this framework. First, lawyers play a large role in legal decisionmaking, and this may be true nowhere more so than with respect to a lawyer representing an individual plaintiff on a contingency basis. Most individual plaintiffs hire attorneys on a contingency basis, whereby the attorney covers the plaintiff’s litigation costs and is repaid only if and when the plaintiff obtains a recovery. It is the attorney, not the plaintiff, who finances the litigation, and therefore it is the attorney, not the plaintiff, who decides whether a potential lawsuit would be cost justified.

A plaintiffs’ attorney working on contingency must offset the entire cost of litigating every case with a fraction of the judgments in the successful cases. This changes the calculus slightly, but it only magnifies the incentive to screen cases for quality

(that is, for high probability  $p$  of winning), because the lawyer gets paid only if the plaintiff wins or obtains a settlement (both of which are more likely if the case is stronger). Indeed, an important study of the practice of contingency fee lawyers from the pre-*Twombly* era found that “[l]ack of liability alone accounts for the largest proportion of cases declined,” rather than reasons such as inadequate damages, the case being outside the lawyer’s area of practice, or others.<sup>34</sup>

In terms of my model, if the decisionmaker is the plaintiffs’ attorney working on a contingency basis, the attorney must weigh the expected fees earned through litigation against the costs of bringing the suit. Indeed, given a limited budget of time and credit (for litigation expenses) that he can extend to his clients, an attorney working on contingency must concentrate his efforts on cases with the highest settlement value. The attorney receives a fraction, around 33 to 40 percent, of the plaintiff’s recovery as his fee.<sup>35</sup>

The comparison for the plaintiffs’ attorney is therefore:

$$\text{Probability of win} \times \text{Fee} \times \text{Judgment amount} \geq \text{Cost of litigation} \quad (4a)$$

$$pfJ \geq C \quad (4b)$$

In this expression,  $f$  is the attorney’s contingency fee. The left-hand side is how much the plaintiffs’ attorney gets if the plaintiff wins, multiplied by the probability of winning. This must be greater than the right-hand side, which is how much the plaintiffs’ attorney has to pay to litigate the case, regardless of whether the plaintiff wins or loses.

Second, lawyers litigate and negotiate for settlement in a dynamic setting. While it is a helpful simplification to assume that there is a single cost  $C$  to litigating a case, the reality is that litigation occurs in stages, and costs accrue incrementally over time. This can have profound effects on settlement dynamics and the plaintiff’s willingness to sue.<sup>36</sup> Most useful here are the insights of Professor Bradford Cornell and Professors Joseph Grundfest and Peter Huang, who observe that the revelation of

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<sup>34</sup> Kritzer, 81 *Judicature* at 27 (cited in note 21).

<sup>35</sup> Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 *Fordham L Rev* 247, 248 (1996).

<sup>36</sup> See William M. Landes, *Sequential versus Unitary Trials: An Economic Analysis*, 22 *J Legal Stud* 99, 99–101 (1993).

information during the course of litigation creates “real options” for plaintiffs.<sup>37</sup> A plaintiff need not weigh her expected judgment against the entire cost of litigating to judgment, because the plaintiff can abandon her claim (and thus avoid further litigation costs) if information revealed in discovery is unfavorable, and she will press ahead only if the information revealed is sufficiently favorable.

Given this, the plaintiff’s decision to sue—really the plaintiffs’ attorney’s decision to take the case—now has two components. First, the plaintiff must determine whether, even if she files suit and the information revealed by discovery is favorable, the case is worth continuing at that point. To do this, the plaintiff compares the *postdiscovery* cost of litigation (call this  $c_2$ , for the second phase of litigation) to the expected judgment *conditional on the information revealed in discovery being favorable* (call this  $p_2J$ , where  $p_2$  is the probability of winning in the event of good news). If the expected benefits outweigh the costs, the plaintiff will be willing to litigate—and the defendant, who also learns  $p_2$  through discovery, will be willing to pay  $p_2J$  to settle. Thus, if discovery reveals good news, the plaintiff can expect to obtain  $p_2J$ , no matter how unlikely good news is. And if discovery is unfavorable, the plaintiff can drop the case and cut her losses.<sup>38</sup>

Second, the plaintiff must determine whether the case is worth bringing in the first place. To do this, the plaintiff compares the cost of litigating *through discovery* (call this  $c_1$ , for the first phase of litigation) to the expected recovery after discovery. From the discussion above, if the information revealed in discovery is favorable, the plaintiff can obtain a settlement of  $p_2J$ .<sup>39</sup> Call the plaintiff’s belief of the probability that discovery will reveal favorable information  $p_1$ . Thus, the *ex ante* probability that the plaintiff will prevail (what I have called  $p$  so far) is  $p = p_1p_2$  (the probability of discovery revealing good news multiplied by the probability of winning in the event of good news), because if

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<sup>37</sup> See Bradford Cornell, *The Incentive to Sue: An Option-Pricing Approach*, 19 J Legal Stud 173, 178–82 (1990); Joseph A. Grundfest and Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 Stan L Rev 1267, 1272–75 (2006).

<sup>38</sup> The reader will note that this discussion implicitly defines “bad news” to be news such that the case is not worth continuing. Of course, some cases may be so strong that the plaintiff never drops the case, even if discovery yields only unfavorable new information. The analysis in the text would still hold in these cases, but one would simply have to set  $p_1 = 1$ .

<sup>39</sup> Note that this settlement value assumes symmetry of costs. I discuss asymmetric costs in Part I.C.



the information is unfavorable, the plaintiff will just drop the case. The relevant comparisons for the decision to sue are now:

$$p_2fJ \geq c_2 \quad (5a)$$

$$pfJ \geq c_1 \quad (5b)$$

Expression 5a simply ensures that, in the event of favorable discovery, the plaintiff is willing to go to trial; if the plaintiff would drop the case even after favorable discovery, the plaintiff would never file suit in the first place, regardless of the pleading standard. Expression 5b is the crux, since it defines the threshold below which the plaintiff (and her lawyer) is unwilling to sue, even given the benefit of the option value that discovery creates.

To make this analysis concrete, I turn to a study by Emery Lee and Thomas Willging, who surveyed thousands of attorneys who had recently represented clients in federal civil cases about the nature of their cases and the costs they incurred in litigating them.<sup>40</sup> This study represents the best (and nearly the only) data on litigation costs in a representative sample of recent federal civil cases. My objective here is to consider data not on how much a plaintiffs' attorney must be *prepared* to pay to go to trial but rather on how much he can *expect* to pay to conduct discovery and then settle a case. Not surprisingly, this latter number is far lower than the \$100,000 figure used above. For surveyed plaintiffs' attorneys, the median cost was \$15,000,<sup>41</sup> and the median case had stakes of \$160,000.<sup>42</sup> Plugging these values, as well as 33 percent for the contingency fee, into Expression 5b yields:

$$p \times 0.33 \times 160,000 \geq 15,000 \quad (6a)$$

$$p \geq 0.284 \quad (6b)$$

Thus, we see that the basic qualitative results above—that the plaintiff will not file unless she believes the case to be relatively

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<sup>40</sup> See generally Lee and Willging, *National, Case-Based Civil Rules Survey* (cited in note 32).

<sup>41</sup> Id at \*35. This is a conservative estimate of  $c_1$ , given that this amount was the median litigation cost among plaintiffs who engaged in *any* discovery, whether it was completed or not.

<sup>42</sup> Id at \*42.

strong—remain unchanged.<sup>43</sup> If a plaintiffs’ attorney will not take a case unless he has about a one-in-four chance of winning on the merits, then a complaint will not be filed unless the plaintiff has already convinced her attorney that her claim has a decent shot of winning—but this already puts the plaintiff’s claim well past the threshold of plausibility.<sup>44</sup>

Of course, the fact that plaintiffs’ attorneys screen their cases based on plausible merit is well understood. But the significance of this fact has been overlooked by critics of *Twombly* and *Iqbal*. For example, in his influential article *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, Professor Arthur Miller observes that

rational plaintiffs’ attorneys are very cost- and time-conscious. To avoid expenditures that may never be reimbursed and to prevent the loss of potentially more attractive alternative professional opportunities, they generally . . . screen potential cases using their own version of plausibility before taking on matters.<sup>45</sup>

Yet Miller does not take the logical step that follows from this observation: plausibility pleading standards rarely affect which cases get filed, precisely because they generally do not impose a binding constraint on this decision. Plaintiffs’ attorneys set a higher bar than the courts.

To be sure, the centrality of the plaintiffs’ attorney to most civil litigation suggests that the results above may not apply, or may not apply as strongly, when (1) expected litigation costs

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<sup>43</sup> Varying the contingency fee rate does not change the qualitative results. A 40 percent contingency fee yields  $p \geq 0.234$ .

<sup>44</sup> Note that there may be situations in which the desire to signal case strength is overridden by other strategic considerations, such that the plaintiff will want to file a deliberately ambiguous or sparse pleading. See, for example, Thomas E. Willging and Emery G. Lee III, *In Their Words: Attorney Views about Costs and Procedures in Federal Civil Litigation* \*29 (Federal Judicial Center, Mar 2010), archived at <http://perma.cc/6SQU-VEDK> (quoting a plaintiffs’ attorney stating that “[a]s a plaintiff I plead enough to tell the story but avoid pleading facts that might come back to haunt me”). What is important to note, however, is that here the withholding of detail is a strategic choice, rather than a reflection of a lack of information on the part of the plaintiff. (A true lack of information would be a reason for the plaintiffs’ attorney not to take the case.) Thus, the plaintiff could always survive a motion to dismiss through repleading with greater detail. Indeed, one often observes the dynamic of dismissal with leave to amend followed by repleading in greater detail. For some data on this, see generally Joe S. Cecil, et al, *Update on Resolution of Rule 12(b)(6) Motions Granted with Leave to Amend: Report to the Judicial Conference Advisory Committee on Civil Rules* (Federal Judicial Center, Nov 2011), archived at <http://perma.cc/K6A6-D7RZ>.

<sup>45</sup> Miller, 60 Duke L J at 67 (cited in note 6).

relative to stakes are much lower than in the typical case or (2) plaintiffs' attorneys are not exercising the gatekeeping function described above. This latter possibility could occur when there is no plaintiffs' attorney, or when there is a plaintiffs' attorney who is acting on an appointed or pro bono basis. Each of these two scenarios creates important exceptions to the general result presented above, so I discuss each of them in turn.

First, the results above depend on a degree of rough proportionality between expected litigation costs and the stakes of the case. As we saw above, even a ratio of stakes to cost of more than ten to one (that is, \$160,000 to \$15,000) is sufficient to ensure that plaintiffs' attorneys set a threshold for predicted merit well above any reasonable threshold for plausibility. Nonetheless, not every claim will fit this pattern. There are cases for which the costs of litigation are unusually low relative to the stakes. Sometimes this may happen because there is unusually little discovery to be done and the legal issues are especially simple, but much more often the reason is simply that there are high stakes. As Lee and Willging found in their survey, litigation costs tend to be roughly proportional to stakes, such that higher-stakes cases have higher expected litigation costs.<sup>46</sup> But as stakes rise, expected litigation costs rise more slowly.<sup>47</sup> Thus, as the stakes of a case get very large, litigation costs shrink relative to stakes.

What this means is that for small- and medium-sized cases—the cases with below, say, a half-million dollars at stake, which make up the great bulk of all civil litigation<sup>48</sup>—the calculations above apply. For a case with stakes of \$50,000, the necessary probability of success ( $p$ ) might be above 50 percent; and for stakes above \$250,000,  $p$  might slip below 20 percent, but the basic logic holds.<sup>49</sup> For larger-stakes cases, though, the result breaks down.

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<sup>46</sup> Emery G. Lee III and Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke L J 765, 771–72, 788 (2010).

<sup>47</sup> Lee and Willging found that, roughly speaking, if one doubles the stakes of a case, the cost of litigating that case rises by 25 percent, holding all other case characteristics constant. *Id.* at 771–72.

<sup>48</sup> See, for example, Lee and Willging, *National, Case-Based Civil Rules Survey* at \*42 (cited in note 32) (noting that both plaintiffs' and defense attorneys estimated the median stakes of a case to be between \$160,000 and \$200,000).

<sup>49</sup> To calculate these estimates, I use Lee and Willging's estimate that a 100 percent change in stakes predicts a 25 percent change in the plaintiff's litigation costs, as well as their findings on the median values for stakes and litigation costs, to generate an equation that predicts litigation costs for any given level of stakes. Lee and Willging, 60 Duke L J at 771–72 (cited in note 46); Lee and Willging, *National, Case-Based Civil Rules Survey* at

Litigation costs relative to stakes are much smaller for the highest-stakes cases, and thus claims with a very low likelihood of success—claims that might be deemed “implausible”—are cost-effective to file. Because high-stakes cases are an important and highly salient subset of the federal docket, I address them in further detail in Part I.F.

Second, there may be no plaintiffs’ lawyer, or the plaintiffs’ lawyer may not be motivated by the cost-benefit calculation described above. A pro se plaintiff may not have the same expertise at estimating the likelihood of success, and she will not measure litigation costs in terms of an attorney’s time. Further, the pro se plaintiff may have more-complex motivations than mere financial costs and benefits. (I discuss motivations such as indignation and spite below in Part I.D.) Because pro se plaintiffs are less likely to be reliable screeners based on predicted merit than attorneys are, plausibility pleading may have a bigger impact on claims brought by pro se plaintiffs.<sup>50</sup> Even so, we should expect to see the screening process described above continue to function for many pro se cases. As the basic framework in Part I.A describes, a pro se plaintiff will weigh her *personal* costs in time and effort against the likely judgment in litigation. Of course, a pro se plaintiff may not do so as precisely as an attorney might, but the basic calculus is a familiar one to attorneys and nonattorneys alike. Indeed, many have had the experience of declining to pursue relief (even informal relief, without legal formalities)

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\*42 (cited in note 32). Lee and Willging’s results are based on a log-log transformation (that is, they use the natural logarithms of both stakes and costs), so the equation is

$$\ln(\text{costs}) = \ln(\alpha) + \beta \ln(\text{stakes}),$$

where  $\alpha$  is the cost of litigating a case with zero stakes and  $\beta = 0.25$  is the ratio between percent changes in stakes and percent changes in litigation costs. Plugging in the median values for costs and stakes, I can solve the equation, which yields  $\alpha = 750$ . Thus, one can predict the litigation costs for any given stakes by solving the following equation:

$$\ln(\text{costs}) = \ln(750) + 0.25 \ln(\text{stakes}).$$

This is a conservative estimate of the relationship between stakes and costs, because Lee and Willging estimate this relationship using an estimation specification that controls for various forms of litigation activity, which are endogenous to the stakes of the case (for example, higher-stakes cases are likely to involve more-extensive discovery). By treating litigation activity as independent from stakes, the influence on stakes is attenuated. In regressions that omit such factors (unreported results available from the author), the relationship is somewhat stronger: a 100 percent change in stakes predicts a 43 percent change in the plaintiff’s litigation costs. Under either estimate of the relationship between stakes and costs, though, the claims in the text hold.

<sup>50</sup> Further, while some plaintiffs prefer to proceed pro se, some plaintiffs proceed on their own precisely because they were unable to find an attorney who was willing to represent them on a contingency basis.

against a clear-cut tort or breach of contract because the stakes at issue were too low to justify the hassle. This is no different in nature than the kind of calculation that a pro se plaintiff must confront when deciding whether to sue.

Likewise, court-appointed attorneys and legal aid providers do not have the same incentives as private attorneys working for contingency fees. For this reason, their filing decisions may not conform to the patterns predicted above, and thus their clients may be more likely to be affected by pleading standards. Still, I should not overstate this difference. To the extent that attorneys working on a pro bono basis and legal aid providers are oversubscribed—and they usually are—one should again expect these attorneys to screen cases on plausible merit before filing. Whether an attorney’s motivation is maximizing profit or maximizing relief to deserving plaintiffs (or both), the incentive will be to select those cases with higher merit.

### C. Asymmetric Information

As noted in the Introduction, the “paradox of pleading” is a widely raised argument in favor of notice pleading. Rakesh Kilaru puts it most succinctly: “Civil rights plaintiffs alleging motive-based torts thus face a classic Catch-22: they cannot state a claim because they do not have access to documents or witnesses they believe exist; and they cannot get access to those documents or witnesses without stating a claim.”<sup>51</sup> Perhaps because *Conley* and *Iqbal* were civil rights cases, this paradox is taken as uncontroversial.<sup>52</sup> But it is crucial to note that *everything in the discussion above applies equally to cases with asymmetric information.*

The reason is that, even when there is no pleading standard, the plaintiff (or her attorney) will file suit only if it is worth the cost of litigating. And that determination depends on the facts known to the plaintiff at the time of filing. If the plaintiff does not have facts indicating that she has a decent claim, or at least facts showing a strong likelihood of uncovering favorable evidence in discovery (this is the “real option” value of litigation discussed

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<sup>51</sup> Kilaru, Comment, 62 Stan L Rev at 927 (cited in note 16).

<sup>52</sup> See Miller, 60 Duke L J at 43–46 (cited in note 6); Steinman, 62 Stan L Rev at 1311–12 (cited in note 4); Spencer, 49 BC L Rev at 481–83 (cited in note 4). Indeed, Miller notes, “[t]he problem was widely recognized at the Duke Conference [on civil litigation, May 10–11, 2010, sponsored by the Judicial Conference Advisory Committee on Civil Rules.] and no opposition was voiced to the need for solving the information-asymmetry problem.” Miller, 60 Duke L J at 105 n 404 (cited in note 6).

above),<sup>53</sup> the plaintiff simply will not file suit. Asymmetry of information makes the plaintiff worse off, but this is true regardless of the pleading standard. The “paradox of pleading” has nothing to do with pleading; a more apt description would be the “tragedy of asymmetric information.”

When a plaintiff (or plaintiffs’ lawyer) is deciding whether a case is worth filing, this decision is based on the information then available to the plaintiff. Some crucial facts, such as the defendant’s motives, may be unknown to the plaintiff, of course. Given that crucial facts may be unknown but may be revealed by discovery, the plaintiff must rely on her estimates of the likelihood that favorable information about those unknown facts will come to light in discovery. If this likelihood is high enough, then it will be worthwhile to sue; if it is too low, the plaintiff will not sue. (This is simply the calculation already described above in Part I.A–B.) But this estimate of how likely it is that discovery will reveal information favorable to the plaintiff’s case is itself dependent on the facts that the plaintiff *currently knows*. If those facts raise lots of red flags, her estimate of discovery revealing favorable information will be higher. If those facts make the defendant look squeaky clean, then her estimate of discovery revealing favorable information will be lower. Thus, even in the presence of asymmetric information, a plaintiff’s decision to sue will depend on her knowledge—before discovery—of facts indicating that her claim has a good chance of prevailing.

And those facts—the ones known before discovery—are exactly the facts that can be included in a pleading. Even if they are not facts that prove the plaintiff’s claim, they are facts that indicate that, by the time discovery is done, the plaintiff will have a strong case.<sup>54</sup> Such facts, when pleaded in the plaintiff’s complaint, will more than suffice to state a plausible claim.

For example, consider a large group of potential plaintiffs who might bring fairly typical employment discrimination claims in federal court. One might imagine the set of all midlevel employees who lost their jobs in a given time period. It is possible that any given one of them was fired for reasons related to intentional discrimination, but it is also possible that any given one of them was fired for entirely separate reasons, such as poor individual performance or downsizing by the employer.

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<sup>53</sup> See note 37 and accompanying text.

<sup>54</sup> As noted above in Part I.B, a “strong case” in this context is one with maybe a one-in-four (or better) chance of winning.

Now assume, for the moment, that every plaintiff in this group has no information bearing on the defendant's discriminatory intent in her case. This set of plaintiffs is uniformly uninformed about the merits of their individual claims. In this situation, will every potential plaintiff in this group be willing to sue? As shown above, this depends on whether  $p$  is at least about 25 percent, once one accounts for the possibility that the plaintiff can drop the case if discovery yields unfavorable evidence. Of course, the true  $p$  for this group is unknowable. In principle, it could be 1 percent, or 10 percent, or 99 percent. But remember that our concern is the paradox of pleading: we are assuming a set of plaintiffs *who cannot articulate any facts explaining why they believe they were victims of discrimination*. While no one knows what the probability is that a randomly chosen person who lost her job will be able to win a judgment on a claim that her employer intentionally discriminated against her, it seems doubtful that her chances of winning are one in four or better. If this is right, then a plaintiff will not be willing to sue when she has no facts tending to show that *she*, specifically, was the victim of discrimination.

Thus, only a plaintiff who has probative, favorable facts about her claim will be willing to sue, even if there is no pleading standard. In some cases, the plaintiff knows that she was a hardworking employee who received positive evaluations from other supervisors. In some cases, the plaintiff knows that she was replaced by a worker who was not a member of her protected class. In some cases, the plaintiff heard discriminatory epithets from her supervisors. And so on. The plaintiff has specific facts that are probative of discrimination, and thus she finds it worthwhile to sue. And because she wants a settlement from the defendant, it is her best strategy to plead those details, even if (as I have assumed throughout this Part) there is no pleading standard.

Therein lies the flaw in the paradox of pleading. It begins with a plaintiff who believes that she has a meritorious case but who is unable to plead facts establishing the plausibility of her claim. This scenario begs the question of how it is that the plaintiff has formed her belief in the merits of her grievance. This belief must come from something that the plaintiff, or someone known to the plaintiff, saw, heard, or experienced—in other words, it must come from *facts*. If so, then all the plaintiff needs to do is plead those facts that led *her* to conclude that her claim

was meritorious. The only paradox here is why someone with no facts indicating that she has a claim would nonetheless believe that she has a claim.

To be clear: there are surely many potential plaintiffs who have been injured by the wrongdoing of a potential defendant, who have no facts suggesting this to them, but who nonetheless would, after full discovery, have a strong case and secure a large judgment on the merits. These plaintiffs, unfortunately, will not receive the judgment that the objective (but, before discovery, unknown) facts of their cases merit. But to be equally clear: this will happen even with no pleading standard. The bar to their recovery is not pleading. The bar is that it is simply not worth it to sue. The plaintiff (or her attorney) estimates a low  $p$ , even after accounting for the possibility that, because of asymmetric information, discovery will reveal favorable facts that are currently obscured.

The problem created by asymmetric information is *not* that judges cannot distinguish a plaintiff with a meritorious claim but no facts from a plaintiff with no claim at all; it is that these two plaintiffs cannot tell *themselves* apart. There is nothing that pleading rules can do to fix this.

#### D. Spite, Indignation, and Optimism

Plaintiffs do not always make coolheaded calculations about litigation costs and benefits when they feel they have been wronged. Some plaintiffs, seething over a perceived legal wrong, would throw my framework out the window and go to court regardless of the costs. Other plaintiffs may weigh costs and benefits, but bias or optimism may infect their calculations.

These considerations surely temper the general results I have reached above, but these considerations themselves ought not to be overstated. First, as emphasized above, it is usually more realistic to treat the decisionmaker as the plaintiffs' attorney, who has the expertise, incentive, and emotional detachment to make decisions driven fundamentally by the calculus presented above.<sup>55</sup>

Second, even a steaming-mad plaintiff will still have a reason *why* she is steaming mad. For pleading standards to affect whether this plaintiff's complaint is dismissed, it must be the case that the plaintiff is so indignant at a legal wrong that she is

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<sup>55</sup> See Part I.B.



willing to go to court regardless of the cost—and that she is nevertheless unable to articulate facts that make her claim plausible. While such a scenario is not impossible, it borders on the fanciful.<sup>56</sup>

Likewise, an overly optimistic plaintiff will have a reason *why* she is so optimistic. Her reasons for optimism provide her with a basis for pleading and settlement, regardless of the pleading standard. Of course, there remains some subset of optimistic plaintiffs who are sufficiently unrealistic that the facts on which they base their optimism would fail under a plausibility pleading standard. These plaintiffs will be affected by the pleading standard.

To recognize that these unduly optimistic plaintiffs will see their claims dismissed under a pleading standard, even if those claims would have survived under no pleading standard, is not to say that pleading standards necessarily make those plaintiffs worse off. Imagine an overly optimistic plaintiff who files suit because she believes that her likelihood of winning is high, when in fact the case is so weak that it will be dismissed under the plausibility pleading standard. This plaintiff files because she believes that the expected benefits of litigation outweigh the costs. Because she is wrong about this, she will *lose* money litigating the case, even under no pleading standard. Having her case dismissed at the outset actually allows her to cut her losses. As I explain below in Part I.F, such plaintiffs are a subset of a larger set of plaintiffs who benefit from the plausibility pleading standard.

#### E. Nuisance Suits

A nuisance suit is a suit brought despite having negative expected value (that is,  $pJ < C$  or even  $pfJ < c_1$ ) because the defendant is willing to pay a settlement to avoid litigation costs. The idea here is that, so long as the plaintiff can credibly threaten to take the defendant to trial, the defendant will pay a settlement to the plaintiff *even if the plaintiff would surely lose at trial*, because the defendant wants to avoid the high cost of litigation. Concern about the *in terrorem* effect of litigation costs on settlement value was expressly cited by the majority in *Twombly* as motivation for

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<sup>56</sup> Of course, this hypothetical plaintiff's complaint may be dismissed anyway, if the facts constituting her grievance do not give rise to a legal claim. But this is *legal* insufficiency of the complaint, and *Twombly* and *Iqbal* did nothing to alter the requirement that complaints be legally sufficient (that is, that they allege a theory of wrongdoing that creates a basis for civil liability). *Iqbal*, 556 US at 679–80.

requiring plausible pleadings.<sup>57</sup> Thus, consideration of nuisance litigation is necessary to complete the picture of when and how plausibility pleading standards might affect litigation.<sup>58</sup> The analysis above, which assumes that plaintiffs sue only if the expected judgment exceeds their own costs, does not apply. Thus, I examine the nuisance-suit scenario in detail here.

The linchpin of the nuisance settlement strategy is a credible claim that the plaintiff will follow through on her threat to take the case to trial if the defendant does not settle. The key obstacle to this strategy is that the plaintiff's threat is usually not credible: if the defendant refuses to pay a settlement, the plaintiff will simply drop the case, because the plaintiff will spend more on litigation costs than she can hope to recover at trial. A rich theoretical literature has examined the conditions under which a plaintiff can overcome this obstacle and successfully employ a nuisance settlement strategy.<sup>59</sup> This literature generally predicts that asymmetry of litigation costs *may* lead to successful nuisance claims against defendants with relatively high litigation costs. Most relevant here, in recent formal game theory work, I identify conditions under which pleading becomes an integral part of a nuisance settlement strategy.<sup>60</sup> Herein, I describe the literature that relates pleadings to nuisance suits and informally present the logic of how pleading and pleading standards affect nuisance litigation.

It has long been recognized that litigation is a strategic game and that the burden and timing of litigation costs can factor into whether the parties settle and for how much. A canonical paper on this topic by Professors David Rosenberg and Steven Shavell gives the example of a plaintiff who can file (at minimal cost) a complaint, even though both the plaintiff and the defendant

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<sup>57</sup> *Twombly*, 550 US at 557–58.

<sup>58</sup> Nonetheless, it is worth recognizing that because there are few, if any, objective measures of what makes a suit a nuisance suit, whether nuisance suits are in practice a significant phenomenon remains an open question.

<sup>59</sup> For some of the seminal papers in this literature, see generally David C. Croson and Robert H. Mnookin, *Scaling the Stonewall: Retaining Lawyers to Bolster Credibility*, 1 Harv Neg L Rev 65 (1996); Lucian Arye Bebchuk, *A New Theory concerning the Credibility and Success of Threats to Sue*, 25 J Legal Stud 1 (1996); D. Rosenberg and S. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 Intl Rev L & Econ 3 (1985). For a brief review of this literature, see William H.J. Hubbard, *Sinking Costs to Force or Deter Settlement*, 32 J L, Econ & Org \*4–7 (forthcoming 2016), archived at <http://perma.cc/FJB8-EZEJ>.

<sup>60</sup> Hubbard, 32 J L, Econ & Org at \*23–26 (cited in note 59).

know that the case has no merit.<sup>61</sup> Their model predicts that the defendant will not litigate the case; instead, the defendant will settle with the plaintiff. This is because defending the case is costly, and since both the plaintiff and defendant know that the case is meritless, they will agree to a “nuisance settlement”—a positive amount that is lower than the defendant’s cost of defending against the claim.<sup>62</sup>

Professor Bone has applied this logic to pleading and motions to dismiss.<sup>63</sup> Echoing Rosenberg and Shavell, he claims that the most a meritless suit could extract from a defendant is the defendant’s cost of answering the complaint. His explanation is that once the complaint is answered, the plaintiff must expend additional resources to continue the lawsuit; if the suit is meritless, the plaintiff will not do so.<sup>64</sup> By this logic, meritless suits will be rare. Because “answering is seldom more costly than filing, the model predicts that few frivolous plaintiffs will find it worthwhile to sue.”<sup>65</sup>

Given this model of pleading and settlement, it seems that the problem of frivolous litigation that so preoccupied the *Twombly* Court is unlikely to be very costly to defendants, assuming that frivolous litigation happens at all. But this model of pleading and settlement understates the relevance of discovery costs to settlement. So long as the plaintiff’s costs of conducting discovery are less than the defendant’s costs, the plaintiff can refuse the nuisance settlement predicted by Rosenberg, Shavell, and Bone; force the defendant to file an answer; and then initiate discovery, at which point the defendant is willing to settle—but this time, for any amount less than the cost of complying with the obligations of discovery.

This is not a trivial difference. The cost of copying each paragraph of the plaintiff’s complaint and then inserting the word “denied” beneath each one may not give a wealthy defendant pause; but the cost of preserving, collecting, reviewing, and producing

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<sup>61</sup> Rosenberg and Shavell, 5 *Intl Rev L & Econ* at 4–5 (cited in note 59).

<sup>62</sup> *Id.* at 4.

<sup>63</sup> See generally Bone, 94 *Iowa L Rev* 873 (cited in note 22). Rosenberg and Shavell’s model is sufficiently abstract that the “cost of defense” to which they refer could include all or some of the costs of a motion to dismiss, an answer, or discovery. Rosenberg and Shavell, 5 *Intl Rev L & Econ* at 4–5 (cited in note 59).

<sup>64</sup> Bone, 94 *Iowa L Rev* at 921 & n 202 (cited in note 22).

<sup>65</sup> Robert G. Bone, *Civil Procedure: The Economics of Civil Procedure* § 4.4.1 at 150 (Foundation 2003).

millions of pages of records and terabytes or petabytes of electronically stored information will.

In order for this strategy to succeed, however, the plaintiffs' attorney must ensure that the plaintiff's threat to pursue discovery after the defendant files an answer is credible. To do this, the plaintiff must make pursuing discovery after the defendant answers as costless as possible for herself. If she does not, the plaintiff's threat to impose discovery costs on the defendant becomes less credible, because following through on the threat requires expenditures by the plaintiff as well.

For this reason, the timing of litigation expenses affects the credibility of threats to pursue litigation, and plaintiffs have an incentive to front-load discovery costs. By gathering all information and evidence from the plaintiff *before the case is filed*, the plaintiffs' attorney turns all of the plaintiff's costs of discovery into sunk costs.<sup>66</sup> By the time the defendant files its answer, the plaintiff faces fewer additional costs if she moves forward with discovery.<sup>67</sup>

The only challenge that remains for the plaintiffs' attorney in executing this strategy is to credibly communicate to the defendant that the plaintiff's costs of discovery have already been sunk. This is a challenge because every plaintiffs' lawyer will have an incentive to claim that this is true to gain an advantage in settlement negotiations. In other words, the plaintiff has to show that her assertion that she has already sunk discovery costs is not merely cheap talk. It is here that detailed pleading becomes useful. It serves as a device to credibly and verifiably signal that the plaintiff has sunk her discovery costs.

At this point, one may wonder how a plaintiff with a low-merit or meritless claim can expend costs on detailed pleading. It

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<sup>66</sup> Of course, this strategy of sinking costs will not work for every potential plaintiff. It may cost the plaintiff more in sunk costs required to execute this strategy than she can recover in a nuisance settlement. If so, there will be no complaint filed and no settlement. But as I show in another article, there is a potentially large set of disputes for which a cost-sinking strategy will generate a settlement that exceeds the plaintiff's sunk costs. See Hubbard, 32 J L, Econ & Org at \*10–20 (cited in note 59).

<sup>67</sup> *Id.* at \*9, 27. In litigation, it will often be the case that it is much easier for the plaintiff to gather new evidence during discovery, when the plaintiff can compel production from the defendant, than in advance of litigation. But note that in the scenario described here, the plaintiff is not seeking to discover information from the defendant in the prelitigation period. Rather, the plaintiff is sinking the costs of *her own* production, as well as the costs of developing legal theories and the like. In a nuisance suit, the plaintiff has no desire prior to litigation to gather information in the possession of the defendant. By assumption, the (lack of) merit of the claim is already common knowledge to the parties.

is worth noting that—at least in the absence of a plausibility pleading standard—detailed pleadings need not contain allegations that, if true, tend to prove the plaintiff’s case. Instead, the plaintiff needs to ensure only that the details in the complaint credibly reflect the expenditure of effort that otherwise would have to occur after the complaint was filed. In this respect, documenting a failed investigation works as well as documenting a successful one. If this sounds far-fetched, it may be. But perhaps, at least to the eyes of seven Supreme Court justices, this is exactly what the complaint in *Twombly* did.<sup>68</sup>

Nonetheless, whether the plaintiff’s complaint details a successful or a failed investigation is relevant to one thing: a motion to dismiss. So far in this Part, I have assumed there is no pleading standard, but here we see a case in which a requirement of plausibility pleading may have bite. If the suit is totally meritless or extremely weak, the complaint may not survive a motion to dismiss under a plausibility pleading standard. The best the plaintiff can do is a true “nuisance settlement” in the sense described by Bone.<sup>69</sup> But in cases that have some (or even great) merit, the plaintiffs’ attorney can still use the costs of discovery to negotiate a more favorable settlement. Thus, even in a case of limited merit, a plaintiffs’ attorney may want to invest in a strong pleading if the defendant’s costs of discovery are likely to be very high.<sup>70</sup>

It is important here to note that this same argument does not apply to detailed *answers* to pleadings. Given the argument above, a reader may wonder why, if detailed pleading is so advantageous, defendants almost never answer in detail.<sup>71</sup> The reason is that a defendant stands to gain nothing from detailed pleading in a nuisance suit. The point of detailed pleading in

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<sup>68</sup> See generally Consolidated Amended Class Action Complaint, *Twombly v Bell Atlantic Corp.*, Civil Action No 02-10220 (SDNY filed Apr 14, 2003) (available on Westlaw at 2003 WL 25629874) (containing twenty-nine pages of allegations in ninety-six numbered paragraphs, with ninety-four of the paragraphs “based upon . . . the investigation of counsel”).

<sup>69</sup> See Bone, 94 Iowa L Rev at 920–22 (cited in note 22).

<sup>70</sup> Note that this argument applies only to nuisance suits brought to exploit high litigation costs of the defendant. Parties may bring nuisance litigation for reasons unrelated to the defendant’s litigation costs. For example, the “fishing expedition” lawsuit seeks relief not for its (pretextual) claims but rather for the purpose of uncovering evidence that could justify additional (potentially meritorious) lawsuits.

<sup>71</sup> See Picker, 2007 S Ct Rev at 175 (cited in note 27) (“As a look at any recently filed answer makes clear, we know how the defendant is going to answer: the defendant is simply going to deny the allegation.”).

nuisance litigation is to document the expenditure of one's litigation costs—but the defendant's primary objective in a nuisance suit is avoiding its litigation costs. Indeed, a nuisance suit is filed precisely because the defendant would rather settle than sink the costs of litigation.

In short, a nuisance suit will have settlement value only if the plaintiff's threat to impose discovery costs on the defendant is credible. By front-loading her own discovery costs, the plaintiff can credibly threaten to impose burdensome discovery demands on the defendant, undeterred by the prospect of her own costs of responding to discovery. This precomplaint investigation will manifest itself in detailed pleading, even when there is no pleading standard.

Thus, the impact of *Twombly* and *Iqbal* on this category of cases is more subtle than is commonly understood. As detailed pleading was the norm long before *Twombly*,<sup>72</sup> we should not expect *Twombly* and *Iqbal* to change the presence or quantity of detail in pleadings—even in nuisance suits! But *Twombly* and *Iqbal* do not necessarily require *detailed* pleading; they require *plausible* pleading. What does this mean in the context of nuisance litigation?

For some types of cases, even plaintiffs bringing nuisance suits can draft plausible complaints. Imagine an employment discrimination complaint that alleges that the plaintiff is a member of a protected class, that the plaintiff was fired while other employees—all white males under the age of forty—were not fired, and that the plaintiff was replaced by a white male under the age of forty whose résumé and experience were weaker than the plaintiff's. These allegations could be brought by a plaintiff with an overwhelmingly strong case, or they could be brought by a plaintiff who is certain to lose—perhaps because other facts (the plaintiff's gross incompetence, mistreatment of coworkers, and so on) need not have been included in the complaint.

For other types of cases, though, the plausibility requirement may have teeth. Perhaps elaborate antitrust claims such as those brought in *Twombly* itself fall into this category. Precisely because the plaintiff's theory of the case is fairly complex, plausibility requires a degree of factual detail that may be impossible for the plaintiff seeking a nuisance settlement to allege (given that, in

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<sup>72</sup> See Cooper, 46 Wake Forest L Rev at 946–47 (cited in note 7) (noting that since 1983, the threat of FRCP 11 sanctions has led lawyers to plead with greater specificity).

order for the claim to be a nuisance claim, the facts forming the basis of the plaintiff's case must be weak).

It is also worth noting that not every case involving a nuisance settlement strategy will have a detailed pleading. If a plaintiff's costs of discovery are likely to be very low, then the plaintiff does not need to put much detail into her complaint in order to have a credible threat to move forward with discovery. A specific example of this would be cases bringing "inventory claims"—highly similar claims by many individual plaintiffs, some of which are meritorious and many of which are not.<sup>73</sup> In these circumstances, if discovery costs are relatively low for plaintiffs, it may be more cost-effective for a plaintiffs' attorney simply to file boilerplate complaints for the entire "inventory" than to engage in screening on merit before the fact. In this scenario, some settlements might be nuisance settlements, while other settlements would reflect meritorious claims. For such claims, the pleadings may lack detail—or, even if rich in detail, may lack details that are specific to the plaintiffs—and as such, the complaints may be close to the line of plausibility.<sup>74</sup> These types of cases, too, may be affected by the plausibility pleading standard.

#### F. Class Actions and Shoot-the-Moon Cases

For the vast majority of claims, plaintiffs (or their attorneys) will not file suit unless they assess their claims to be fairly strong. But this argument depends on the empirical assumption that for most claims, the cost of litigation is sufficiently high relative to the stakes of the case to give a plaintiff (or her lawyer) pause before filing suit. As shown above, the cost of litigating (at least through discovery) is usually tens of thousands or hundreds of

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<sup>73</sup> Anecdotally, some types of asbestos litigation have been described this way, as have certain types of cases involving relatively small claims for fixed statutory damages, such as claims brought under the Fair Debt Collection Practices Act, Pub L No 95-109, 91 Stat 874 (1977), codified as amended at 15 USC § 1692 et seq. See, for example, *Amchem Products, Inc v Windsor*, 521 US 591, 600–01 (1997) (noting that the parties referred to one group of plaintiffs with pending asbestos claims as inventory plaintiffs).

<sup>74</sup> For example, a products liability complaint for personal injury from exposure to asbestos may contain considerable detail about the history of the asbestos industry, details of the industry's alleged wrongdoing, and medical evidence of the effects of asbestos on human health—all of which are alleged identically across countless individual complaints—but relatively little factual detail on the nature of how the plaintiff's current health problems were caused by asbestos. Nonetheless, one might argue that so long as there is some allegation of exposure to asbestos, it would be hard to call such a complaint implausible.

thousands of dollars, and the cost of litigation scales roughly proportionally with the stakes of litigation.<sup>75</sup> But as one looks across the spectrum of cases, as the stakes start to rise, the costs of litigation do not rise as quickly, and therefore cases with the highest stakes tend to have litigation costs that are much smaller relative to their stakes.

For high-stakes individual claims, this means that the gatekeeping function of plaintiffs' attorneys may disappear—it may be worth suing under no pleading standard, even though the likelihood of winning is very low and the facts known to the plaintiff, if alleged in the complaint, would not amount to a plausible claim. For example, if stakes are \$1 billion and expected costs are a hefty but not proportionately large \$1 million, then from Expression 5b we have:

$$0.33 p (1,000,000,000) \geq 1,000,000 \quad (7a)$$

$$p \geq 0.003 \quad (7b)$$

In other words, if the stakes are high enough, a plaintiff may be willing to accept lottery-ticket odds. Because such claims may not be plausible, the choice of pleading standard may affect these claims.

Most of the cases with the highest stakes, though, are not individual actions but class actions. While the principles discussed above apply to class actions as well as individual actions, the nature of class actions as large and sometimes-complex aggregations of many individual claims makes class actions uniquely sensitive to pleading standards. As I explain, litigating a class action can simultaneously be both *too expensive* and *too inexpensive* for the normal gatekeeping function of plaintiffs' attorneys to operate as it does in the mine-run of cases.

One of the virtues of the class action device is that by aggregating many similar claims, a single action can economize on litigation costs relative to the alternative of each class member bringing an individual claim.<sup>76</sup> Indeed, the prototypical class action involves claims that plaintiffs would not bring individually (because the cost of litigating an individual claim outweighs the expected judgment) but that plaintiffs would find economically feasible to litigate on a class basis.

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<sup>75</sup> See Part I.B.

<sup>76</sup> See Note, *Aggregation of Claims in Class Actions*, 68 Colum L Rev 1554, 1554 (1968).



The potential efficiencies from litigation on a class basis also ensure that a larger share of the total amount recovered in a successful class action goes to the plaintiff class, rather than to the plaintiffs' attorneys. As noted above, in an individual action, a plaintiffs' attorney will earn a contingency fee of 33 to 40 percent of the total recovery, while in a class action, attorney's fees are set by the court, or, if the case is settled (as it usually is), the parties may negotiate attorney's fees as a separate part of the settlement, subject to judicial approval.<sup>77</sup> Because of the economies of scale in class action litigation, the plaintiffs' attorneys in successful class actions can be well compensated for far less than 33 to 40 percent of the total recovery.

Thus, relative to the total stakes of the class action, and relative to the total cost of class members litigating individual suits, the costs for a plaintiffs' attorney to litigate a class action are low. These economies of scale have a profound effect on the incentives of plaintiffs' attorneys to act as gatekeepers in class action litigation. Because the stakes are so high relative to the costs, litigation may be cost justified even if the factual basis for the claim is very weak and the plaintiffs' expected likelihood of success is very low. If we translate the calculations for individual suits to the class action context, we can again take the hypothetical \$1 billion stakes and \$1 million in litigation costs for the plaintiff class, but adjust the contingency fee to reflect the efficiencies of class litigation. For example, let's consider a 10 percent fee, rather than a 33 percent fee:

$$0.10 p (1,000,000,000) \geq 1,000,000 \quad (8a)$$

$$p \geq 0.01 \quad (8b)$$

While this is a slightly higher bar than the likelihood-of-success cutoff for individual litigation in Expression 7b, a 1 percent chance of success is hardly screening for case quality! And in any event, if the facts known to the plaintiffs give them only a 1 percent chance of success on the merits, such facts probably would not meet a plausibility pleading standard.

Of course, plaintiffs' attorneys might not be compensated on a percentage basis in a class action. Instead, the court's fee award

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<sup>77</sup> See FRCP 23(e) (requiring that class action settlements be approved by the court); FRCP 23(h) (providing that a court may award attorney's fees in a certified class action).

or the parties' negotiated settlement could simply reimburse the plaintiffs' attorneys for the full value of their time—based on an appropriate hourly rate—and inflate this amount by a multiplier reflecting the ex ante risk that the plaintiffs' attorneys would recover nothing.<sup>78</sup> This approach, though, leads to even *less* gate-keeping by plaintiffs' attorneys, because it guarantees that, ex ante, the fee award will cover the plaintiffs' attorneys' litigation costs: a low probability of prevailing is compensated by a higher fee award, so there is no need to avoid long shot cases. Thus, class actions create the same incentive as high-stakes individual actions: plaintiffs' attorneys would find it rational to pursue a shoot-the-moon strategy with long odds claims, at least in the absence of a pleading standard.

The defendant may enjoy economies from aggregation as well. But the logic of the shoot-the-moon claim does not depend on the defendant's litigation costs being high or low. Rather, the tendency of the class action device to facilitate a shoot-the-moon dynamic is a product of the potentially massive economies of scale that it provides for plaintiffs.

Nonetheless, the costs of defending a class action are relevant to pleading strategy, albeit for a different reason. As noted above in Part I.E, a nuisance claim's success depends on an asymmetry of litigation costs between the plaintiff and the defendant. While a shoot-the-moon strategy depends on the plaintiff's litigation costs relative to the *stakes*, a nuisance settlement strategy depends on the plaintiff's litigation costs relative to the *defendant's litigation costs*. Importantly, the class action device not only lowers the plaintiff class's costs relative to the total stakes; it also lowers the plaintiff class's costs relative to the defendant's costs. This is precisely because it is the plaintiffs' side of the litigation that is being consolidated into a single litigation effort.<sup>79</sup> Further, it is essential to recognize that the efficiencies

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<sup>78</sup> This is the prevalent approach that courts take. See Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U Pa L Rev 2043, 2050–56 (2010) (describing the lodestar method and its application in class action cases).

<sup>79</sup> This is part of the normative justification for class actions. Even in the absence of a class action, a defendant can consolidate its litigation efforts across individual cases much more easily than individual plaintiffs can coordinate their litigation expenses. See, for example, David Rosenberg and Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J Legal Analysis 305, 305–10 (2014). Nonetheless, such efficiencies should not be overstated; sophisticated plaintiffs' attorneys often share discovery and coordinate litigation activity in related cases. See Matthew J.B. Lawrence, *Courts Should Apply a Relatively More Stringent Pleading Threshold to Class Actions*, 81 U Cin L Rev 1225, 1245 (2013).

of the class action device are lower costs on a per-plaintiff basis; the costs of a single class action are higher—sometimes astronomically higher—than the costs of a single individual action, and the costs are higher for both the plaintiffs' lawyers and the defense lawyers.

In an important sense, therefore, the class action device makes litigation too expensive for the normal gatekeeping function of plaintiffs' lawyers to operate in some cases. By raising defense costs, and raising them relative to plaintiff's costs, class action aggregation can make viable a nuisance settlement strategy that would not work in the individual action context.

In this way, both *Twombly* and its critics are right: class actions (and in particular antitrust class actions) can make litigation very expensive in *absolute* terms, as the Court in *Twombly* emphasized,<sup>80</sup> but a properly constituted class action is, by design, more efficient and less expensive to litigate *relative* to individual actions.<sup>81</sup> With respect to claims that, to the plaintiffs' attorney drafting the complaint, have a good shot on the merits, the class action device interacts with pleading practice in a benign or even beneficial way. Pleading standards are irrelevant, because the plaintiff can and will (for all the reasons given above in Part I.A) allege the facts that form the basis of her claim, and the efficiencies of the class action ensure that plausible claims are not deterred by high litigation costs for the plaintiff.

But with respect to claims that the plaintiffs' attorney recognizes to be long shot claims, the class action device creates incentives that require pleading standards to perform a gatekeeping function usually reserved for plaintiffs' attorneys. By raising defense costs both in dollar terms and relative to plaintiffs' costs, low-merit claims may become viable bases for nuisance settlements. And by lowering plaintiffs' costs relative to the stakes, a class action can make a long shot claim cost justified, even if it lacks nuisance value. And of course, both of these effects can manifest themselves in the same class action.

What immediately follows from this conclusion is that if pleading standards are likely to have an effect as a descriptive matter, and if plausibility pleading is likely to be desirable as a normative matter, this will be true in the class action context if it is true anywhere. It should not be surprising, therefore, that

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<sup>80</sup> *Twombly*, 550 US at 558.

<sup>81</sup> See Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of Twombly and Iqbal*, 51 Wm & Mary L Rev 1997, 2038 (2010).

*Twombly* and *Iqbal*—the Supreme Court’s two interventions to install the doctrine of plausibility pleading—were large, high-stakes class actions with massively asymmetrical litigation costs.<sup>82</sup> And conversely, it should not be surprising that in more-routine pleading cases since *Twombly*, the Court has shown no interest in expanding the gatekeeping function of the courts. *Erickson v Pardus*,<sup>83</sup> decided only weeks after *Twombly*, reversed the dismissal of a complaint filed by an individual pro se prisoner alleging mistreatment of his medical conditions.<sup>84</sup> *Johnson v City of Shelby, Mississippi*,<sup>85</sup> the Court’s most recent word on plausibility pleading, was a per curiam reversal of the dismissal of a complaint filed by two individual police officers who alleged they were fired for whistle-blowing activity.<sup>86</sup>

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In sum, the thought experiment of a world with no pleading standard yields the conclusion that, in general, cases that would not be filed (or that would be dismissed) under a pleading standard would not be filed even in the absence of a pleading standard, and complaints that are pleaded with factual detail under a pleading standard would be pleaded with factual detail even in the absence of a pleading standard. This is because the economics of litigation are such that it is generally not worth suing unless one believes that the claim has a decent shot (maybe one in four) of prevailing. To form such a belief, though, one must already have articulable facts in mind. And if so, pleading these facts facilitates settlement, even if there is no risk of a motion to dismiss for failure to state a claim.

This basic logic, however, has its limits, and understanding these limits helps sharpen the descriptive and normative contents

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<sup>82</sup> When I teach *Twombly* to my Civil Procedure students, we work through a rough calculation of the stakes in that case. Given that the putative class included all US households with phone or Internet service during the period from February 1996 through December 2003, this includes approximately 180 million households over 95 months. See *FCC Releases Study on Telephone Trends* \*1-1, 8-3 (FCC, May 22, 2002), archived at <http://perma.cc/T848-W29F>. Given that damages under the Sherman Act are trebled, a \$20 monthly overcharge per household due to the alleged conspiracy implies total damages exceeding \$1 trillion. This is more than 8 percent of the entire US gross domestic product in 2003, the year that the case was filed. Even a two-cent monthly overcharge implies damages to the class exceeding \$1 billion.

<sup>83</sup> 551 US 89 (2007).

<sup>84</sup> *Id.* at 89–90.

<sup>85</sup> 135 S Ct 346 (2014).

<sup>86</sup> *Id.* at 346–47.

of this analysis. As I show above, there are several factors that (perhaps surprisingly) do *not* affect the analysis:

(1) Contingency fee arrangements: The widespread use of contingency fees by plaintiffs' attorneys reinforces the basic analysis. Because plaintiffs' attorneys' compensation is a fraction of the settlement obtained, a plaintiffs' attorney will take a case only if it is relatively valuable when compared to the attorney's expected litigation costs.

(2) Staging of litigation costs: The fact that litigation proceeds in stages, and thus that the costs of litigation arise piecemeal, allows plaintiffs with relatively lower-expected value claims to bring suit. This effect for a typical real-life case, however, does not induce plaintiffs without plausible (however sensibly defined) claims to file in the absence of a pleading standard.

(3) Asymmetric information: Contrary to the popular view that heightened pleading standards create a paradox of pleading, pleading standards do not have any special effect when asymmetry of information favors the defendant.

There are other factors, though, that do undermine the prediction that pleading standards will not affect the decision to file or the decision to plead in detail:

(1) Plaintiffs who do not pay litigation costs: A pro se plaintiff with a very low opportunity cost of her time, or a plaintiff represented by an attorney acting pro bono, may be willing to bring suit even when unable to articulate facts explaining why the claim may have merit. Pleading standards may therefore affect such plaintiffs. Note, though, that to the extent that a provider of pro bono legal services is oversubscribed or otherwise resource constrained, the provider will tend to focus its attention on the strongest cases, thereby replicating the screening effect predicted by my analysis.

(2) Plaintiffs motivated by spite, indignation, or optimism: While their attorneys will often succeed at tempering their zeal, some plaintiffs may insist on filing suit even when they cannot articulate why they believe that they have a decent claim. Outcomes for these plaintiffs could be affected by pleading standards.

(3) Some nuisance suits: Some low-merit nuisance litigation may be discouraged by higher pleading standards. While

most low-merit nuisance claims will not be brought, even under no pleading standard, claims in which litigation costs are highly asymmetric and favor the plaintiff may be viable in the absence of a pleading standard.

(4) Class actions and shoot-the-moon claims: Related to low-merit cases with high litigation costs for the defendants are low-merit cases with extremely high stakes. These shoot-the-moon claims may be viable under no pleading standard but could be affected by a pleading standard. Class actions may be particularly susceptible to this dynamic, as the cost economies and aggregation of stakes due to the class action device may make plaintiffs' litigation costs a tiny fraction of the stakes.

The general result that pleading standards will make little difference, as well as the qualifications to the scope of this result, generates several empirical predictions and may inform our normative assessment of pleading rules as well. Before turning to these predictions, however, I briefly consider how judicial behavior may respond to the phenomenon of case screening and detailed pleading that occurs regardless of the pleading standard.

## II. JUDICIAL PERCEPTIONS OF PLEADING

So far, I have argued that detailed pleading will arise even in a regime of no pleading standard. The goal of this thought experiment is to shed light on actual pleading practice in a world in which defendants *can* file motions to dismiss and judges *can* dismiss cases for failure to state a claim. So I now consider how screening of case quality by the plaintiff and the use of pleading detail as a signal to the defendant interact with the third actor in the courtroom: the judge.

Because of incentives to screen merit and signal case quality, plaintiffs will tend to file detailed factual pleadings regardless of the pleading standard. Thus, long before *Twombly* and plausibility pleading came along, federal court judges saw detailed pleadings in most cases. This meant not only that few complaints would be susceptible to motions to dismiss but also that the few complaints that lacked factual detail would appear exceptional in their lack of detail. Because lack of factual detail in a complaint was exceptional, judges would take note of complaints lacking facts and draw inferences about their claims. From a sparse complaint, a judge could infer that the plaintiff lacked favorable facts and could conclude that the case was

exceedingly weak, at least relative to the large numbers of cases with detailed pleadings. If so, a judge would be tempted to save the court's and the parties' time by disposing of the case at the outset.

Take a hypothetical district court judge in the pre-*Twombly* era. This judge has no particular ideological agenda but understands that she operates in a liberal notice pleading regime. The overwhelming majority of civil complaints that she sees contain factual details, and many complaints are long—sometimes tediously long—recitations of the facts of the dispute, with particular emphasis on the facts that tend to prove the plaintiff's case.<sup>87</sup>

Now imagine that a complaint is filed in this judge's court alleging an employment discrimination claim. This complaint offers nothing more than the identities of the plaintiff and defendant, the required jurisdictional allegations, a demand for relief, and the following statement: "I was turned down for a job because of my race." When the judge reads this complaint, what will her reaction be? Probably skepticism. All other plaintiffs in this kind of case—even the ones who end up losing—provide some indication in their complaints of why or how the denial of employment was because of race. Perhaps they describe how they were highly qualified for the job, how their employers hired white applicants instead, or how the hired applicants were less qualified. Perhaps they allege comments about race made by human resources personnel or provide accounts of other minorities who were treated poorly by the defendant. But this plaintiff? Nothing.

Given that this judge lives in a world in which detailed factual pleading is the norm, she will draw a negative inference. Even plaintiffs with poor cases, she will reason, can muster *some* evidence of discrimination in their complaints. If this plaintiff's attorney cannot state *one fact* suggesting race discrimination, the judge might wonder, why is this complaint worth months or years of the court's time?

Of course, the judge might not grant a motion to dismiss the complaint. But the judge might. And *this* is the interesting part, because "I was turned down for a job because of my race" is all a

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<sup>87</sup> For examples of judicial criticisms of long-winded complaints, see *American Nurses' Association v Illinois*, 783 F2d 716, 724 (7th Cir 1986) ("The pleading of facts is well illustrated by the present case. The complaint is twenty pages long and has a hundred page appendix."); *Decker v Massey-Ferguson, Ltd.*, 681 F2d 111, 114 (2d Cir 1982) (bemoaning the "prolix and discursive 69 page complaint").

complaint has to say” to state a Title VII claim for racial discrimination.<sup>88</sup> A complaint *will* say much more than it *has to* say. And if judges see detailed pleading all the time, it is natural that they will come to expect it.

In short, if nearly all plaintiffs have an incentive to plead in detail, judges—even judges hearing cases under a notice pleading standard—will (accurately) perceive factually detailed pleading as the norm. Sparsely pleaded complaints will appear aberrant and suspect, leading judges to (accurately) infer that the claims raised by those complaints are relatively weak. Given this dynamic, the desire of judges to control their caseloads and weed out weaker cases will create constant pressure to dismiss the rare complaint that gives the defendant notice of the plaintiff’s claim but that raises an implausible claim.

If so, then the practical difference between notice pleading and plausibility pleading becomes even narrower, and this is true *even for those types of cases that are exceptions to the basic framework*, as noted above in Part I. Judges accustomed to detailed pleadings would look skeptically upon pleadings by pro se plaintiffs, or pleadings in cases with shoot-the-moon stakes, that lacked factual detail. And their skepticism would be justified; although the economic logic of these cases would mean that it was rational to file suit under a low pleading standard, it would remain the case that these claims, by definition, lacked articulable facts that gave the plaintiff reason to think the claim had a decent shot at success. And if judges not only were skeptical of such complaints but in fact dismissed them notwithstanding that they gave notice to the defendants, then something like a plausibility pleading standard would have emerged endogenously from the behavior of plaintiffs and plaintiffs’ attorneys long before *Twombly*.

### III. SOME EVIDENCE IN SUPPORT OF THE THEORY

My central thesis in this Article is that, in general, pleading rules will not operate as binding constraints on litigant behavior, because other considerations—litigation cost, the need to signal case strength in order to obtain settlement—operate as stricter screens. Importantly, this claim is essentially an empirical one. In this Part, I describe some empirical implications of this theory of pleading and provide some evidence corroborating these

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<sup>88</sup> *Bennett v Schmidt*, 153 F3d 516, 518 (7th Cir 1998) (Easterbrook).



predictions. To be clear, this evidence is impressionistic and merely suggestive. Ultimately, these predictions will have to be tested against the results of the growing quantitative literature on pleading. My hope is that the predictions and evidence herein will inform future empirical studies of pleading.

#### A. Everything New Is Old Again

At the most basic level, this theory is summarized by the old cliché that the more things change, the more they stay the same. The most fundamental empirical prediction of this theory is that even in a world *with* pleading standards, dismissals for failure to state a claim will be rare no matter what the pleading standard is, because cases close to the margin of dismissal simply will not be filed. For the same reason, motions to dismiss will be uncommon.

In this respect, the data are uncontroversial: Dismissals for failure to state a claim were rare in the past and are rare today—maybe 2 percent of federal civil cases end with a dismissal for failure to state a claim.<sup>89</sup> Indeed, motions to dismiss are *filed* in only about 5 percent of cases, a rate that has remained roughly constant since before *Twombly*.<sup>90</sup>

Perhaps most striking is that even in the pre-FRCP world of common-law pleading, the demurrer—precursor to the motion to dismiss—was rare. Dean Clark, the architect of notice pleading, testified to this fact in describing the state of pleading in 1938 as follows:

I have had some experience in studying the statistics of trial courts, and very rarely indeed does a final action come on a demurrer—very, very rarely. The percentage is almost

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<sup>89</sup> See Joe S. Cecil, et al, *Motions to Dismiss for Failure to State a Claim after Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules* \*9, 14 (Federal Judicial Center, Mar 2011), archived at <http://perma.cc/PS98-NW6D>. An examination of these tables reveals that across all cases in two samples from 2006 and 2010, about 5 percent of cases involved motions to dismiss and about 40 percent of rulings on motions to dismiss were granted without leave to amend. Thus, 2 percent ( $0.05 \times 0.40$ ) of cases involved motions to dismiss being granted without leave to amend. Of course, this is just a rough estimate; for example, courts do not ultimately rule on every motion to dismiss that is filed.

<sup>90</sup> *Id.* at \*9 (indicating motion to dismiss filing rates of 4 percent in 2006 and 6 percent in 2010). Earlier work, based on smaller samples, suggests that numbers may have been somewhat higher at earlier points in time. Thomas E. Willging, *Use of Rule 12(b)(6) in Two Federal District Courts* \*6–8 (Federal Judicial Center, July 1989), archived at <http://perma.cc/6ZFX-EMH9> (finding, in samples of cases from 1975, 1978, and 1988, motions to dismiss filed in 10 to 15 percent of cases and case dispositions based on motions to dismiss in 1 to 6 percent of cases).

infinitesimal. Actually demurrers cut a very small figure in any general picture of the court's business.<sup>91</sup>

Thus, the experience under common-law pleading, even in the eyes of Clark himself, counseled that there was no reason to expect changes in pleading standards to dramatically affect practice.

Of course, while this fact is consistent with my theory of pleading, it hardly proves it. There may be other reasons why dismissal rates might remain constant, even across long periods and various pleading regimes. Most obviously, selection effects may confound any effort to draw inferences from trends in dismissal rates. If a change in the law induces changes in filing and settlement behavior, these changes may affect the composition of cases subject to motions to dismiss, thereby rendering changes in motion to dismiss filing rates and dismissal rates hard to detect. Still, lack of change in dismissal rates is informative.<sup>92</sup>

It is beyond the scope of this Article to systematically address such empirical issues. Rather, for the remainder of this Part, I concentrate largely on *qualitative* evidence. In this respect, the qualitative evidence discussed below has the advantage of being less sensitive to the selection effects that have bedeviled the empirical literature on *Twombly* and *Iqbal*. For example, open-ended survey questions to practitioners allow respondents to describe any effects of pleading standards on potential cases that were considered but never filed because the pleading standard affected their viability.

In the following sections, I identify several predictions of my theory and present qualitative evidence indicating that these predictions are consistent with experience.

## B. Practitioner Surveys

My theory of pleading generates several predictions about how practitioners themselves would perceive the effects of a change in pleading standards from notice pleading to plausibility pleading. The theory predicts that: (1) Practitioners will be largely unaffected by changes in pleading standards. (2) Plaintiffs' attorneys will plead in detail regardless of the

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<sup>91</sup> Dawson, *Rules of Civil Procedure* at 239 (cited in note 11) (quoting Clark's statement about FRCP 12 to the Institute on Federal Rules of the American Bar Association).

<sup>92</sup> See Daniel Klerman and Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J Legal Stud 209, 210–14 (2014) (showing that the leading models of selection in litigation and settlement will, under plausible conditions, allow inferences to be drawn from changes in plaintiffs' trial win rates (or the lack thereof)).

pleading standard. (3) Plaintiffs' attorneys will screen cases for plausible merit regardless of the pleading standard.

Surveys of practitioners lend support to these predictions. In December 2009 and January 2010, Willging and Lee surveyed both plaintiffs' attorneys and defense attorneys across a range of practice areas about the effects of *Twombly* and *Iqbal*, reporting that "[m]ost interviewees indicated that they had not seen any impact of the two cases in their practice."<sup>93</sup>

A survey by Rebecca Hamburg and Matthew Koski lends support to every one of these predictions.<sup>94</sup> This study was commissioned by the National Employment Lawyers Association (NELA), an organization of attorneys who represent plaintiffs in employment litigation.<sup>95</sup> I emphasize this study because it surveys attorneys for the group often considered the *most* affected by plausibility pleading: employment discrimination plaintiffs. Hamburg and Koski surveyed members of NELA during October and November 2009—two and a half years after *Twombly* and about six months after *Iqbal*. The respondents were overwhelmingly critical of *Twombly* and *Iqbal*,<sup>96</sup> and some reported hearing about others being hurt by the new pleading standards.<sup>97</sup> But based on the respondents' descriptions of their own experiences, it appears that the effect of *Twombly* and *Iqbal* on complaint drafting was modest and the effect on pleading outcomes was nil.

Most of the plaintiffs' attorneys surveyed by Hamburg and Koski reported that *Twombly* and *Iqbal* "affected the way in which they structure complaints" and that they "include more factual allegations in their complaints."<sup>98</sup> Thus, this survey suggests an effect of plausibility pleading on the drafting of complaints. But the survey also confirmed that factually detailed pleading has always been the norm. By far the most frequent

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<sup>93</sup> Willging and Lee, *In Their Words* at \*1, 25 (cited in note 44).

<sup>94</sup> See generally Rebecca M. Hamburg and Matthew C. Koski, *Summary of Results of Federal Judicial Center Survey of NELA Members, Fall 2009* (NELA, Mar 26, 2010), archived at <http://perma.cc/E7XP-93RB>.

<sup>95</sup> "NELA advances employee rights and serves lawyers who advocate for equality and justice in the workplace. NELA provides assistance and support to lawyers in protecting the rights of employees against the greater resources of their employers and the defense bar." *Id.* at \*3.

<sup>96</sup> By my count, of the respondents who offered their own comments about pleading, 85 of 150 made comments criticizing *Twombly* or *Iqbal*. *Id.* at \*62–75.

<sup>97</sup> See *id.* at \*62, 65–66.

<sup>98</sup> Hamburg and Koski, *Summary of Results* at \*10, 28 (cited in note 94). Seventy percent agreed with the former statement and over 94 percent agreed with the latter statement. *Id.* at \*28.

description of the attorneys' own experiences was some version of the following:

"I have always drafted detailed complaints."<sup>99</sup>

Willging and Lee report virtually identical feedback from the plaintiffs' attorneys they surveyed:

"We have always included more than is necessary for notice pleadings."

"I never did notice pleading, always much more."

"I have always done very fact-intensive pleading and could always add more facts if needed."<sup>100</sup>

Further, the attorneys who were surveyed by Hamburg and Koski and those surveyed by Willging and Lee confirmed that screening cases for merit by plaintiffs' attorneys was a regular practice long before *Twombly*:

"I plead facts based on the prescreening I do before filing a case. My work is done up front and I plead with specificity."<sup>101</sup>

"Plaintiff's counsel who practice wholly in this area also generally take nearly all work on a contingent fee basis, as almost no clients can afford to pay attorney's fees, and therefore are already extraordinarily careful in case selection."<sup>102</sup>

"I have always carefully screened my cases."<sup>103</sup>

These statements echo earlier survey findings on the screening role of plaintiffs' attorneys. A decade before *Twombly*, Professor Herbert Kritzer concluded that "contingency fee lawyers generally turn down at least as many cases as they accept, and often turn down considerably more than they accept."<sup>104</sup>

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<sup>99</sup> Id at \*64. By my count, thirty-one respondents volunteered something to this effect. Of these, twenty-seven explicitly said that they had "always" pleaded with detail. Id at \*62-75. In contrast, seven said that they plead more facts, and three noted that defendants are filing more motions to dismiss. Id.

<sup>100</sup> Willging and Lee, *In Their Words* at \*28-29 (cited in note 44).

<sup>101</sup> Id at \*29.

<sup>102</sup> Hamburg and Koski, *Summary of Results* at \*62 (cited in note 94).

<sup>103</sup> Id at \*64.

<sup>104</sup> Kritzer, 81 *Judicature* at 26 (cited in note 21). See also id at 28:

We might return to Elihu Root's injunction, "about half of the practice of the decent lawyer consists in telling would-be clients that they are damned fools and should stop," as one possible measure [of whether attorneys are too litigious]. If we take "half of the practice," to refer to the proportion of potential cases accepted, then most contingency fee lawyers achieve this measure of decency.

Most tellingly, the respondents reported essentially nothing in terms of the effects of *Twombly* and *Iqbal* on filings or dismissals. With regard to filings, of the 150 plaintiffs' attorneys who offered comments on pleading, 1 attorney mentioned that 1 case was not filed because of *Twombly* or *Iqbal*.

With regard to dismissals, recall that my theory also predicts that plaintiffs' attorneys will report that they will rarely face, let alone lose, motions to dismiss for failure to state a claim, regardless of the pleading standard. In Hamburg and Koski's survey of plaintiffs' attorneys practicing employment litigation, 92.8 percent of the surveyed plaintiffs' attorneys had never—not once!—had a complaint dismissed under *Twombly* or *Iqbal*.<sup>105</sup> Some respondents had not even seen a single motion to dismiss filed since *Twombly*.<sup>106</sup> Respondents in Willging and Lee's survey had similarly little to report. Indeed, one respondent, speaking in the wake of *Iqbal*, explained: "I have never faced a serious challenge to a complaint in 20 years of practice and only have had 2–3 motions to dismiss for failure to state a claim filed."<sup>107</sup>

In short, it appears that *Twombly* and *Iqbal* have induced plaintiffs to add some padding to the factual detail in their complaints, but long before *Twombly*, plaintiffs' attorneys were screening cases on the merits and pleading with factual detail. As a consequence, the bottom line for plaintiffs, both before and after *Twombly*, is that motions to dismiss, let alone dismissals with prejudice, have been rare.

### C. Cross Jurisdictional Practice

Just as my theory of pleading predicts that changes in pleading standards within a court system should have little effect on filing rates or pleading detail, it predicts that differences in pleading rules across jurisdictions should lead to few differences in practice. Even if selection effects bias *quantitative* evidence on dismissal rates toward a finding of no difference, *qualitative* evidence on relative, overall advantages of pleading rules should account for the various ways in which pleading rules can affect practice. Thus, a qualitative, comparative approach to pleading practice could reveal the differing effects of different pleading standards. For example, one could survey the experiences

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<sup>105</sup> Hamburg and Koski, *Summary of Results* at \*28 (cited in note 94).

<sup>106</sup> See *id.* at \*68.

<sup>107</sup> Willging and Lee, *In Their Words* at \*25 (cited in note 44).

of practitioners in state courts and the courts of the District of Columbia. While the civil procedure rules of most states (and the District of Columbia) essentially mirror the FRCP, seventeen states have pleading rules that require some version of fact pleading—a pleading standard that is *higher* than plausibility pleading.<sup>108</sup> These seventeen states compose more than half of the US population.

Yet I know of no claims—whether from scholars or practitioners, whether in print or conversation, whether systematic or anecdotal—that fact pleading standards have generated systematic differences in litigation practice in these states, either before or after *Twombly*. If anything, some anecdotes suggest the opposite. For example, when prodefendant organizations complain about “judicial hellholes” that are (allegedly) inordinately generous to plaintiffs, such “hellholes” reside primarily in fact pleading, rather than notice pleading, states.<sup>109</sup> Looking more broadly, Professor Scott Dodson notes that pleading in the United States is unique among countries: “America has the most lax pleading system in the world.”<sup>110</sup> Often, when a complaint is filed, civil law jurisdictions require not only fact pleading but also evidence.<sup>111</sup> Yet Dodson observes little concern internationally over these differences in pleading rules.<sup>112</sup>

And to add the most dubious sort of empirical evidence—the personal anecdote: I practiced in Illinois (a fact pleading

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<sup>108</sup> See John B. Oakley and Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash L Rev 1367, 1371 (1986); John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 Nev L J 354, 358 (2003). In sorting states into these categories, I rely on Professors John B. Oakley and Arthur F. Coon’s 1986 article. According to this study, the fact pleading states are Arkansas, California, Connecticut, Delaware, Florida, Illinois, Louisiana, Maryland, Missouri, Nebraska, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Texas, and Virginia. Oakley and Coon, 61 Wash L Rev at 1378 (cited in note 108). In this context, “fact pleading” includes code pleading and civil pleading (that is, pleading under the civil law system, which is used in Louisiana).

<sup>109</sup> A recent report from the American Tort Reform Foundation on “judicial hellholes” lists fourteen state court jurisdictions as “judicial hellholes” or on a “watch list.” *Judicial Hellholes* \*3–4 (American Tort Reform Foundation, 2011), archived at <http://perma.cc/X46E-W7NR>. Ten of these fourteen “hellhole” jurisdictions are located in fact pleading states: California, Florida, Illinois (three), Louisiana, New Jersey (two), New York, and Pennsylvania. The notice pleading jurisdictions on these lists are in Alabama, Mississippi, Nevada, and West Virginia. For the basis of my categorization of states into fact pleading and notice pleading categories, see Oakley and Coon, 61 Wash L Rev at 1378 (cited in note 108); Oakley, 3 Nev L J at 356–58 (cited in note 108).

<sup>110</sup> Dodson, 158 U Pa L Rev at 447 (cited in note 12).

<sup>111</sup> *Id.* at 453–55.

<sup>112</sup> *Id.*

jurisdiction) for five years before *Twombly*. I litigated cases in both state court (fact pleading) and federal court (notice pleading). In terms of length, specificity, and factual detail, the state court and federal court complaints I encountered were interchangeable.<sup>113</sup>

#### D. Pro Se and IFP Plaintiffs

Given that this theory of pleading rests on the screening role of plaintiffs' attorneys and plaintiffs themselves, one would expect that when neither the plaintiff nor her attorney bears the costs of litigation, the impetus to screen for merit will be weaker. If so, then pleading standards might have an effect, possibly even a large effect, on outcomes for such plaintiffs.

Empirically, we might expect that pro se plaintiffs, who are not constrained by an attorney and may have a very low opportunity cost of their time, and IFP plaintiffs, whose costs are subsidized by the state and who may have appointed or pro bono counsel, will be affected by pleading standards. This prediction may manifest itself empirically in changes in dismissal rates of pro se or IFP cases after a change from notice pleading to plausibility pleading.

This prediction with respect to dismissal rates has an important advantage over hypotheses about dismissal rates generally. The premise underlying this prediction is that pro se and IFP plaintiffs do not face economic incentives to change their settlement or filing patterns in response to pleading standards.<sup>114</sup>

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<sup>113</sup> The two quantitative studies that have looked for differential patterns across fact pleading and notice pleading states in the wake of *Twombly* and *Iqbal* have also found none. See Jill Curry and Matthew Ward, *Are Twombly & Iqbal Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 Tex Tech L Rev 827, 865–72 (2013); Roger Michalski and Abby K. Wood, *Twombly and Iqbal at the State Level* \*27–45 (unpublished manuscript, July 29, 2015), archived at <http://perma.cc/E9KF-KBCN>. Jill Curry and Matthew Ward search for changes in patterns of removal from state to federal court, based on the theory that defendants in notice pleading states will now have a greater preference for pleading standards in federal court. But they find no evidence that patterns of removal to federal court responded to *Twombly* and *Iqbal*, and no difference in response between notice pleading and fact pleading states. Curry and Ward, 45 Tex Tech L Rev at 828–30 (cited in note 113). Professors Roger Michalski and Abby K. Wood compare case filings and outcomes in state courts in Nebraska, a state that adopted plausibility pleading in the wake of *Twombly*, with outcomes in a set of states that did not adopt plausibility pleading. They find no evidence that adoption of plausibility pleading changed litigation outcomes in Nebraska. Michalski and Wood, *Twombly and Iqbal at the State Level* at \*3–8 (cited in note 113).

<sup>114</sup> To be more precise, the claim is that for this group of (potential) plaintiffs, many of them are close to the margin with respect to meeting the pleading standard but are

In other words, for this group of plaintiffs, selection effects should be at their nadir.

Ironically, much of the empirical work on the effects of *Twombly* and *Iqbal* (including some of mine) has excluded pro se and IFP plaintiffs from their analyses.<sup>115</sup> This is because the Supreme Court appeared to carve out such cases from the application of *Twombly* in *Erickson*, which reversed the grant of a motion to dismiss a complaint by a pro se prisoner and insisted that a pro se pleading is “to be liberally construed.”<sup>116</sup> Nonetheless, Dodson as well as Professors Kevin Clermont and Theodore Eisenberg include such plaintiffs in their empirical studies of court judgments before and after *Twombly* and *Iqbal*.<sup>117</sup> These studies offer suggestive evidence that pro se and IFP plaintiffs are, in fact, more affected by pleading standards than represented plaintiffs.<sup>118</sup>

### E. Settlement Patterns

The claim that detailed pleading serves to facilitate settlement suggests a straightforward prediction about settlement: because detailed pleading serves as a credible signal of the strength of a plaintiff’s case, the filing of a complaint may be sufficient to induce settlement, even without any other litigation activity. In a recent study, Professors Christina Boyd and David Hoffman examine litigation activity in a sample of federal civil cases and find that about one-third of filed lawsuits are settled without *any* litigation activity occurring—no motions, no discovery.<sup>119</sup> This poses the question: If the parties had no

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*inframarginal* (that is, unaffected by the pleading standard) with respect to the decisions to file or to settle. Anecdotally, at least, this seems a tenable characterization of a meaningful share of pro se and IFP cases.

<sup>115</sup> See, for example, Hubbard, 42 J Legal Stud at 61–62 (cited in note 20).

<sup>116</sup> *Erickson*, 551 US at 94, quoting *Estelle v Gamble*, 429 US 97, 106 (1976).

<sup>117</sup> Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 Judicature 127, 130–32, 134 (Nov–Dec 2012); Clermont and Eisenberg, 100 Cornell L Rev at 206–07 (cited in note 20).

<sup>118</sup> Dodson includes represented plaintiffs, plaintiffs proceeding pro se, and IFP plaintiffs. Dodson, 96 Judicature at 130–32 (cited in note 117). Analysis of his results reveals that the statistically significant effect is entirely concentrated among prisoner-litigation claims brought by IFP prisoners; there is no significant change in the rate at which district courts dismiss claims in cases with represented plaintiffs. (This conclusion is based on analysis of Table 2 of Dodson’s article.) *Id.* at 132. Clermont and Eisenberg use administrative data and report effects of *Twombly* and *Iqbal* that are concentrated among pro se cases. Clermont and Eisenberg, 100 Cornell L Rev at 194–95, 206–07 (cited in note 20).

<sup>119</sup> Christina L. Boyd and David A. Hoffman, *Litigating toward Settlement*, 29 J L, Econ & Org 898, 911 (2012). It should be noted, though, that Boyd and Hoffman’s sample was limited to cases involving corporate veil piercing allegations. *Id.* at 908–09. While I



need for motion practice or discovery to reach settlement, why did the plaintiff bother to file at all? The answer provided above is that the act of filing a detailed complaint itself promotes settlement.<sup>120</sup>

#### F. Case Law

While the thought experiment presented in Part I presupposes an *absence* of case law or doctrine on pleading, Part II recognizes that there are pleading standards enforced by judges and that this theory of pleading should predict both the nature of the complaints that judges see and how judges respond. While it would be impossible for this Article to satisfactorily canvas the jurisprudence on pleading, I offer a handful of examples, including the two seminal pleading cases, *Conley* and *Twombly*, to suggest that the pleadings in those cases, and the judicial responses to those pleadings, are better predicted by this theory of pleading than by even the doctrine attributed to those very cases.

I begin with *Conley*, the case that has long stood for notice pleading.<sup>121</sup> The funny thing about *Conley* is that the pleadings in *Conley* were rife with factual detail. The Court summarized the facts alleged in the plaintiffs' complaint:

Petitioners were employees of the Texas and New Orleans Railroad at its Houston Freight House. Local 28 of the Brotherhood was the designated bargaining agent under the Railway Labor Act for the bargaining unit to which petitioners belonged.

A contract existed between the Union and the Railroad which gave the employees in the bargaining unit certain protection from discharge and loss of seniority.

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see no reason why these cases would be exceptional in any way relevant to the argument here, there remains a need for further empirical evidence on this point.

<sup>120</sup> This is hardly a secret among practitioners. See, for example, Robert L. Haig, ed, 1 *Business and Commercial Litigation in Federal Courts* § 7:33 at 572 (Thomson Reuters 3d ed 2011):

A well-developed complaint may force the defendant to confront many questions that will require answers if it hopes to prevail; the more of these questions that give the defense pause, the more likely that it will be receptive to considering early settlement discussions or mediation on terms favorable to the plaintiff.

<sup>121</sup> *Conley*, 355 US at 47 (“[A]ll 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.”) (citation omitted).

In May 1954, the Railroad purported to abolish 45 jobs held by petitioners or other Negroes all of whom were either discharged or demoted.

In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority.

Despite repeated pleas by petitioners, the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees.<sup>122</sup>

Could there have been any doubt that this complaint contained enough factual detail to state a plausible claim under *Twombly*? No. Indeed, the Supreme Court in *Conley* said it had “no doubt” that the complaint’s factual allegations were sufficient.<sup>123</sup> Rather, the central question in *Conley* had nothing to do with pleading of facts; it was whether the duty of “fair representation” under the Railway Labor Act barred racial discrimination by the union in pursuing grievances brought by union members.<sup>124</sup> As Professor Alexander Reinert notes, “*Conley* was a strange poster child for notice pleading—the plaintiffs had provided extensive factual detail, they had specified their legal claims, and neither party briefed or addressed Rule 8.”<sup>125</sup> For the complaint in *Conley* itself, nothing turned on the difference between notice pleading and plausibility pleading.

In the long interim between *Conley* and *Twombly*, a small literature documented the consistent practice of the federal courts to see, and expect, factually detailed pleadings, even in the wake of *Conley*. Thirty years ago, Professor Richard Marcus concluded that notice pleading was a “chimera.”<sup>126</sup> Over a decade ago, Professor Christopher Fairman called it a “myth,”<sup>127</sup> providing numerous examples of what appeared to be a wide range of ad hoc standards employed by district courts in ruling on motions to dismiss.<sup>128</sup> These standards, whatever they were, were not notice

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<sup>122</sup> Id at 43 (paragraph breaks added).

<sup>123</sup> Id at 48.

<sup>124</sup> Id at 43, 45–46.

<sup>125</sup> Reinert, 86 Ind L J at 128 (cited in note 4).

<sup>126</sup> Marcus, 86 Colum L Rev at 451 (cited in note 12).

<sup>127</sup> Christopher M. Fairman, *The Myth of Notice Pleading*, 45 Ariz L Rev 987, 988 (2003).

<sup>128</sup> Id at 998–1011.

pleading. Judges expected something more and were willing to dismiss the occasional complaint that failed to state a plausible case. Marcus lamented: “Whatever the reason, for more than twenty years after *Conley*, there was virtually no academic recognition that pleading practice had not vanished; defendants continued to make motions to dismiss and courts continued to grant them.”<sup>129</sup> Of course, *Conley*’s famous dictum did not go away. As recently as 2002, in *Swierkiewicz v Sorema NA*,<sup>130</sup> the Court recited the rule that “[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”<sup>131</sup>

Nonetheless, the Supreme Court itself in *Twombly* noted that over the previous half century, “a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard.”<sup>132</sup> A striking example of such a “balk” is *Car Carriers, Inc v Ford Motor Co*,<sup>133</sup> which, like *Twombly*, involved a complaint alleging an antitrust conspiracy that the court held failed to state a claim, despite a number of detailed factual allegations.<sup>134</sup> Twenty-three years before *Twombly*, the *Car Carriers* court said no fewer than three times that given the allegations in the complaint, the claim was “implausible.”<sup>135</sup>

Finally, the *Twombly* litigation reveals the same pattern of detailed pleading and an implicit requirement of factual allegations that render a claim plausible. The most telling if oft-overlooked fact about *Twombly* is this: in 2003, the district court dismissed the complaint.<sup>136</sup> Notably, the district court did so only a year after *Swierkiewicz* reiterated the *Conley* dictum. The Supreme Court’s “sweeping,” “startling,” and “surprising”<sup>137</sup> decision in *Twombly* simply affirmed the decision that the district

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<sup>129</sup> Marcus, 86 Colum L Rev at 434 (cited in note 12).

<sup>130</sup> 534 US 506 (2002).

<sup>131</sup> Id at 514, quoting *Hishon v King & Spalding*, 467 US 69, 73 (1984) (brackets in original). Note, though, that *Leatherman v Tarrant County Narcotics Intelligence and Coordination Unit*, 507 US 163 (1993), another oft-cited pre-*Twombly* pleading case, avoided citing this dictum.

<sup>132</sup> *Twombly*, 550 US at 562.

<sup>133</sup> 745 F2d 1101 (7th Cir 1984).

<sup>134</sup> Id at 1104–05, 1110.

<sup>135</sup> Id at 1109–10.

<sup>136</sup> *Twombly v Bell Atlantic Corp*, 313 F Supp 2d 174, 189 (SDNY 2003), vacd and remd, 425 F3d 99 (2d Cir 2005), revd, 550 US 544 (2007).

<sup>137</sup> Smith, 36 Pepperdine L Rev at 1063 (cited in note 3).

court, subject to the binding precedent of *Conley* and *Swierkiewicz*, made four years prior.

Notable, too, is the Second Circuit's opinion, which was reversed by the Supreme Court. It invoked the terminology of plausibility pleading, even as it vacated the district court opinion. Consider the following quotations, which are drawn from the Second Circuit's and the Supreme Court's decisions in *Twombly*. Pop quiz: Which of these quotations come from the court embracing notice pleading, and which come from the court rejecting it?

A: "If a pleaded conspiracy is implausible on the basis of the facts as pleaded—if the allegations amount to no more than 'unlikely speculations'—the complaint will be dismissed."<sup>138</sup>

B: "[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>139</sup>

C: "We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, [and] that the success of such meritless claims encourages others to be brought."<sup>140</sup>

D: "[Pleading rules serve the practical purpose of preventing] a plaintiff with a largely groundless claim [to] be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value. . . . Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive."<sup>141</sup>

Whatever the difference was between the Second Circuit, which applied the notice pleading standard of *Conley*, and the Supreme Court, which announced a new regime of plausibility pleading, it was not that the Second Circuit failed to require that the plaintiff's claim for relief be plausible!

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<sup>138</sup> *Twombly v Bell Atlantic Corp.*, 425 F3d 99, 111 (2d Cir 2005), rev'd, 550 US 544 (2007).

<sup>139</sup> *Twombly*, 550 US at 570.

<sup>140</sup> *Twombly*, 425 F3d at 117.

<sup>141</sup> *Twombly*, 550 US at 558 (quotation marks omitted).

In sum, the complaint in *Conley* would have survived under *Twombly*, the district court in *Twombly* dismissed the complaint under *Conley*, and the Second Circuit in *Twombly* required plausibility under *Conley*. These facts together raise at least the possibility that, just as detailed pleading has been nothing new for plaintiffs' attorneys, plausibility pleading has been nothing new for judges. As one practitioner argued shortly after it was decided, *Twombly* "is less a sea change as it is a recognition of what was already going [on] out there in the trenches."<sup>142</sup>

This leaves only the puzzle of why the Supreme Court bothered to address pleading standards when it did—or at all. On this question, I offer only conjectures. Perhaps *Twombly* and *Iqbal* were simply "oddball" cases, to use the term coined by Professor Suja Thomas,<sup>143</sup> and perhaps the Supreme Court was engaged in rare exercises in error correction. Perhaps they are just a product of the Roberts Court's distinctive interest in civil procedure and the Court's efforts, as Professor Howard Wasserman puts it, to "clean up doctrinal confusion" in the field.<sup>144</sup> Perhaps the Supreme Court is a lagging, rather than leading, indicator of changes in civil procedure and practice; Professor Hillel Levin has noted that this is not the first time that a landmark Supreme Court decision on procedure ultimately proved to be little more than a confirmation of existing practice.<sup>145</sup> Indeed, for more than a decade after the *Celotex* trilogy was decided in 1986,<sup>146</sup> a steady stream of articles argued that these cases had brought about the end of the jury trial. But empirical studies found that summary judgment rates rose, and trial rates fell, years before the *Celotex* trilogy, and that in fact those rates were basically flat throughout the 1980s.<sup>147</sup>

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<sup>142</sup> Jeff Jeffrey, *The Changing World of Civil Procedure Post Twombly, Iqbal* (The Blog of Legal Times, June 18, 2010), archived at <http://perma.cc/4Q9W-23MS> (quoting attorney Andrew Pincus).

<sup>143</sup> Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U Ill L Rev 215, 216.

<sup>144</sup> Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 Rev Litig 313, 317 (2012).

<sup>145</sup> Hillel Y. Levin, *Iqbal, Twombly, and the Lessons of the Celotex Trilogy*, 14 Lewis & Clark L Rev 143, 143–45 (2010).

<sup>146</sup> See generally *Matsushita Electric Industrial Co v Zenith Radio Corp*, 475 US 574 (1986); *Anderson v Liberty Lobby, Inc*, 477 US 242 (1986); *Celotex Corp v Catrett*, 477 US 317 (1986).

<sup>147</sup> See Joe S. Cecil, et al, *A Quarter-Century of Summary Judgment Practices in Six Federal District Courts*, 4 J Empirical Legal Stud 861, 872, 881–83 (2007).

## IV. THE “LIBERAL ETHOS” IN MODERN PRACTICE

In presenting its account of plausibility pleading, the objectives of this Article have been essentially descriptive, rather than normative. But if plausibility pleading is—and has long been—the norm, one might ask whether this stands in tension with the purposes of pleading under the FRCP and the liberal ethos that the FRCP introduced in 1938. As Professor Marcus put it, “Dean Clark and the other drafters of the Federal Rules set out to devise a procedural system that would install what may be labelled the ‘liberal ethos,’ in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.”<sup>148</sup>

Professor Spencer captures a widespread sentiment in arguing that with *Twombly* and *Iqbal* the courts have rejected the liberal ethos of civil procedure in favor of what he calls the “restrictive ethos” in civil procedure.<sup>149</sup> The restrictive ethos is “characterized by a desire to discourage certain claims and to keep systemic litigation costs under control.”<sup>150</sup> This “restrictive ethos . . . frustrates the ability of claimants to prosecute their claims and receive a decision on the merits in federal court.”<sup>151</sup>

While the merely descriptive account presented in this Article does not establish any definitive normative claims about plausibility pleading, it does provide a framework for understanding its effects, which facilitates an evaluation of the doctrine. As I argue herein, the juxtaposition of “liberal” notice pleading and “restrictive” plausibility pleading may be more apparent than real. As Professor Bone has argued, the vision of the drafters of the FRCP was a pragmatic one,<sup>152</sup> and we should entertain the possibility that plausibility pleading serves the same ends today that notice pleading sought to serve in 1938. Indeed, I make a more audacious claim: The paradox of plausibility pleading is not that it hurts plaintiffs facing information asymmetries. Rather, it is that plausibility pleading not only is consistent with the liberal ethos but also may help both defendants and plaintiffs in a world of costly litigation and sometimes-hostile judges.

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<sup>148</sup> Marcus, 86 Colum L Rev at 439 (cited in note 12).

<sup>149</sup> Spencer, 78 Geo Wash L Rev at 353 (cited in note 14).

<sup>150</sup> Id at 366.

<sup>151</sup> Id at 353–54 (quotation marks omitted).

<sup>152</sup> Bone, 94 Iowa L Rev at 890–98 (cited in note 22).

Of course, *Twombly* and *Iqbal* certainly do not promote the resolution of disputes by jury trial or after discovery. Quite the opposite: they seem to prefer disposition at the pleading stage, before discovery. But any conclusion as to the demise of the liberal ethos and the rise of the restrictive ethos would be doubly overstated. Judged by the standard of “disposition [ ] on the merits, *by jury trial, after full disclosure through discovery*,”<sup>153</sup> the liberal ethos has never taken hold; jury trials after full discovery constitute about 3 percent of all federal court civil dispositions and did so long before *Twombly*.<sup>154</sup> But neither has the restrictive ethos taken hold; both before and after *Twombly* and *Iqbal*, granted motions to dismiss compose an equally small share of federal court civil dispositions. This bears repeating: only about 3 percent of federal civil cases are resolved by a jury trial—but only about 3 percent of federal civil cases are resolved by a motion to dismiss.

More to the point, judges have never been the gatekeepers to federal court, either before or after *Twombly* and *Iqbal*. That role has always belonged to plaintiffs’ attorneys. Pleading standards have little bite because litigation costs and litigation strategy constrain plaintiffs far more severely than pleading rules.

The infrequency of jury trials and the relative unimportance of pleading standards are signs that our usual conception of the liberal ethos relies on a dichotomy—between resolution *on the merits at trial* and resolution *due to technical defects in the pleadings*—that no longer exists. This dichotomy famously existed under common-law pleading and was a concern of Clark and the drafters of the FRCP.<sup>155</sup> But it is irrelevant today. Instead, both resolution at trial *and* resolution on the pleadings are unusual outcomes in modern litigation. As Professor Maria Glover notes, the real endgame is settlement.<sup>156</sup> The liberal ethos of the FRCP needs to be understood in this light.

How does one translate the liberal ethos into a world of settlement? The key can be found in another famous dictum from

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<sup>153</sup> Marcus, 86 Colum L Rev at 439 (cited in note 12) (emphasis added).

<sup>154</sup> Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J Empirical Legal Stud 705, 715 (2004).

<sup>155</sup> See Spencer, 78 Geo Wash L Rev at 354–56 (cited in note 14) (“Simplified pleading and broad discovery were designed to promote resolution of disputes on the substantive merits as opposed to procedural technicalities.”) (citations omitted).

<sup>156</sup> J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 NYU L Rev 1713, 1715–16 (2012).

*Conley*: “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>157</sup> The critical distinction is not between pleading and trial, but between resolution of litigation as a game of skill versus resolution on the merits. With common-law pleading long buried, however, the game of skill today is not exploitation of the traps and technicalities of pleading but rather strategies that lead to settlements or other outcomes unjustified by the merits of the claim but instead driven by litigation costs. These strategies can be used to deprive both plaintiffs and defendants of resolution on the merits. Of course, the *Twombly* Court was focused on the dangers that high litigation costs pose to defendants,<sup>158</sup> but this concern is not unique to them. From the plaintiff’s perspective, litigation costs are also a first-order concern, because high litigation costs deter potentially meritorious claims for modest damages.

Once viewed in this light, it is no foregone conclusion that plausibility pleading represents a departure from the liberal ethos. First, plausibility pleading must be judged on the extent to which it promotes or inhibits resolution on the merits rather than through a game of skill. In Part IV.A, I argue that plausibility pleading serves the ends of the liberal ethos. Although it hardly promotes discovery or jury trials, it does foster the resolution of cases on the merits that otherwise would be not tried to a jury but rather settled based on a game of skill.

Second, plausibility pleading’s effect on plaintiffs, and on the ability of aggrieved parties to gain access to discovery, must be assessed in light of the fact that the vast majority of complaints will never be challenged with a motion to dismiss, and thus we must ask what effect plausibility pleading has on those plaintiffs close to the margin of dismissal. In Part IV.B, I argue that raising pleading standards can increase access to the courts for those marginal plaintiffs whose risky but plausible claims would otherwise be too expensive to litigate.

#### A. “On the Merits” Rather Than a “Game of Skill”

Despite the fact that it is a source of much criticism of the plausibility standard, the *whole point* of the plausibility

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<sup>157</sup> *Conley*, 355 US at 48.

<sup>158</sup> *Twombly*, 550 US at 558–59.



standard is that the court is judging the *merits* of the complaint.<sup>159</sup> It is true, of course, that a judicial judgment on the merits early in a case is likely to be less accurate than a judicial (or jury) judgment on the merits after full discovery and trial.<sup>160</sup> This is a fair criticism. But the relevance of this fact is overstated. It assumes that the alternative to a decision at the pleading stage is a decision at the trial stage. However, such an assumption is almost quaint in a world in which fewer than 5 percent of cases reach trial.<sup>161</sup> Instead, most cases settle. Thus, the relevant comparison is the extent to which a decision (one way or the other) at the pleading stage is a less accurate reflection of the merits than a *settlement* by the parties in the shadow of the likely outcome, and the likely cost, of taking a case to judgment. Indeed, *Twombly's* concern was a case that would settle not because it had merit, but because the costs of discovery were large and asymmetrically burdensome to the defendant. In short, the alternative to dismissal is not necessarily resolution on the merits. Settlement may or may not be on the merits, and dismissing a case *on the merits* is preferable to settlement *not on the merits*.

Of course, because the true merit of a case is never perfectly observable to the court, any system that dismisses some cases at the pleading stage runs the risk of dismissing a case that, had it not been dismissed, would have settled *on the merits*. It is this trade-off between benefit (preventing settlements not on the merits) and cost (preventing settlements on the merits) that is, or at least should be, the central issue in the debate on the wisdom of *Twombly* and *Iqbal*. We must assess the extent to which plausibility pleading makes a difference in those cases that might otherwise be decided on the merits rather than as a game of skill.

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<sup>159</sup> Marcus made this point long before *Twombly*. Marcus, 86 Colum L Rev at 454 (cited in note 12):

Under the received tradition, the problem with common law pleading practice was that, while it led to actual decisions, it often did not lead to merits decisions because cases were frequently resolved on technicalities. The notice pleading scenario, by way of contrast, eliminates the possibility for even genuine merits decisions at the pleadings stage. The middle ground is to use pleadings practice to make genuine and reliable merits decisions. Contrary to expectation, this activity is not dead, though it is often camouflaged in notice pleading language.

<sup>160</sup> See, for example, Steinman, 62 Stan L Rev at 1312 (cited in note 4); Spencer, 49 BC L Rev at 434 (cited in note 4); Hoffman, 88 BU L Rev at 1263 (cited in note 6).

<sup>161</sup> See Hadfield, 1 J Empirical Legal Stud at 715 (cited in note 154).

In this respect, the theory of pleading that I develop above offers guidance: in most cases, the pleading standard simply will not make a difference. Importantly, this is true even for cases in which there is an asymmetry of information favoring the defendant. There are some categories of cases, though, for which pleading standards may affect whether a case is filed or, if it is filed, whether it is dismissed: (1) cases with pro se or IFP plaintiffs; (2) suits driven by spite, indignation, or optimism; (3) low-merit nuisance suits; and (4) shoot-the-moon cases.

Notably, three of these four categories comprise cases that, by definition, do not settle on the merits. Suits filed only because of spite, indignation, or optimism, as well as low-merit nuisance suits and shoot-the-moon cases, have settlement value *despite* their lack of merit.

So, for the vast bulk of cases that are going to settle on the merits, the pleading standard is not going to have much (if any) effect on outcomes. And most types of cases for which plausibility pleading may lead to more dismissals are cases that will not otherwise settle on the merits. By replacing *settlement not on the merits* with *dismissal on the merits*, plausibility pleading serves, rather than departs from, the ends of the liberal ethos.

But not perfectly. The fourth category of cases that may be affected by plausibility pleading includes cases with pro se or IFP plaintiffs. While many cases brought by such plaintiffs may be low merit such that dismissal is normatively desirable, many may not be. In particular, one might expect pro se plaintiffs to be less effective than represented parties at assessing the merits of their claims, screening on the merits, and drafting detailed and effective complaints. The classic case, *Dioguardi v Durning*,<sup>162</sup> is emblematic of precisely this concern. If so, and if higher pleading standards are applied to such plaintiffs, then relatively strong cases may be dismissed under a higher pleading standard. This counsels caution in the application of plausibility pleading to pro se and IFP plaintiffs. For these claimants, *Erickson* provides a doctrinal hook for a more liberal approach,<sup>163</sup> and perhaps it is no surprise that one of the leading examples of liberality in the application of plausibility pleading, *Swanson v Citibank, NA*,<sup>164</sup> involved a pro se plaintiff.<sup>165</sup>

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<sup>162</sup> 139 F2d 774 (2d Cir 1944) (Clark).

<sup>163</sup> *Erickson*, 551 US at 94.

<sup>164</sup> 614 F3d 400 (7th Cir 2010).

<sup>165</sup> *Id* at 402.

B. When to Hold and When to Fold<sup>166</sup>

Imagine a poker player who sits down to play a hand of poker. Both she and her opponent are skilled poker players, but only one will win the hand; the other will lose all of the money she has bet. But this poker player has to worry not only about her opponent, for this is an unusual poker game. There is a third person sitting at the table, the dealer, and although most dealers are fair, there is a chance that this dealer has stacked the deck against her. Of course, she still may be able to win the hand; a good player will sometimes beat the odds. But a good player also knows that, on average, she will lose more than she wins when the deck is stacked against her.

The dealer deals the players their cards. Our player looks at her hand: it is a decent, but not great, set of cards. With a fair deck, she would have a good shot at winning the hand, but with a stacked deck, this hand is a losing proposition. She faces a dilemma: What to do?

At this point, imagine that the dealer says the following: “I know you’re worried about whether you’re playing with a stacked deck. I’m not going to keep you in the dark forever. After you have placed your bets and just before you reveal your hand, I will reveal whether the deck is stacked against you.”

Now, consider an alternative scenario. The dealer instead says, “I will reveal whether the deck is stacked at the very beginning of the game, before you place any bets. But there is a catch: if I reveal that the deck is stacked against you, I will force you to fold.”

In which scenario is our poker player better off? Put another way, in which scenario would our poker player even be willing to sit down at the table?

In the first scenario, our poker player’s response to the dealer’s offer will be, “Thanks for nothing.” By the time she discovers whether the deck is stacked, she has already placed her bets and there is nothing she can do but hope for the best and see how the cards fall.

But in the second scenario, it is as if she is playing a fair game. If the dealer reveals a fair deck, then she can play the game with confidence. And if the dealer reveals a stacked deck,

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<sup>166</sup> I am indebted to conversations with Professors Bill Landes and J.J. Prescott for developing the ideas in this Section. They bear no culpability, however, for the poker metaphor. But see Kenny Rogers, *The Gambler* (United Artists 1978).

then she has no choice but to fold—but that is exactly what she would do anyway, given that she now knows she is playing an unfair game. The early revelation of information ensures that she risks her money only when the deck is fair.

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A major concern with plausibility pleading is that the vague, loosely defined standard of plausibility invites or even requires the exercise of discretion by judges, who may exercise their discretion in a way that reflects bias, whether conscious or unconscious. To the extent that these biases reflect hostility or incredulity toward the claims of certain plaintiffs, this could lead to those claims being dismissed—even if such claims, objectively considered, deserve an opportunity for discovery and trial on the merits.<sup>167</sup>

This is a powerful critique of the plausibility standard. But this critique looks only at the dismissal decision itself, ignoring the larger context in which a motion to dismiss takes place. A judge exercises discretion throughout a lawsuit—discretion that can profoundly affect the likely outcome of a trial or the value of a settlement. In other words, the problem that this critique identifies is not the plausibility standard—it is judicial bias.

Of course, no plaintiff wants to see her complaint dismissed because the judge is biased against her claim. But whether the complaint is dismissed or not, the plaintiff is stuck with the judge to whom her case is assigned, and that same judge will decide motions on the scope of discovery, motions for summary judgment, and evidentiary motions at trial. Thus, plausibility pleading does not create the problem of judicial bias; it simply reveals it earlier in the litigation process. And as the poker analogy above makes clear, if one faces a potentially biased decisionmaker, it is better to have the decisionmaker reveal his bias sooner rather than later. A judicial order revealing whether the

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<sup>167</sup> See Bone, 94 Iowa L Rev at 889 (cited in note 22) (noting that “critics fear that *Twombly* gives too much latitude to district judges, who are eager to screen cases and likely to read the opinion as granting permission to do so”); A. Benjamin Spencer, *Iqbal and the Slide toward Restrictive Procedure*, 14 Lewis & Clark L Rev 185, 199–200 (2010) (“Indeed, an important function of the jury is to screen out [the judge’s] institutional bias, making it even more disconcerting that the *Iqbal* decision gave judges more power to scrutinize facts at the pleading stage.”) (citation omitted); Hoffman, 88 BU L Rev at 1260 (cited in note 6) (noting that “imbuing courts with discretion to conduct factual sufficiency review of merits allegations is likely to lead to [ ] disparities in judicial practices at the pleading stage, across different categories of cases and different courts”).

judge considers a plaintiff's claim plausible is a tremendously valuable piece of information to a plaintiff with an uncertain claim facing the prospect of spending tens or hundreds of thousands of dollars on a lawsuit that may be decided by a hostile judge.

Strong cases will generally be immune from bias at the pleading stage, given that, for all the reasons elaborated above, plaintiffs with strong cases will be willing and able to draft factually detailed complaints. These complaints will easily meet the plausibility standard and will not even be challenged by motions to dismiss. A biased judge can do nothing about these cases. Bias matters, though, for cases close to the margin of plausibility. But precisely because they have weaker factual foundations, these cases are also likely to be marginal at summary judgment or at trial—times when the judges' biases could also have profound effects. These marginal cases therefore stand to gain from plausibility pleading, because a dismissal simply reveals what would likely be an inevitable outcome anyway—a loss on the merits at the hands of the judge—but without the investment in time and money necessary to get the case through discovery to summary judgment.

To be clear, “bias” in this context need not reflect any improper prejudice against a party, although it is precisely this sort of bias that motivates the concerns about plausibility pleading noted above. Rather, “bias” as I am using the term includes both improper prejudice and simply a judge's personal take on the facts, distinct from the parties' views. If the judge perceives or interprets the legal implications of facts alleged in the complaint differently from the plaintiff, this can have a major impact on the plaintiff's likelihood of ultimate success on the merits! Thus, whether due to antipointiff attitudes or merely a good faith take on the facts, the judge's bias is something that the plaintiff wants to identify sooner rather than later.

Further, the *denial* of a motion to dismiss is a sign that the judge is not too biased against the plaintiff, and this is a valuable signal to the *defendant* as well. It means that the deck is not stacked in the defendant's favor (and may even be stacked in the plaintiff's favor). As a consequence, just as the granting of a motion to dismiss defeats a marginal claim but saves the plaintiff further litigation costs, the denial of a motion to dismiss reveals that the judge is more likely to be favorably disposed toward the plaintiff than previously estimated. This additional information

may, in turn, promote a quick settlement for the parties, given that the defendant's outlook has dimmed and an early dismissal is off the table.

To give a concrete example, let's say a plaintiff has a claim for a \$300,000 injury. Her lawyer believes that with an unbiased judge she has a 30 percent chance of winning at trial. But with a biased judge, she has only a 10 percent chance of winning at trial. Let's say that one out of every five judges is biased. Further, it costs \$10,000 to prepare a complaint and another \$70,000 to take the case through discovery to trial. In a world without the plausibility standard, is this a case worth bringing?

The answer is no. With an unbiased judge, the expected payoff from filing suit is:

$$\begin{aligned} \text{Probability of win} \times \text{Judgment amount} - \text{Total cost} & \quad (9a) \\ & = \text{Payoff} \end{aligned}$$

$$30\% \times \$300,000 - \$80,000 = \$10,000 \quad (9b)$$

With a biased judge, the expected payoff from filing suit is:

$$10\% \times \$300,000 - \$80,000 = -\$50,000 \quad (10)$$

So, without knowing whether the judge is biased or not, the plaintiff must weigh the 80 percent chance of an unbiased judge against the 20 percent chance of a biased judge. The net expected payoff is negative:

$$20\% \times (-\$50,000) + 80\% \times \$10,000 = -\$2,000 \quad (11)$$

But under a regime of plausibility pleading, a biased judge will dismiss the suit at the outset. The expected payoff with an unbiased judge is unchanged, but the expected loss from having a biased judge falls. With a biased judge, the suit is dismissed right away. This means that with a biased judge, the plaintiff's chance of winning falls to zero, but her costs are limited to the costs of preparing the complaint:

$$0\% \times \$300,000 - \$10,000 = -\$10,000 \quad (12)$$

Because the plaintiff's losses are limited when she gets a biased judge, it is now worthwhile to sue. Her net expected recovery is positive:

$$20\% \times (-\$10,000) + 80\% \times \$10,000 = \$6,000 \quad (13)$$

Of course, most cases will not be close to the margin of filing or not filing, nor close to the margin of dismissal. This is what the theory in Part I and the evidence in Part III tell us. But importantly, to the extent that cases are close to the margin, the plausibility standard *increases* the net expected value of claims when litigation is costly and judicial bias is a serious concern later in litigation and not just at the pleading stage.<sup>168</sup>

The information value of an early signal from the judge is not limited to scenarios of potential judicial bias. More generally, if plaintiffs are unsure of their own assessments of the facts, or of the legal consequences of those facts, the plausibility pleading standard serves as a safety valve. Rather than incurring the expense of litigating to summary judgment before getting a clear signal of the judge's view of the allegations, a plaintiff gets an early signal from the judge ruling on a motion to dismiss before having to bear the bulk of the costs of litigation. By creating an extra, early signal about the value of the plaintiff's claim, pleading standards increase the option value of borderline claims, because they dispose of the weakest claims before the plaintiff has to pay for further litigation. Given that litigation costs can be a deterrent for plaintiffs with otherwise-worthy claims, a procedural device that reduces expected litigation costs serves, rather than disserves, the liberal ethos by providing plaintiffs a slightly more meaningful opportunity to bring claims.

To be clear, we should expect this benefit to be small. I expect that most judges are essentially unbiased and that most plaintiffs' attorneys have a good sense of the strength of the claim before filing. Further, a defendant need not file a motion to dismiss and, as a matter of strategy, a defendant will forgo filing a motion to dismiss if litigating the motion benefits the plaintiff more than the defendant. Thus, it should not be surprising that, as I have already noted, motions to dismiss remain relatively uncommon events, even after *Twombly* and *Iqbal*. The fact that plaintiffs can benefit from motions to dismiss by getting early signals of

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<sup>168</sup> In unreported results (available from the author upon request), I show that this conclusion is generally true for cases close to the margin of filing or not filing and for cases close to the plausibility threshold. Of course, if litigation costs are very low, or if judicial bias manifests itself only at the pleading stage, these results do not hold.

courts' inclinations creates a natural check on their overuse by defendants.

#### CONCLUSION

Imagining what pleading would look like in a world with *no* pleading standard allows us to take a fresh look at plausibility pleading. What we find is that the seemingly stark doctrinal change wrought by *Twombly* and *Iqbal* should have had an attenuated effect in practice, precisely because the kind of factually detailed, plausible pleadings that these cases require are what most plaintiffs would file anyway—and were what most plaintiffs *did* file before *Twombly*. Equally importantly, even before *Twombly* and *Iqbal*, most plaintiffs who were unable to draft plausible pleadings simply did not file suit.

Of course, *requiring* plausible pleadings will surely have *some* effect. In this respect, my thought experiment helps distinguish which plaintiffs may be adversely affected, unaffected, or even aided by *Twombly* and *Iqbal*. There is widespread concern about plaintiffs with claims involving information asymmetries facing a paradox of pleading. But plausibility pleading has little or no adverse effect on such claims. These claimants *do* face a serious disadvantage, but it is the same disadvantage they faced before *Twombly* and *Iqbal*: litigation is simply too expensive relative to their expected recovery.

On the other hand, we might expect to see more *pro se* and IFP plaintiffs turned away after *Twombly* and *Iqbal*, at least if the courts do not sufficiently heed the counsel of *Erickson*. Other, less sympathetic categories of cases may be affected as well, such as cases driven by spite, low-merit cases, or shoot-the-moon lawsuits.

Some plaintiffs may even gain from plausibility pleading standards. Litigation is risky and expensive, and an early signal from the judge that resolves uncertainty—whether about the state of the law or simply the bias of the judge—is valuable. A poker player would rather learn that the deck is stacked against her when she still has a chance to fold than after going all in. Losing a case on a motion to dismiss is bad, but losing for the same reasons after spending tens of thousands of dollars on discovery is worse.

In sum, while most cases are unaffected by plausibility pleading standards, we can identify several limited sets of plaintiffs that may be affected. The potential effects for these plaintiffs,



however, point in different directions. Thus, while plausibility pleading may have little or no net effect on the volume of litigation or the rate of dismissals, it may slightly shift the composition of cases that reach discovery.

Finally, while it has been taken for granted that plausibility pleading represents a retreat from the liberal ethos of the FRCP, this view deserves to be reexamined. The liberal ethos ideals of full discovery and trial were never realized under notice pleading; plausibility pleading does nothing to change this. But the liberal ethos goal of resolving cases on the merits is largely served, rather than disserved, by plausibility pleading. Resolving cases on the merits—even with considerable inaccuracy—at the pleading stage must be judged against the alternative, which is settling cases. Settlement on the merits is surely preferable to dismissal, but settlement not on the merits is worse. By leaving most cases unaffected, but affecting (at least on the margin) cases driven by nonmerits factors such as nuisance value, spite, or lottery-ticket stakes, plausibility pleading promotes the ideal of resolution on the merits in a world in which the ideal of trial on the merits is usually little more than an aspiration.

There is one last wrinkle. We might expect that cases with plausible claims will settle on the merits and that cases with very high stakes or asymmetrical litigation costs will settle *not* on the merits. But “cases with plausible claims” and “cases with very high stakes or asymmetrical discovery costs” are not exclusive categories. A case can be both.<sup>169</sup> And while cases with a mix of plausible merit, high stakes, and asymmetrical costs are likely a small set of all filed cases, they may have a disproportionate impact on federal civil litigation as a whole.<sup>170</sup> How to deal with litigation that is driven by both merit and asymmetric litigation costs remains a critical policy question for civil procedure.

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<sup>169</sup> See Marcus, 86 Colum L Rev at 479 (cited in note 12) (“The problem is identifying a strike suit. . . . [T]here is no intrinsic relation between litigation expense or other disagreeable side effects of a lawsuit and the absence of merit in [a] plaintiff’s case.”); Spencer, 49 BC L Rev at 452 (cited in note 4) (noting that “discovery abuse in the form of impositional requests is not an evil unique to groundless or insufficiently pleaded claims” because “[s]uch abuse can occur regardless of whether the underlying claims are legitimate or meritless, well-pleaded or not”).

<sup>170</sup> See William H.J. Hubbard, *The Discovery Sombrero and Other Metaphors for Litigation*, 64 Cath U L Rev 867, 896 (2015) (noting that 5 percent of cases account for more than half of all litigation costs).