

IQBAL'S RETRO REVOLUTION

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INTRODUCTION

The Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*² represent a "philosophical sea change in American civil litigation."³ Although the exact meaning of these cases remains the topic of vigorous debate, there is nearly universal agreement that the decisions have "revolutionized the law on pleading"⁴ by shifting from a liberal notice pleading regime to a

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1. 550 U.S. 544 (2007).

2. 129 S. Ct. 1937 (2009).

3. *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 6 (2009) [hereinafter *Miller Testimony*] (statement of Arthur Miller, Professor, New York University School of Law).

4. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010). Professor Arthur Miller remarked: "I have spent my whole life with the federal rules, and this is one of the biggest deals I have ever seen." Tony Mauro, *Groups Unite to Keep Cases on Docket: Plaintiffs' Lawyers Seek to Stop Dismissals After Iqbal Decision*, NAT'L L.J., Sept. 21, 2009, at 1. Supreme Court practitioner and commentator Thomas C. Goldstein said that "*Iqbal* is the most significant Supreme Court decision in a decade for day-to-day litigation in the federal courts." Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 21, 2009, at A10; see also Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 80 (2010) ("After over half a century, the pleadings paradigm has undergone a transformation that may fundamentally change the way in which civil actions . . . are initiated and litigated."); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1063 (2009) ("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*.").

heightened “plausibility” paradigm⁵ in which courts are empowered to dismiss complaints that are insufficiently detailed.⁶

Given the importance of these cases, it is not at all surprising that *Twombly* and *Iqbal* have produced a torrent of legal scholarship.⁷ That scholarship has covered a wide array of topics. Many commentators have criticized the cases,⁸ others have attempted to define more precisely what the Supreme Court meant in *Iqbal* and *Twombly*,⁹ while still others have analyzed the

5. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008) [hereinafter Spencer, *Plausibility Pleading*] (“Notice pleading is dead. Say hello to plausibility pleading.”); Catherine T. Struve, *Procedure as Palimpsest*, 158 U. PA. L. REV. 421, 421 (2010) (describing *Twombly* as a “landmark pleading decision”).

6. See *Iqbal*, 129 S. Ct. at 1952.

7. See, e.g., Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009) [hereinafter Bone, *Court Access*]; Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules”*, 2009 WIS. L. REV. 535; Clermont & Yeazell, *supra* note 4; Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441 (2010) [hereinafter Dodson, *Comparative Convergences*]; Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>; Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61 (2007); Mark Herrmann, James M. Beck & Stephen B. Burbank, *Debate, Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141 (2009), <http://www.pennumbra.com/debates/pdfs/PlausibleDenial.pdf>; Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217 (2008); Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 FED. RULES DECISIONS 604 (2006); Malveaux, *supra* note 4; 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 (2010); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011; A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009) [hereinafter Spencer, *Pleading Doctrine*]; A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010); Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90 (2009); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010) [hereinafter Thomas, *New Summary Judgment*]; Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008); Elizabeth Thornburg, *Law, Facts, and Power*, 114 PENN. ST. L. REV. PENN. STATIM 1 (2010), <http://www.pennstatelawreview.org/114/114%20Penn%20Statim%201.pdf>; Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010).

8. See, e.g., Clermont & Yeazell, *supra* note 4.

9. See, e.g., Spencer, *Pleading Doctrine*, *supra* note 7, at 4 (“In this latest installment of my ongoing project to understand federal civil pleading standards, I turn to an effort to engage in a systematic analysis of

disproportionate impact the decisions are having or may have on particular kinds of cases.¹⁰

Whatever the approach of these articles, they share one feature: they describe the *Iqbal* plausibility standard as “novel” in the modern era¹¹ and nearly devoid of any historical precedent.¹² This Article challenges that conventional wisdom and argues that, although the post-*Iqbal* era is revolutionary (in the sense that it marks a sharp break with what immediately preceded it), it is not entirely new. Rather, the current pleading regime bears a sharp resemblance to the turbulent period from 1983 to 1993, after Federal Rule of Civil Procedure 11 was amended to combat frivolous litigation and before Rule 11 was revised to its current form. Specifically, the 1983 version of Rule 11 and *Iqbal* are similar in their motivation, implementation, and effects.

Just as the Supreme Court’s *Twombly* and *Iqbal* decisions were motivated by a concern about the costs of litigation,¹³ the Advisory Committee amended Rule 11 in 1983 to address “the rising number of civil lawsuits and increasing costs and delay in litigation.”¹⁴ Under the 1983 version of Rule 11 (unlike the current rule),

contemporary pleading doctrine that will hopefully yield a comprehensive theoretical description of its fundamental components and underlying rationale.”).

10. See, e.g., Schneider, *supra* note 7, at 519–20.

11. Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337, 1338 (2010) (describing *Twombly* and *Iqbal* as “thoroughly novel, quite uncertain, and shakily resting on a foundation laid by a faulty legal process”); see also Clermont & Yeazell, *supra* note 4, at 832 (“No prior model exists to help us understand how to test factual sufficiency now.”); Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 44 (2010) [hereinafter Dodson, *Presuit Discovery*] (“[*Twombly* and *Iqbal*] together have transformed federal civil pleading from a seventy-year pleading regime based primarily on notice to a newly-minted ‘plausibility’ regime based primarily on non-conclusory facts.” (footnotes omitted)); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 59–60 (2010) (“In [*Twombly* and *Iqbal*], the Supreme Court charted a new path in pleadings jurisprudence and established what I call ‘New Pleading.’”); Malveaux, *supra* note 4, at 80 (“*Iqbal* has ushered in a new pleading paradigm”); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1295 (“In *Twombly*, however, the Supreme Court appeared to endorse a new paradigm—plausibility pleading”); Struve, *supra* note 5, at 422 (describing *Iqbal* and *Twombly* as a “new approach to pleading”).

12. One exception is Professor Suja Thomas who argues that *Twombly* and *Iqbal* have caused “the 12(b)(6) dismissal standard [to] converg[e] with the standard for summary judgment.” Thomas, *New Summary Judgment*, *supra* note 7, at 17. But no commentary has made the comparison set forth in this Article between post-*Iqbal* pleading and pleading under the 1983 version of Rule 11.

13. See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (discussing high costs of discovery in antitrust cases).

14. GEORGENE M. VAIRO, *RULE 11 SANCTIONS* 8 (Richard G. Johnson ed., 3d ed. 2004).

sanctions were mandatory and generally payable to the other side, the rule contained no “safe harbor provision” by which an attorney could withdraw an allegedly frivolous paper with no penalty, and, most significantly for present purposes, attorneys had to certify that any allegations in the complaint were “*well grounded in fact*.”¹⁵ Although the “well grounded in fact” language was directed at the sufficiency of the lawyer’s prefiling investigation and not to the sufficiency of the complaint, courts used the 1983 version of Rule 11 to dismiss complaints that were not sufficiently specific, and thereby “tighten[ed] the liberal pleading regime” set forth in Rule 8(a).¹⁶ Indeed, commentators criticized the 1983 version of Rule 11 because it “created a risk that the threat of the imposition of sanctions would promote a revival of fact pleading that was antithetical to the spirit (if not the letter) of the Federal Rules of Civil Procedure.”¹⁷ This is precisely what scholars are saying about *Iqbal* today.¹⁸

The similarities do not end there, however. The plausibility standard that is the hallmark of the post-*Iqbal* era was also used from 1983 to 1993. Courts in that period examined the “plausibility” of the complaint as a factor in determining whether a complaint was sanctionable under the 1983 version of Rule 11 and, therefore, subject to dismissal.¹⁹ Thus, through its interpretation of Rule 8 in *Iqbal* and *Twombly*, the Supreme Court has achieved something very similar to what the 1983 rulemakers accomplished through

15. FED. R. CIV. P. 11 (1983) (amended 1993) (emphasis added).

16. Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 634 n.18 (1987); see also *Liggins v. Morris*, 749 F. Supp. 967, 971 (D. Minn. 1990) (“[Inadequately detailed] complaint[s] “will be subject to dismissal for failure to comply with Rule 8 and Rule 11 of the [FRCP]. In addition, the potential application of sanctions in the form of attorney’s fees or other appropriate relief under Rule 11 will be seriously addressed.”); Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1316 (2006) (noting that the 1983 version of Rule 11 served to “constrain the sweeping scope of Rule 8(a)”).

17. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1332, at 491 (3d ed. 2004); see also Note, *supra* note 16, at 644–45 (“[T]he [1983 version of] Rule 11 . . . undermine[s] the liberal pleading regime. In some cases, sanctions imposed under the grounded-in-fact clause threaten simplified pleading and its corollary of liberal discovery. The grounded-in-fact clause has been construed to demand that both lawyers and judges evaluate the plausibility of claims before they have gained a particularized understanding of the circumstances of those claims.”).

18. See, e.g., *Dodson, Presuit Discovery*, *supra* note 11, at 51 (noting that the primary impact of *Twombly* and *Iqbal* is the imposition of “a fact pleading requirement on Rule 8”).

19. See, e.g., *Moore v. Keegan Mgmt. Co. (In re Keegan Mgmt. Co. Sec. Litig.)*, 154 F.R.D. 237, 240 (N.D. Cal. 1994) (noting that under the 1983 version of the rule, for a pleading to be well grounded in fact, “at the time the complaint [was] filed, the attorney [had to] possess evidence, direct or circumstantial, sufficient to support a finding that the allegations [were] reasonably plausible”), *rev’d*, 78 F.3d 431 (9th Cir. 1996).

Rule 11: courts today, as they did from 1983 to 1993, are using a heightened plausibility standard to review complaints.²⁰

Further, the post-*Iqbal* era is strikingly similar to the 1983–1993 era of pleading in terms of its effects. As an initial matter, *Iqbal*, like the 1983 version of Rule 11, has spawned massive amounts of litigation seeking clarification of its meaning and copious amounts of scholarship criticizing the courts for imposing a heightened pleading standard that has led to too many complaints being dismissed early in the litigation.²¹ Further, commentators are condemning *Iqbal* in a variety of other ways that echo the criticisms directed at the 1983 version of Rule 11. First, commentators are calling *Iqbal* a “defendant’s tool,” which is how critics described the 1983 version of Rule 11.²² Second, a significant criticism of *Iqbal* is that it is subjective and gives judges too much discretion, which was a major complaint about the 1983 version of Rule 11.²³ Third, critics

20. A few commentators have noted the relationship between *Iqbal*'s plausibility requirement and Rule 11. Professors Clermont and Yeazell, for example, suggested that the Court “could have less disruptively attained an equivalent of the *Twombly* and *Iqbal* regime by aggressively rereading Rule 11 rather than Rule 8.” Clermont & Yeazell, *supra* note 4, at 849. Along these same lines, David Noll interprets *Iqbal* “as an attempt to police the policies underlying Rule 11.” David Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 127 (2010). Specifically, Noll argues that the *Iqbal* Court “sought to prevent one of the basic problems Rule 11 is directed at—factual allegations ‘without any factual basis or justification.’” *Id.* at 127 n.54 (quoting FED. R. CIV. P. 11 advisory committee’s note (1993)). Thus, Noll concludes that *Iqbal* should “be understood to reflect [the Court’s] conclusion that *Iqbal* lacked reasonable grounds to allege that Ashcroft and Mueller personally acted with a particular purpose.” *Id.* at 127. Others have also noted some connection between *Iqbal* and Rule 11. See Bone, *Court Access*, *supra* note 7, at 876 (“It makes no sense, for example, to strengthen pleading requirements if the same result can be achieved much better by bolstering Rule 11 sanctions . . .”); Hoffman, *supra* note 7, at 1253–54 (“[I]mposing a plausibility requirement at Rule 8(a)(2) is probably close—if not (at least sometimes) equivalent—to the Rule 11(b)(3) proscription against asserting claims for which there is no evidentiary support and no likelihood of evidentiary support after a reasonable opportunity for further discovery. That is, an allegation that is implausible may also be said to violate Rule 11(b)(3), although neither the majority nor the dissent in *Twombly* made mention of this possibility.” (footnote omitted)); Bradley Scott Shannon, *I Have Federal Pleading All Figured Out*, 61 CASE W. RES. L. REV. 453, 480 (2010) (describing Rule 11 as the “elephant in the (court)room”). None of these commentators, however, have explored the relationship between *Iqbal* and the 1983 version of the rule.

21. See *supra* notes 7–10 and accompanying text. For this criticism of the 1983 version of Rule 11, see Paul D. Carrington & Andrew Wasson, *A Reflection on Rulemaking: The Rule 11 Experience*, 37 LOY. L.A. L. REV. 563, 566–67 (2004) (“Rule 11 became a celebrated issue. . . . Three excellent books by distinguished authors sought to state or restate the law of Rule 11. In addition, scores of law review articles were written. No other single procedure rule in the nation’s history was ever given so much critical attention.” (footnote omitted)).

22. See *infra* Part V.B.

23. See *infra* notes 176–77 and accompanying text.

are condemning *Iqbal* for having a “chilling effect” on plaintiffs, which was a principal criticism of the 1983 version of Rule 11.²⁴ Finally, commentators are noticing that *Iqbal* is having a disproportionate effect on certain kinds of litigation—civil rights and employment discrimination cases in particular—which is the exact same thing that critics were saying about the 1983 version of Rule 11.²⁵

That *Iqbal* has returned us to the 1983–1993 era of pleading is, perhaps, not surprising given the opposition of Justices Scalia and Thomas—two of the five-justice majority in *Iqbal*—to the 1993 amendment of Rule 11. In opposing those changes, Justice Scalia wrote that the 1983 version of Rule 11 had been so effective in reducing frivolous litigation that “[t]he proposed revision would render the Rule toothless.”²⁶ Justice Scalia was correct that the 1993 amendment severely weakened Rule 11,²⁷ but now the *Iqbal* majority has, in many ways, turned back the clock to 1983.

This Article proceeds chronologically. Part I describes pleading from 1938 until 1983 under the notice pleading regime put in place by the drafters of the Federal Rules of Civil Procedure. Part II surveys the harsh features of the 1983 amendments to Rule 11 and the effect it had on pleading. Part III details the 1993 amendments to Rule 11 that restored notice pleading. Part IV discusses the *Twombly* and *Iqbal* decisions and the important ways in which they changed pleading. Part V then explores the significant similarities between the 1983–1993 era of pleading and the post-*Iqbal* era, including the implications of this historical link.

I. PLEADING FROM 1938 TO 1983

Pleading is often described as the “gatekeeper for civil litigation.”²⁸ At the pleading stage, courts decide which cases will survive and proceed to subsequent stages of litigation, including potentially expensive and time-consuming discovery, and which cases will not. In setting pleading standards, rulemakers concern themselves primarily with balancing two competing concerns: (1) “citizen access to the justice system and merit adjudications based on the full disclosure of relevant information”—which weigh in favor of more liberal pleading standards—and (2) concerns about combating abusive and frivolous lawsuits—which weigh in favor of

24. See *infra* Part V.C.

25. See *infra* Part V.D.

26. Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 507 (1993) (Scalia, J., dissenting).

27. Charles Yablon, *Hindsight, Regret, and Safe Harbors in Rule 11 Litigation*, 37 LOY. L.A. L. REV. 599, 611 (2004) (“There is no doubt that Rule 11 got some of its teeth pulled in 1993 . . .”).

28. Clermont & Yeazell, *supra* note 4, at 824.

more restrictive standards.²⁹ Efforts to strike the right balance between these goals is the dominant theme in the story of pleading in the modern era, and, as the *Iqbal* saga shows, that tension continues today.

The primary goal of the drafters of the original 1938 Federal Rules of Civil Procedure was to liberalize pleading standards. By promulgating those rules, the Supreme Court launched the modern era of notice pleading, ending “centuries of dispute over the words the plaintiff needed to say to start a lawsuit.”³⁰ Before the enactment of the Federal Rules of Civil Procedure, pleadings had to lay out the issues in dispute and state facts “in considerable detail.”³¹ Moreover, courts frequently dismissed complaints because of technicalities.³²

By contrast, under the new system of notice pleading, the drafters of the rules made clear that “[n]o technical form[s of pleadings and motions are] required,”³³ and a complaint would be sufficient under Rule 8 if it contained “a short and plain statement of the claim showing that the pleader is entitled to relief.”³⁴ The rulemakers showed “just how serious [they] were about simplifying pleading”³⁵ when they attached forms to the rules that demonstrated “how very little was required of plaintiffs.”³⁶ “Form 11 sets forth a vehicular-negligence claim in thirty-seven words, achieving this brevity in part by blessing the use of conclusory terms: ‘[T]he defendant negligently drove a motor vehicle. . . . As a result, the plaintiff was physically injured’”³⁷

29. See *Miller Testimony*, *supra* note 3, at 9.

30. Clermont & Yeazell, *supra* note 4, at 824.

31. *Id.*; see *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 88 (2009) [hereinafter *Burbank Testimony*] (statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania Law School) (“Those who drafted the Federal Rules objected to fact pleading because it led to wasteful disputes about distinctions—among ‘facts,’ ‘conclusions,’ and ‘evidence’—that they thought were arbitrary or metaphysical.”); Spencer, *Plausibility Pleading*, *supra* note 5, at 434 (characterizing the pre-1938 pleading rules as a “cumbersome and inelegant code pleading system that required the pleading of ‘ultimate facts’ rather than mere ‘evidentiary facts’ or ‘conclusions’” (footnote omitted)).

32. Clermont & Yeazell, *supra* note 4, at 824 (“[T]he rulemakers felt that [the older system] asked too much of the pleading stage, which consequently had become the center of legal attention, ended up mired down in battles over technicalities, and provided a vehicle for monumental abuse.”).

33. FED. R. CIV. P. 8(d)(1).

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

35. Clermont & Yeazell, *supra* note 4, at 824.

36. *Burbank Testimony*, *supra* note 31, at 89.

37. Clermont & Yeazell, *supra* note 4, at 824–25 (alterations in original) (discussing FED. R. CIV. P. form 11). Rule 84 provides that “[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” FED. R. CIV. P. 84.

In the landmark 1957 case of *Conley v. Gibson*,³⁸ the Supreme Court embraced the concept of “notice pleading,” making clear that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”³⁹ Instead, the Court said, a complaint is sufficient as long as it “give[s] the defendant *fair notice* of what the plaintiff’s claim is and the grounds upon which it rests.”⁴⁰ Further, the Court uttered its famous statement (which the *Twombly* Court “retired”): “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁴¹

This notice-pleading standard made “starting a lawsuit unsupported by evidence very easy.”⁴² The “motivating theory” behind this liberal pleading standard was that “the stages subsequent to pleading—disclosure, discovery, pretrial conferences, summary judgment, and trial—could more efficiently and fairly handle functions such as narrowing issues and revealing facts.”⁴³

The original drafters of the Federal Rules included Rule 11—a specific provision governing attorney conduct—with the goal of increasing attorney responsibility to the court, but it was essentially a dead letter during this time period and therefore had no impact on Rule 8’s liberal pleading standard.⁴⁴ The earliest version of Rule 11 provided that an attorney’s signature on a pleading or motion

38. 355 U.S. 41 (1957).

39. *Id.* at 47.

40. *Id.* (emphasis added).

41. *Id.* at 45–46. Several commentators have noted that when the *Conley* Court uttered its famous “no set of facts” phrase, it was talking about the legal sufficiency of the complaint rather than factual sufficiency. See, e.g., Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 113 (2009); Wendy Gerwick Couture, *Conley v. Gibson’s “No Set of Facts” Test: Neither Cancer nor Cure*, 114 PENN ST. L. REV. PENN STATIM 19 (2010), <http://pennstatelawreview.org/114/114%20Penn%20Statim%2019.pdf>. As Professor Couture explained, courts, including the *Twombly* Court, have “conflate[ed]” the two tests, “treating them as synonymous.” *Id.* at 28. Thus, some commentators have argued that the *Twombly* Court’s “retirement” of this phrase is not particularly significant. E.g., *id.* at 29 (“[T]he ‘no set of facts’ test is not the cancer maligned by the *Twombly* Court.”). Because so many courts understand the “no set of facts” test to be about factual sufficiency, however, the Court’s retirement of that language is meaningful at least in the sense that it has signaled to lower courts the need for more detailed factual pleading.

42. Clermont & Yeazell, *supra* note 4, at 825.

43. *Id.*; Spencer, *Plausibility Pleading*, *supra* note 5, at 434 (“[S]ubsequent stages of the litigation process would enable the litigants to narrow the issues and test the validity and strength of asserted claims.”).

44. VAIRO, *supra* note 14, at 4–10. Before the Federal Rules of Civil Procedure were enacted in 1938, courts had the inherent (and after 1918, statutory) power to sanction lawyers, but traditionally, that power was rarely used. *Id.* at 4–5.

constituted a certification that the attorney had “read the pleading, motion, or other paper; that to the best of his knowledge, information and belief there [was] good ground to support it; and that it [was] not interposed for delay.”⁴⁵ Commentators criticized the rule for its lack of detail and clarity—particularly the subjective “good ground to support” language.⁴⁶ This imprecise language created confusion in the courts over the standard of conduct expected of lawyers, the kinds of pleadings and motions that should trigger Rule 11, and the range of available sanctions.⁴⁷ As a result of this confusion, courts rarely imposed sanctions.⁴⁸ Nevertheless, this ineffective rule remained unchanged for forty-five years until the 1983 amendments.

Thus, from 1938 to 1983, particularly in the years following the Supreme Court’s decision in *Conley*, the simple notice pleading standard held sway. That changed with the 1983 amendments to Rule 11.

II. PLEADING FROM 1983 TO 1993

Increasing concerns about “costs and delay that often accompany contemporary civil litigation in the federal courts”⁴⁹ led to a series of changes to the federal rules in 1983, including substantial changes to Rule 11.⁵⁰ In particular, the Advisory Committee intended the new Rule 11 to address the “rising number of civil lawsuits and increasing costs and delay in litigation, the perceived ineffectiveness of existing sanctions rules in preventing dilatory and abusive practices, and the unwillingness of courts to impose theretofore discretionary sanctions.”⁵¹ As set forth below, although the changes to Rule 11 were not necessarily directed at pleading, they nevertheless had a dramatic impact on pleading.

45. FED. R. CIV. P. 11 (1938).

46. VAIRO, *supra* note 14, at 7.

47. *Id.* at 7–10.

48. *Id.* at 9 (“Sanctions were imposed only in the most compelling situations.”); 5A WRIGHT & MILLER, *supra* note 17, § 1331, at 461 (“By the early 1980’s experience had shown that Rule 11 rarely was utilized and appeared to be ineffective in deterring abuses in federal civil litigation. A significant contributing factor apparently was the inherent ambiguity of the original rule.” (footnote omitted)).

49. VAIRO, *supra* note 14, at 3.

50. The other changes involved discovery and case management. *See, e.g.*, FED. R. CIV. P. 16 advisory committee’s note (1983) (facilitating “judicial control” over litigation so that cases may be “disposed of . . . more efficiently and with less cost and delay”); FED. R. CIV. P. 26 advisory committee’s note (1983) (explaining that the 1983 amendments to Rule 26 were intended to address “[e]xcessive discovery and evasion or resistance to reasonable discovery requests”).

51. VAIRO, *supra* note 14, at 8 (citing FED. R. CIV. P. 11 advisory committee’s note (1983)).

The 1983 Amendments to Rule 11 included seven major changes,⁵² three of which merit discussion. First and most importantly, “the significance of the certification requirement was sharpened, and its scope was broadened.”⁵³ The new signature requirement provided that the attorney or party

has read the [document]; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.⁵⁴

The Advisory Committee suggested a number of criteria for courts to consider in assessing the reasonableness of the attorney’s inquiry. Of particular note, one of those standards directed courts to consider “whether the pleading, motion, or other paper was based on a *plausible* view of the law.”⁵⁵

Although this change in Rule 11 was directed at the sufficiency of the lawyer’s prefiling investigation and not at the complaint itself, it also had a dramatic effect on pleading; specifically, it “was quite obviously (albeit indirectly) intended to constrain the sweeping scope of Rule 8(a).”⁵⁶ On its face, the amended Rule 11 was in direct conflict with Rule 8(a).⁵⁷ Rule 8(a)’s liberal notice pleading standard—requiring only that the complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief”⁵⁸—deliberately “avoids mention of ‘facts’ or ‘causes of action.’”⁵⁹ By contrast, the 1983 version of Rule 11 required that lawyers conduct a prefiling investigation to establish that, among other things, any allegations in the complaint were “*well grounded in fact*.”⁶⁰ In other words, Rule 8(a) largely deemphasized the need for lawyers to include facts in their complaint—remember that Form 11 stated a vehicular-negligence claim in thirty-seven words—while the 1983 version of Rule 11 required that lawyers investigate the specific factual and legal bases for the complaint. Thus, the 1983 version of Rule 11 articulated “a standard for avoiding sanctions

52. 5A WRIGHT & MILLER, *supra* note 17, § 1331, at 472.

53. *Id.*

54. FED. R. CIV. P. 11 (1983).

55. FED. R. CIV. P. 11 advisory committee’s note (1983) (emphasis added).

56. Redish & Amuluru, *supra* note 16, at 1316.

57. See Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1163–64 (1993) (describing Rule 8(a) and Rule 11 as “almost self-contradictory”).

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

59. Note, *supra* note 16, at 647.

60. FED. R. CIV. P. 11 (1983) (emphasis added).

that require[d] a complaint to specify legal and factual bases to a fuller extent than that necessary to survive a motion to dismiss.”⁶¹

Rule 11 did not actually change the pleading standard—it cannot, since Rule 8 governs pleading—but the amended Rule 11 did change the way lawyers drafted their complaints. With the specter of Rule 11 sanctions hanging over their heads, plaintiffs’ lawyers pled with more specificity. Their fear was warranted. While some courts rightly rejected the notion that Rule 11 had any impact on the pleading requirements of Rule 8,⁶² many courts nevertheless used Rule 11’s “well grounded in fact” language to dismiss complaints that were not sufficiently specific, and thereby “tighten[ed] the liberal pleading regime” set forth in Rule 8(a).⁶³ As a result, “Rule 11’s duty of reasonable inquiry seemed to affect the accepted standard for pleading under Rule 8(a).”⁶⁴ This caused

61. Note, *supra* note 16, at 634.

62. See, e.g., *Simpson v. Welch*, 900 F.2d 33, 36 (4th Cir. 1990) (“The fact that appellant’s complaint was vague and conclusory does not justify sanctions under Rule 11.”); *Frantz v. U.S. Powerlifting Fed’n*, 836 F.2d 1063, 1068 (7th Cir. 1987) (“Rule 11 requires not that counsel *plead* the facts but that counsel *know* facts Rule 11 neither modifies the ‘notice pleading’ approach of the federal rules nor requires counsel to prove the case in advance of discovery.”); *Computer Place, Inc. v. Hewlett-Packard Co.*, 607 F. Supp. 822, 832 n.11 (N.D. Cal. 1984) (“[Rule 11] requires a reasonable inquiry into the facts underlying allegations; it does not increase the requirements of Rule 8.”), *aff’d*, 779 F.2d 56 (9th Cir. 1985).

63. Note, *supra* note 16, at 634 n.18; see, e.g., *Hale v. Harney*, 786 F.2d 688, 692 (5th Cir. 1986) (holding that sanctions were an appropriate punishment for failure to meet Rule 11’s “requirement that the pleader’s belief be one ‘formed after reasonable inquiry’”); *Liggins v. Morris*, 749 F. Supp. 967, 971 (D. Minn. 1990) (“[Inadequately detailed] complaint[s] will be subject to dismissal for failure to comply with Rule 8 and Rule 11 of the [FRCP]. In addition, the potential application of sanctions in the form of attorney’s fees or other appropriate relief under Rule 11 will be seriously addressed.”); *Cashco Oil Co. v. Moses*, 605 F. Supp. 70, 71 (N.D. Ill. 1985) (“Rule 11 now imposes a more stringent standard on a party’s or its lawyers’ allegations than heretofore, and this Court expects such allegations to have the kind of factual and legal foundation the new standards require.” (citation omitted)); *Rodgers v. Lincoln Towing Serv., Inc.*, 596 F. Supp. 13, 20–21 (N.D. Ill. 1984) (dismissing claims for failure “to make ‘reasonable inquiry’ to see that ‘it is well grounded in fact’” per Rule 11), *aff’d*, 771 F.2d 194 (7th Cir. 1985). But see AM. JUDICATURE SOC’Y, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 95 (1989) (concluding that “Rule 11 motions are not routine” and “Rule 11 has had effects on the pre-filing conduct of many attorneys . . . of the sort hoped for by the rulemakers”).

64. VAIRO, *supra* note 14, at 14; see Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1007 (2003) (“The strengthening of Rule 11 [in 1983] created a theoretically significant barrier to entering the judicial system.”). The heightened pleading standard raised a particular problem for plaintiffs in cases in which the defendants controlled the relevant information. See, e.g., *Johnson ex rel. Johnson v. United States*, 788 F.2d 845, 856 (2d Cir. 1986) (Pratt, J.,

commentators to criticize the rule because it “created a risk that the threat of the imposition of sanctions would promote a revival of fact pleading that was antithetical to the spirit (if not the letter) of the Federal Rules of Civil Procedure.”⁶⁵

Significantly, in judging whether a lawyer had met his duty of reasonable inquiry under Rule 11, the courts, following the Advisory Committee’s suggested standards, used plausibility as a touchstone.⁶⁶ As the Supreme Court noted, the standard for determining the appropriateness of Rule 11 sanctions is “whether, at the time the attorney filed the pleading or other paper, his legal argument would have appeared plausible.”⁶⁷ Thus, foreshadowing today’s post-*Iqbal* practice, courts sanctioned lawyers who brought claims that were not “plausible.”⁶⁸

A second significant amendment to Rule 11 was to make sanctions mandatory, so that district courts were required to impose sanctions if they determined that a violation had occurred.⁶⁹ In a

dissenting) (describing the “Catch 22’ barrier [facing plaintiffs]: no information until litigation, but no litigation without information”).

65. 5A WRIGHT & MILLER, *supra* note 17, § 1332, at 491; see Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some “Chilling” Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1342 (1986) (“[A]s a practical matter lawyers may perceive that greater specificity in pleading is required, if for no other reason than to ward off a motion for sanctions. Such an outcome would increase the potential chilling effect of the rule’s reasonable inquiry standard by introducing the threat of sanctions for pleadings that otherwise meet the rule 8(a)(2) requirement of a ‘short and plain statement of the claim.’ It would also be at odds with the policy of permitting less-than-certain claims to proceed to discovery—a policy that has survived numerous attacks in the years since the federal rules were adopted.” (footnotes omitted)); Note, *supra* note 16, at 644–45.

66. FED. R. CIV. P. 11 advisory committee’s note (1983).

67. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403–04 (1990).

68. See, e.g., *Black Hills Inst. of Geological Research v. S.D. Sch. of Mines & Tech.*, 12 F.3d 737, 745 (8th Cir. 1993) (“Improperly naming a party in a suit justifies Rule 11 sanctions when ‘joining the party [is] baseless or lacking in plausibility.’”); *Pelletier v. Zweifel*, 921 F.2d 1465, 1514 n.88 (11th Cir. 1991) (noting that among the factors for the court to consider in determining whether claims are sanctionable is “the plausibility of the argument”); *Repp v. Webber*, 142 F.R.D. 398, 403 (S.D.N.Y. 1992) (rejecting sanctions where “[p]laintiffs’ arguments have a plausible basis in fact and existing law”); *Port Drum Co. v. Umphrey*, 119 F.R.D. 26, 28 (E.D. Tex. 1988) (“Undoubtedly, the rule is intended to insure the veracity of allegations and plausibility of legal arguments to a reasonable degree.”); *Harris v. Marsh*, 679 F. Supp. 1204, 1385 (E.D.N.C. 1987) (“Before a litigation document is filed, its basis in law and fact must be considered. If counsel or parties initiate litigation or interpose defenses without first considering the plausibility of their contentions, such conduct, even if not intentionally executed in bad faith, nevertheless is sanctionable.” (footnote omitted)), *modified*, 123 F.R.D. 204 (E.D.N.C. 1988), *aff’d in part, rev’d in part sub nom.* *Blue v. U.S. Dep’t of the Army*, 914 F.2d 525 (4th Cir. 1990).

69. FED. R. CIV. P. 11 (1983) (“[T]he court . . . shall impose . . . an appropriate sanction.”); 5A WRIGHT & MILLER, *supra* note 17, § 1331, at 473.

third important change, the amended rule explicitly authorized the district court to grant attorneys' fees and costs for violating the rule.⁷⁰ Indeed, although the 1983 version of the rule authorized the district courts to impose a wide variety of "appropriate sanctions,"⁷¹ attorneys' fees became the "Rule 11 sanction of choice."⁷² Thus, in most cases, when a court found that a lawyer had violated Rule 11, it ordered fee-shifting not otherwise available in the American legal system.⁷³

These three changes—the new certification standard that put pressure on lawyers to plead with greater specificity, combined with the significant economic incentive to bring a Rule 11 motion and the mandate to the courts to sanction all violations of the rule—"dramatically altered the conduct of lawyers litigating in federal court[]" in several respects.⁷⁴ First, the amendments caused Rule 11's "invocation and application" to become "pervasive."⁷⁵ Lawyers, particularly defense counsel, "routinely" filed Rule 11 motions "to force their adversaries to justify the factual and legal bases underlying motions and pleadings,"⁷⁶ and courts were therefore inundated with "satellite" Rule 11 litigation.⁷⁷

Second, perhaps most significantly for present purposes, the 1983 version of Rule 11 affected parties' substantive rights.⁷⁸ Specifically, it "harmed plaintiffs, particularly public interest and civil rights plaintiffs" by "chill[ing] vigorous advocacy."⁷⁹ Several empirical studies concluded that sanctions were being imposed "disproportionately against plaintiffs, particularly in certain types of

70. 5A WRIGHT & MILLER, *supra* note 17, § 1331, at 473.

71. FED. R. CIV. P. 11 (1983) ("[T]he court, upon motion or upon its own initiative, shall impose upon the person who signed it . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.").

72. 5A WRIGHT & MILLER, *supra* note 17, § 1336.3, at 681; Nelken, *supra* note 65, at 1333 (concluding that courts awarded attorney's fees as a sanction in ninety-six percent of reported cases in which there was a Rule 11 violation); see also AM. JUDICATURE SOC'Y, *supra* note 63, at 36–40 (discussing the prevalence and appropriateness of Rule 11 as an "expense-shifting" statute).

73. Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 599 (1998) [hereinafter Vairo, *Profession*].

74. *Id.* at 589, 599.

75. 5A WRIGHT & MILLER, *supra* note 17, § 1331, at 474.

76. Vairo, *Profession*, *supra* note 73, at 598.

77. VAIRO, *supra* note 14, at 13–14 (discussing concerns about "satellite litigation").

78. Redish & Amuluru, *supra* note 16, at 1316 ("By effectively expanding the scope of the parties' burdens at the pleading stage, the 1983 version of Rule 11 dramatically impacted the ability of plaintiffs to enforce their substantive rights . . .").

79. 5A WRIGHT & MILLER, *supra* note 17, § 1332, at 489; see VAIRO, *supra* note 14, at 14–15 (discussing concerns about chilling effects of 1983 amendments).

litigation such as civil rights, employment discrimination, securities fraud cases brought by investors, and antitrust cases brought by small companies.⁸⁰ Moreover, the primary focus of sanctions was the complaint,⁸¹ which formed the basis of 50% of the requests for sanctions according to one study,⁸² and 57.8% of the requests for sanctions according to another.⁸³

This empirical evidence led to widespread criticism that the 1983 version of the rule was having a dramatic chilling effect on plaintiffs' lawyers by causing them to decide not to bring arguably meritorious cases.⁸⁴ While it is difficult to determine how many

80. Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 FED. RULES DECISIONS 189, 200 (1988) [hereinafter Vairo, *Critical Analysis*]; see Nelken, *supra* note 65, at 1327 ("[R]ule 11 sanctions issues have tended to recur in certain kinds of cases. Although civil rights cases accounted for only 7.6% of the civil filings between 1983 and 1985, 22.3% of the rule 11 cases involve civil rights claims."); Note, *supra* note 16, at 631 ("Although almost every major lawsuit now includes at least the threat of a rule 11 motion, sanctions are more likely to be imposed in public interest litigation, such as civil rights and employment discrimination cases, than in other types of federal litigation." (footnote omitted)). *But see* AM. JUDICATURE SOC'Y, *supra* note 63, at 69 (finding "less reason for concern" at least in the Third Circuit). Professor Burbank, the reporter for the Third Circuit study, criticized the work of Professor Vairo and others for relying on reported cases, while Professor Burbank's Third Circuit study also included unreported cases. In some instances, however, Professor Burbank's conclusions were consistent with studies that examined reported cases only. *See infra* note 82.

81. VAIRO, *supra* note 14, at 16.

82. AM. JUDICATURE SOC'Y, *supra* note 63, at 110 (finding complaint at issue in 70 of 140 Rule 11 motions); *see also* Miller, *supra* note 64, at 1007-08 ("[T]he 1983 Rule was criticized for having a disproportionate impact, particularly in areas of the law considered 'disfavored' by some, such as civil rights cases . . .").

83. THOMAS E. WILLGING, FED. JUDICIAL CTR., *THE RULE 11 SANCTIONING PROCESS* 77, 78 tbl.12 (1988) (finding complaint at issue in 44 of 76 Rule 11 motions).

84. Miller, *supra* note 64, at 1008 ("After several years of extraordinary activity under the [1983] Rule, a comprehensive study by the Federal Judicial Center . . . revealed that Rule 11 motions were filed much more frequently by defendants, that defendants' motions were granted with greater frequency, and that Rule 11 motions were filed disproportionately more often in civil rights cases, although the grant rate was not necessarily higher." (footnote omitted)); *see* Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1363-64 (9th Cir. 1991) (en banc) ("Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons whose rights have been violated but whose claims are not likely to produce large damage awards. This is because attorneys would have to figure into their costs of doing business the risk of unjustified awards of sanctions."); George Cochran, *Rule 11: The Road to Amendment*, 61 MISS. L.J. 5, 11 (1991) ("With no clear distinction having been drawn between a position which is 'merely losing' and that which is both 'losing and sanctionable,' Rule 11 is a blueprint for conservatism." (footnote omitted)).

attorneys declined to bring meritorious cases because of Rule 11, some studies attempted to analyze that question. In one 1988 study, 20% of surveyed lawyers reported that they refrained from bringing an arguably meritorious case because they were concerned about sanctions.⁸⁵

In addition to the empirical evidence of Rule 11's chilling effect,

A great deal of anecdotal evidence exists indicating that a large number of judges, including those who previously were less than zealous in prodding the parties before them, began citing the 1983 version of Rule 11 in pre-trial conferences and other proceedings (on or off the record) in order to remind litigants of their ethical obligations and that monetary consequences might follow violations of the rule.⁸⁶

Similarly, courts frequently warned "plaintiffs whose claims were dismissed with leave to amend that they would be subject to sanctions if the amended complaint did not correct the factual or legal deficiencies that led to dismissal."⁸⁷

By the early 1990s, some commentators concluded that the courts had begun to apply Rule 11 less harshly, particularly in certain kinds of cases,⁸⁸ but the 1983 version of Rule 11 continued to produce a tidal wave of criticism⁸⁹ that eventually pushed the rulemakers to amend the rule.

85. WILLGING, *supra* note 83, at 167 ("Whether it can be classified as a chilling effect or not, lawyers reported a cautioning effect of rule 11.").

86. VAIRO, *supra* note 14, at 42-43. Another significant criticism of the amended rule was that district courts were applying it "unpredictably." 5A WRIGHT & MILLER, *supra* note 17, § 1332, at 481. This inconsistent application of the rule undoubtedly contributed to its chilling effect. See Cochran, *supra* note 84, at 9 ("[O]n the same set of facts, almost half of judges surveyed would have sanctioned a complaint as frivolous which the other half determined not to violate the Rule. . . . Lawyers sanctioned by the district court for bringing 'frivolous' cases, have secured reversals not only of sanctions but also on the merits." (footnote omitted)).

87. Nelken, *supra* note 65, at 1329.

88. See Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 105-06 (1991) ("As the federal judiciary enters its eighth year of implementing the Rule, courts apparently have improved their application of it by becoming more solicitous of the needs of civil rights plaintiffs and their counsel, in recognition of the important social function that civil rights litigation fulfills in combating discrimination.").

89. See, e.g., Cochran, *supra* note 84, at 6 ("My concerns are the ones shared by many who have followed the tortuous path taken since 1983: the stifling of creative litigation, the devastating professional and financial consequences to attorneys litigating in good faith, and a new form of time-consuming, destructive satellite litigation which should not be tolerated.").

III. THE 1993 AMENDMENTS TO RULE 11 AND THE RETURN TO NOTICE PLEADING

In 1993, rulemakers, “motivated by a desire to curb some of the perceived excesses surrounding Rule 11 motion practice under the 1983 version of the rule,”⁹⁰ substantially amended Rule 11 to its current form.⁹¹ As a result of these changes, “[t]here is no doubt that Rule 11 got some of its teeth pulled.”⁹²

First, the 1993 amendments made sanctions discretionary rather than mandatory.⁹³ This change was “important, because it was a signal to courts and litigants that they should be less zealous in using Rule 11 in cases where there were relatively minor infractions of the rule.”⁹⁴

Second, the amendments added a “safe harbor” provision by which the party seeking Rule 11 sanctions must serve the motion on the offending attorney and allow that attorney twenty-one days to withdraw the offending paper before filing the sanctions motion with the court.⁹⁵ Through this provision, the drafters of the

90. 5A WRIGHT & MILLER, *supra* note 17, § 1331, at 478; *see* FED. R. CIV. P. 11 advisory committee’s note (1993) (“The revision . . . places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court.”).

91. The Federal Rules of Civil Procedure were subsequently restyled in 2007, but the restyling was not meant to make any substantive changes to the rules. FED. R. CIV. P. 11 advisory committee’s note (2007). Because those changes were merely stylistic, I cite throughout this section to the current version of the rule.

92. Yablon, *supra* note 27, at 611; *see* 5A WRIGHT & MILLER, *supra* note 17, § 1331, at 478 (“By adding a safe harbor provision and reducing monetary incentives that might encourage private parties to seek sanctions under the rule through its emphasis on the use of fines paid to the court rather than the opposing party, the Rule 11 now in force seeks to reduce the litigation that the prior rule had generated. In addition, by making the imposition of sanctions discretionary rather than mandatory and emphasizing the importance of a party’s ability to pay as a factor in determining whether to levy sanctions or not, the current rule seeks to protect litigants who have fewer resources and thus prevent the unfair application of the rule.” (footnote omitted)); *see also* Carrington & Wasson, *supra* note 21, at 571 (noting that the 1993 amendments sought to lessen the chilling effect on civil rights plaintiffs by adding “both the safe harbor provision protecting counsel from sanctions if the sanctionable filing is timely withdrawn after its defects have been pointed out by the adversary, and the preference for non-monetary sanctions”).

93. FED. R. CIV. P. 11(c)(1) (“If . . . the court determines that Rule 11(b) has been violated, the court *may* impose an appropriate sanction on any attorney . . .” (emphasis added)). *See generally* 5A WRIGHT & MILLER, *supra* note 17, § 1336.1, at 648 (discussing the transition from a mandatory to a discretionary rule).

94. VAIRO, *supra* note 14, at 32.

95. FED. R. CIV. P. 11(c)(2) (“The motion [for sanctions] . . . must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service . . .”).

amendments aimed to “mitigate Rule 11’s chilling effect” and “encourag[e] the withdrawal of papers that violate the rule without involving the district court” thereby reducing Rule 11 litigation.⁹⁶

Third, the revisions shifted the purpose of sanctions from compensation to deterrence, thereby “chang[ing] the emphasis with regard to the types of sanctions to be ordered by the district court.”⁹⁷ Specifically, the new rule provides that “[a] sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.”⁹⁸ Thus, the new rule “envision[ed] public interest remedies such as fines and reprimands as the norm” rather than “private interest remedies,” such as attorneys’ fees.⁹⁹ To drive home this point, the Advisory Committee’s note accompanying the amendment states that monetary penalties “should ordinarily be paid into court,” rather than the opposing party, except under “unusual circumstances.”¹⁰⁰

Fourth, the amendments modified the requirement that the litigant certify that the assertions made in papers presented to the court be “well grounded in fact.”¹⁰¹ Instead, the new version specifically allows pleaders to make factual contentions even though the pleader lacks evidentiary support at the time that they are made. Thus, under the revised signature requirement, the “attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the factual contentions have evidentiary support *or, if specifically so identified, will likely to have evidentiary support* after a reasonable opportunity for further investigation or discovery.”¹⁰²

The 1993 amendments achieved their goal of reducing Rule 11 litigation; since their passage, lawyers have filed fewer Rule 11 motions.¹⁰³ As a result, there has been less “satellite litigation” and, moreover, by most accounts, the reduced threat of sanctions has decreased the chilling effect of Rule 11.¹⁰⁴

96. 5A WRIGHT & MILLER, *supra* note 17, § 1337.2, at 722.

97. *Id.* § 1336.3, at 689.

98. FED. R. CIV. P. 11(c)(4).

99. 5A WRIGHT & MILLER, *supra* note 17, § 1336.3, at 689.

100. FED. R. CIV. P. 11 advisory committee’s note (1993).

101. Fed. R. Civ. P. 11 (1983).

102. FED. R. CIV. P. 11(b)(3) (emphasis added). Notably, Justice Scalia and Justice Thomas disagreed with the amendments, and Justice Scalia wrote a dissenting opinion. Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 507 (1993) (Scalia, J., dissenting).

103. Miller, *supra* note 64, at 1009; Vairo, *Profession*, *supra* note 73, at 643.

104. Vairo, *Profession*, *supra* note 73, at 643. *But see generally* Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1 (2002) (examining why the 1993 amendments have not been more successful at reducing the rule’s chilling effects, especially

Moreover, the changes to Rule 11 lifted the pressure on pleading standards that the 1983 version of the rule had imposed. "The cases decided under the 1993 version of Rule 11 suggest that the lower federal courts understood that the 1993 amendments were designed to liberalize the rule."¹⁰⁵ Courts recognized that they were to "impose sanctions only where the conduct in question reaches a point of clear abuse."¹⁰⁶ Indeed, some courts explicitly rejected the notion that Rule 11 could even have any impact on the pleading standard. As one court stated, "It appears that [the third-party defendant] is asking the court to graft, via [Rule] 11(b), a particularity requirement onto the notice pleading requirements of [Rule] 8(a). I decline to do so."¹⁰⁷

In contrast to the 1983–1993 time period—when courts used Rule 11 to sanction lawyers for failing to plead their claims with sufficient detail by, among other things, dismissing their complaints—courts in the period following the amendment to Rule 11 recognized that a complaint could be insufficient under Rule 8 without being sanctionable. Indeed, as the Sixth Circuit explained, under the amended Rule 11, a complaint that contains insufficient factual detail—even bare-bones, conclusory allegations—is not ordinarily sanctionable:

Although [the plaintiff] failed to include more than bare, conclusory assertions in her complaint, and thus failed to plead with the requisite specificity necessary to make an actionable claim, she did not fail in this endeavor by a wide margin. . . . As a general proposition, a district court should be hesitant to determine that a party's complaint is in violation of Rule 11(b) when the suit is dismissed pursuant to Rule 12(b)(6) and there is nothing before the court, save the bare allegations of the complaint.¹⁰⁸

for civil rights plaintiffs); Carl Tobias, *Civil Rights Plaintiffs and the Proposed Changes to Rule 11*, 77 IOWA L. REV. 1775 (1992) (analyzing the proposal of the 1993 amendments on civil rights plaintiffs).

105. VAIRO, *supra* note 14, at 77; *see, e.g.*, Hedges v. Yonkers Racing Corp., 48 F.3d 1320, 1327 (2d Cir. 1995) (reversing the imposition of sanctions by the district court because, *inter alia*, the 1993 amendments were meant to liberalize the "standard for compliance"); Weinreich v. Sandhaus, 156 F.R.D. 60, 63 (S.D.N.Y. 1994) ("[C]ourts 'must strive to avoid the wisdom of hindsight . . . and any and all doubts must be resolved in favor' of the party that signed the allegedly sanctionable document." (second alteration in original) (quoting *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985))).

106. VAIRO, *supra* note 14, at 78.

107. *New York v. Solvent Chem. Co.*, 875 F. Supp. 1015, 1020 (W.D.N.Y. 1995).

108. *Tafns v. Proctor*, 316 F.3d 584, 594 (6th Cir. 2003); *see also* *Team Obsolete Ltd. v. A.H.R.M.A. Ltd.*, 216 F.R.D. 29, 44 (E.D.N.Y. 2003) ("The mere fact that the plaintiffs fail to state a claim . . . does not mean that Rule 11 sanctions should be imposed. 'Otherwise Rule 11 sanctions would be imposed

The Supreme Court's 2002 unanimous decision in *Swierkiewicz v. Sorema N.A.*¹⁰⁹ confirmed that liberal notice pleading was the governing standard and "provided a full-throated endorsement" of that standard.¹¹⁰ In that employment discrimination case, the Court found the plaintiff's bald allegation—that his "age and national origin were motivating factors in [the defendant's] decision to terminate his employment"—sufficient under Rule 8.¹¹¹ In doing so, the Court recognized that this approach to pleading would "allow[] lawsuits based on conclusory allegations of discrimination to go forward" but concluded that "the Federal Rules do not contain a heightened pleading standard for employment discrimination suits."¹¹² Heightened pleading, the Court noted, is only required under the circumstances set forth in Rule 9(b).¹¹³ Confirming that the liberal pleading standard had returned, the Court said that "[g]iven the Federal Rules' simplified standard for pleading, '[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.'"¹¹⁴

In short, whatever pressure the 1983 version of Rule 11 put on the pleading standard was largely eliminated by the 1993 amendments. Thus, the 1993 amendments to Rule 11 meant a return to liberal notice pleading, at least until *Twombly* and *Iqbal*.

IV. TWOMBLY AND IQBAL

With the exception of the 1983–1993 time period described above, Rule 8(a)'s simple notice pleading standard held sway for fifty years following the Supreme Court's decision in *Conley*.¹¹⁵ On

whenever a complaint was dismissed, thereby transforming it into a fee shifting statute under which the loser pays." (quoting *Harlyn Sales Corp. Profit Sharing Plan v. Kemper Fin. Servs., Inc.*, 9 F.3d 1263, 1270 (7th Cir. 1993)); *Mover's & Warehousemen's Ass'n of Greater New York, Inc. v. Long Island Moving & Storage Ass'n*, No. 98CV-5373(SJ), 1999 WL 1243054, at *8 (E.D.N.Y. Dec. 16, 1999) ("That plaintiff's claims do not survive a motion to dismiss render them neither frivolous nor necessarily untrue; they are merely insufficiently alleged.").

109. 534 U.S. 506 (2002).

110. Steinman, *supra* note 11, at 1301.

111. *Id.* (alteration in original) (quoting Amended Complaint at 37, *Swierkiewicz v. Sorema N.A.*, No. 99-Civ.-12272 (S.D.N.Y. Apr. 19, 2000)); see *Swierkiewicz*, 534 U.S. at 509.

112. *Swierkiewicz*, 534 U.S. at 514–15.

113. *Id.* at 513.

114. *Id.* at 514 (second alteration in original) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

115. Spencer, *Plausibility Pleading*, *supra* note 5, at 436 ("Over the next fifty years, the Supreme Court never wavered from these principles."); Steinman, *supra* note 11, at 1302 ("Before *Twombly*, it was clear that this approach to pleading governed all actions in federal court, except for a discrete number of issues for which a stricter standard was explicitly imposed by statute or rule.").

occasion, lower courts implemented heightened pleading standards,¹¹⁶ but in *Swierkiewicz* and other cases, the Supreme Court tamped down those efforts. Then came *Twombly* and *Iqbal*.

A. Bell Atlantic Corp. v. Twombly

In *Twombly*, telephone and Internet subscribers alleged that the country's largest telecommunications firms had engaged in an illegal conspiracy in restraint of trade and therefore violated section 1 of the Sherman Act.¹¹⁷ In order to state a claim under section 1 of the Sherman Act, plaintiffs must establish that the defendants' anticompetitive behavior is a result of a "contract, combination . . . , or conspiracy."¹¹⁸ On this element, plaintiffs alleged parallel conduct by the defendants in great detail, explaining how the defendants had refused to compete against one another and kept other potential competitors out of their markets,¹¹⁹ but alleged an agreement between the defendants in only a conclusory manner.¹²⁰ Under antitrust law, parallel conduct alone is not illegal if it is the result of independent acts by competitors.¹²¹

In a 7–2 opinion authored by Justice Souter, the Supreme Court found those allegations insufficient under Rule 8(a).¹²² To satisfy Rule 8, the Supreme Court said that the complaint must contain "allegations plausibly suggesting (not merely consistent with) agreement."¹²³ The Court held that the allegations concerning a

116. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (noting that some lower courts "impose non-Rule-based heightened pleading in direct contravention of notice pleading doctrine").

117. The named plaintiffs represented a massive putative class "consisting of all 'subscribers of local telephone and/or high speed internet services . . . from February 8, 1996 to present.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 550 (2007) (alteration in original) (quoting Consolidated Amended Class Action Complaint ¶ 53, *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 CIV. 10220 (GEL))).

118. *Id.* at 548 (alteration in original).

119. *Id.* at 550–51.

120. In the complaint, the plaintiffs alleged agreement as follows:

In the absence of any meaningful competition between the [defendants] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition . . . within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated consumers and markets to one another.

Id. at 551.

121. *Id.* at 552.

122. *Id.* at 570.

123. *Id.* at 557.

“contract, combination, or conspiracy” were “merely legal conclusions resting on the prior allegations” of parallel conduct.¹²⁴ As for the more specific allegations of parallel conduct, the Court emphasized that parallel conduct alone does not violate the Sherman Act.¹²⁵ To the contrary, the Court said that parallel conduct is “a common reaction of firms in a concentrated market” and entirely consistent with “a wide swath of rational and *competitive* business strategy unilaterally prompted by common perceptions of the market.”¹²⁶ Thus, the Court concluded, “an allegation of parallel conduct and a bare assertion of conspiracy will not suffice.”¹²⁷ “Further factual enhancement” was necessary to cross “the line between possibility and plausibility of ‘entitle[ment] to relief.’”¹²⁸ Significantly, in reaching its conclusion, the Court “retire[d]” *Conley*’s “no set of facts” language.¹²⁹ As commentators quickly recognized, *Twombly* “imposed an entirely new test on the pleading stage, instituting a judicial inquiry into the pleading’s convincingness.”¹³⁰

In reaching this conclusion, the Court’s primary motivation appears to have been its concern about the high costs of discovery. In particular, the Court did not want to permit meritless claims to reach the discovery stage in which plaintiffs could extract significant settlements from defendants in light of the high costs of discovery. As Justice Souter wrote, “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”¹³¹

B. Ashcroft v. Iqbal

Twombly sent “shockwaves throughout the legal community,”¹³² but many wondered whether it applied “only to complex antitrust claims, while the more lenient notice pleading approach [would continue] to apply more generally.”¹³³ In *Iqbal*, the Court “remove[d] any doubt that *Twombly* reflects the generally applicable pleading standard in federal court.”¹³⁴

124. *Id.* at 564 & n.9.

125. *Id.* at 565–67.

126. *Id.* at 553–54 (emphasis added).

127. *Id.* at 556.

128. *Id.* at 557 (alteration in original); *see also id.* at 555 (“Factual allegations must be enough to raise a right to relief above the speculative level . . .”); *id.* at 570 (“Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”).

129. *Id.* at 562–63.

130. Clermont & Yeazell, *supra* note 4, at 827.

131. *Twombly*, 550 U.S. at 559.

132. Steinman, *supra* note 11, at 1305.

133. *Id.*

134. *Id.* at 1306.

In *Iqbal*, the plaintiff, a Pakistani Muslim arrested after the September 11, 2001, attacks, filed a *Bivens* action against federal officials, including Attorney General John Ashcroft and FBI Director Robert Mueller.¹³⁵ The claims against Ashcroft and Mueller rested on the theory that they “each knew of, condoned, and willfully and maliciously agreed” to arrest and detain Iqbal and thousands of other Arab Muslim men and subject them to harsh conditions of confinement “as a matter of policy, solely on account of [their] religion, race, and/or national origin and for no legitimate penological interest.”¹³⁶ The complaint further alleged that Ashcroft was the “principal architect” of the policy” and Mueller was “instrumental in [its] adoption, promulgation, and implementation.”¹³⁷

In a 5–4 decision authored by Justice Kennedy, the Court found that these allegations were not sufficient to survive a motion to dismiss.¹³⁸ In reaching this conclusion, the Court reiterated the principles announced in *Twombly*: “A pleading that offers ‘labels and conclusions’ or a ‘formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’”¹³⁹ Rather, “a complaint must contain sufficient [nonconclusory] factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”¹⁴⁰

In applying these principles, the Court employed a two-step analysis. First, it identified the “conclusory” allegations in the complaint—(1) that Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject [Plaintiffs]’ to harsh conditions of confinement ‘as a matter of policy, solely on account of [their] religion, race, and/or national origin and for no legitimate penological interest’; (2) that “Ashcroft was the ‘principal architect’ of this invidious policy”; and (3) that “Mueller was ‘instrumental’ in adopting and executing it”¹⁴¹—and found them fatally flawed under *Twombly* because they are “bare assertions [that] . . . amount to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim.”¹⁴² Therefore, the Court disregarded these allegations.

135. *Ashcroft v. Iqbal* 129 S. Ct. 1937, 1942 (2009).

136. *Id.* at 1944.

137. *Id.* (alteration in original).

138. *Id.* at 1952.

139. *Id.* at 1949 (alteration in original) (citation omitted) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)).

140. *Id.* (quoting *Twombly*, 550 U.S. at 570).

141. *Id.* at 1951 (quoting First Amended Complaint and Jury Demand ¶¶ 10, 11, 96, *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005)).

142. *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 555).

Second, the Court returned to the remaining allegation—that the FBI had rounded up many Arab Muslims and subjected them to harsh conditions of confinement—and determined that this assertion did not plausibly suggest “purposeful, invidious discrimination” because the government’s conduct was entirely consistent with good law enforcement:

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.¹⁴³

Thus, the Court concluded, the plaintiffs’ complaint was insufficient because it needed “to allege more by way of factual content to ‘nudge[.]’ his claim of purposeful discrimination ‘across the line from conceivable to plausible.’”¹⁴⁴

In reaching this conclusion, the Court explicitly rejected the notion that *Twombly* should be “limited to pleadings made in the context of an antitrust dispute.”¹⁴⁵ Specifically, it stated that “[t]hough *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard ‘in all civil actions and proceedings in the United States district courts.’”¹⁴⁶ As in *Twombly*, the Court seems to have been motivated in large part by the costs of discovery and the need to give trial judges the ability to dismiss lawsuits before they reach discovery.¹⁴⁷

C. *Pleading After Iqbal*

Courts and commentators continue to debate the precise meaning of *Twombly* and *Iqbal*, but there are a few points of general agreement. First, *Twombly* and *Iqbal* are here to stay, at least for

143. *Id.*

144. *Id.* at 1952 (alteration in original) (quoting *Twombly*, 550 U.S. at 570).

145. *Id.* at 1953.

146. *Id.* (citation omitted) (quoting FED. R. CIV. P. 1).

147. *E.g., id.* (“It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.” (quoting *Twombly*, 550 U.S. at 559)).

the foreseeable future.¹⁴⁸ Although some commentators suggest that these decisions may not be as significant as they seem,¹⁴⁹ the Supreme Court itself explicitly stated that its interpretation of Rule 8 in *Iqbal* governs all civil actions in U.S. district courts, not just antitrust and *Bivens* cases.¹⁵⁰ And the lower courts are following suit: *Iqbal* is well on its way to becoming the most cited case of all time.¹⁵¹

Second, liberal notice pleading appears dead.¹⁵² Despite the Court's insistence to the contrary, *Iqbal*, with its requirement that the complaint be "plausible" at the pleading stage, makes it more difficult to satisfy Rule 8's "short and plain statement" standard. In deciding whether a complaint satisfies this standard, *Iqbal* requires that courts follow a two-step process. First, the court is to disregard any conclusory allegations.¹⁵³ Second, the court is to determine whether the remaining nonconclusory allegations, accepted as true, plausibly suggest an entitlement to relief.¹⁵⁴ The *Iqbal* decision tells us, moreover, that "plausibility" means more than just a "sheer possibility that a defendant has acted unlawfully."¹⁵⁵ In other words, the complaint must "nudge[] [plaintiff's] claims across the line from conceivable to plausible."¹⁵⁶ In determining whether the complaint has achieved plausibility, the Court explained, judges are to use their "judicial experience" and "common sense."¹⁵⁷

While lower courts are left with the unenviable task of sorting out what constitutes a "plausible" complaint,¹⁵⁸ the primary impact

148. Clermont, *supra* note 11, at 1363–71 (debunking the myth that "The *Twombly-Iqbal* Justices Didn't Really Mean It").

149. See, e.g., Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 474–75 (2010); Allan R. Stein, *Confining Iqbal*, 45 TULSA L. REV. 277, 302–03 (2009) (arguing *Iqbal* was a special case that will not change pleading standards in ordinary cases); Steinman, *supra* note 11, at 1320–21; see also Noll, *supra* note 20, at 147–49.

150. *Iqbal*, 129 S. Ct. at 1953; see also Clermont & Yeazell, *supra* note 4, at 840 (noting that the *Twombly* and *Iqbal* opinions "are generalized interpretations of Rule 8, not a good-for-this-trip-only reading for antitrust and *Bivens* cases" (footnote omitted)).

151. Steinman, *supra* note 11, at 1295 n.9; see *id.* at app.

152. Spencer, *Plausibility Pleading*, *supra* note 5, at 431–32; see Clermont & Yeazell, *supra* note 4, at 829–30 ("[T]he Court in these two cases added a requirement . . . that goes above and beyond having to give notice.").

153. *Iqbal*, 129 S. Ct. at 1949.

154. See *id.* at 1951.

155. *Id.* at 1949.

156. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); see *Iqbal*, 129 S. Ct. at 1950–51.

157. *Iqbal*, 129 S. Ct. at 1950.

158. See *Kasten v. Ford Motor Co.*, No. 09-11754, 2009 WL 3628012, at *7 (E.D. Mich. Oct. 30, 2009) ("What is not clear going forward from *Iqbal*, is how much factual content is necessary to give the defendant fair notice, and how much content is necessary to 'nudge claims' from merely conceivable to plausible. There is no roadmap for courts to distinguish between conclusory

of *Twombly* and *Iqbal* appears to be the imposition of “a fact pleading requirement on Rule 8.”¹⁵⁹ As one commentator explained, the *Twombly* standard “assesses the factual sufficiency of the allegations. And, the conclusory/nonconclusory dichotomy of *Iqbal* forces a plaintiff to detail factual support for her allegations to avoid having her complaint deemed ‘conclusory’ and thus disregarded.”¹⁶⁰ Thus, the plaintiff’s lawyer needs to go element-by-element and “give a particularized mention of the factual circumstances of each element of the claim.”¹⁶¹ Over and above providing detail, in order to be “plausible,” the complaint must also be convincing.¹⁶²

V. IQBAL AND THE RESURRECTION OF THE 1983 VERSION OF RULE 11

Twombly and *Iqbal* have transformed pleading and introduced a great deal of uncertainty. To date, commentators have produced an enormous amount of scholarship offering a wide variety of analyses and perspectives on these cases.¹⁶³ Noticeably, however, that scholarship has described the *Iqbal* plausibility standard as “novel” in the modern era¹⁶⁴ and identified little historical precedent for the post-*Iqbal* pleading era. As set forth in this Part, however, the post-*Iqbal* period of pleading is not entirely new. To the contrary, the current era bears a sharp resemblance to federal pleading from 1983 to 1993. Specifically, the 1983 version of Rule 11 and *Iqbal* are comparable in their motivation, implementation, and effects.

Both the 1983 version of Rule 11 and *Iqbal* were motivated by a perceived need to help courts overwhelmed by frivolous cases.¹⁶⁵ Further, in both cases, the implementation of the new standards created significant uncertainty. Thus, just as Rule 11 was a focal point of litigation from 1983 to 1993,¹⁶⁶ courts today are flooded with

and well-pled factual allegations, and then determine whether such well-pled facts plausibly give rise to an entitlement to relief. If, as the Supreme Court suggests, determining plausibility is ‘a context-specific task that requires the reviewing court to draw on its judicial experience and common sense,’ there may be no exacting standard for courts to use in evaluating complaints under [Rule] 8(a).” (citations omitted); Mark Moller, *Procedure’s Ambiguity*, 86 IND. L.J. 645, 645–46 (2011) (arguing that “[f]ew Supreme Court opinions are as deeply inscrutable as” *Twombly* and *Iqbal*).

159. Dodson, *Presuit Discovery*, *supra* note 11, at 51.

160. *Id.*

161. Clermont & Yeazell, *supra* note 4, at 830.

162. *Id.* at 832–33 (“[F]or the first time, pleadings must undergo a test not for factual detail, but for factual convincingness.”).

163. See sources cited *supra* note 7.

164. See sources cited *supra* note 11.

165. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009); see *supra* Part II.

166. Carrington & Wasson, *supra* note 21, at 567 (“No other single procedure rule in the nation’s history was ever given so much critical attention.”).

Iqbal motions,¹⁶⁷ and *Iqbal*, like the 1983 version of Rule 11, has become an extremely popular subject among scholars.¹⁶⁸

As set forth in detail below, in terms of effects, the current criticisms of *Iqbal* are exactly the same complaints that were directed at the 1983 version of Rule 11. First, and perhaps most significantly, commentators complain that *Iqbal* has tightened pleading standards—just the way that the 1983 version of Rule 11 did (albeit indirectly). Further, under both pleading standards, plausibility is a touchstone for determining whether a complaint should survive the pleading stage. Second, this stricter pleading standard has commentators complaining, just as they did in 1983, about a “chilling effect” on plaintiffs and, relatedly, that the courts have taken a decidedly pro-defendant turn. Third, courts and commentators are noticing that *Iqbal* is having a disproportionate effect on certain kinds of litigation—civil rights and employment discrimination cases in particular—the same criticism that was leveled at the 1983 version of Rule 11.

A. *The Heightened Pleading Standard*

The most striking similarity between the 1983 version of Rule 11 and *Iqbal* is that both displaced liberal notice pleading and effectively imposed a heightened pleading standard based, at least in part, on whether the complaint is plausible.

As discussed in Part II, Rule 11 is directed at the sufficiency of the lawyer’s pre-filing investigation rather than the pleading itself, but the 1983 version of the rule nevertheless had a dramatic effect on pleading. Specifically, courts used Rule 11’s pre-filing investigation requirement to require more detailed pleading,¹⁶⁹ and many courts used Rule 11 to dismiss complaints that were not sufficiently specific.¹⁷⁰ Commentators criticized the rule because it “undermine[d] the liberal pleading regime.”¹⁷¹ Further, in judging

167. Steinman, *supra* note 11, at 1295 n.9.

168. See VAIRO, *supra* note 14, at 2–3 nn.6–10 (collecting sources).

169. *Id.* at 14 (“Rule 11’s duty of reasonable inquiry seemed to affect the accepted standard for pleading under Rule 8(a) . . .”).

170. Note, *supra* note 16, at 634 n.18; see, e.g., Gallagher v. Kopera, 789 F. Supp. 277, 278 (N.D. Ill. 1992) (“[A]llegations made on information and belief violate Rule 11.”); Liggins v. Morris, 749 F. Supp. 967, 971 (D. Minn. 1990) (stating that inadequately detailed complaints “will be subject to dismissal for failure to comply with Rule 8 and Rule 11”); Cashco Oil Co. v. Moses, 605 F. Supp. 70, 71–72 (N.D. Ill. 1985) (striking claims sua sponte that contained allegations without “the kind of factual and legal foundation” required by Rule 11); Rodgers v. Lincoln Towing Serv., Inc., 596 F. Supp. 13, 20 (N.D. Ill. 1984) (finding attorney violated Rule 11 by alleging facts without any “reasonable factual basis” for believing them to be true), *aff’d*, 771 F.2d 194 (7th Cir. 1985). *But see* AM. JUDICATURE SOC’Y, *supra* note 63, at 95 (“Rule 11 has had effects on the pre-filing conduct of many attorneys in this circuit of the sort hoped for by the rulemakers and has yielded other benefits.”).

171. Note, *supra* note 16, at 644–45.

whether a lawyer had met his duty of reasonable inquiry under Rule 11, some courts, following the Advisory Committee's suggested standards, used plausibility as a touchstone.¹⁷² While the 1993 Amendments to Rule 11 brought a return of liberal notice pleading, the Supreme Court, through its interpretation of Rule 8 in *Iqbal* and *Twombly*, has now returned us to a pleading regime that resembles 1983 in several significant respects.

First and foremost, as previously discussed, *Iqbal* has replaced the liberal notice pleading standard with a heightened plausibility standard.¹⁷³ In determining whether plaintiffs meet that standard, courts are to examine the nonconclusory allegations in the complaint and decide, based on their "judicial experience and common sense" whether those allegations "nudge[] [the plaintiffs'] claims across the line from conceivable to plausible."¹⁷⁴ The primary impact of this standard is to "impose a fact pleading requirement on Rule 8"¹⁷⁵ that compels lawyers to go element-by-element and "give a particularized mention of the factual circumstances of each element of the claim."¹⁷⁶ Thus, *Iqbal*, just like the 1983 version of Rule 11, has produced "a revival of fact pleading that [is] antithetical to the spirit (if not the letter) of the Federal Rules of Civil Procedure."¹⁷⁷

Second, *Iqbal*, like the 1983 version of Rule 11, has introduced a great deal of subjectivity into pleading. Under the 1983 version of Rule 11, sanctionable complaints were in the eye of the beholder: "[O]n the same set of facts, almost half of judges surveyed would have sanctioned a complaint as frivolous which the other half determined not to violate the rule. . . . Lawyers sanctioned by the district court for bringing 'frivolous' cases, have secured reversals not only of sanctions but also on the merits."¹⁷⁸

Iqbal is already under attack for the same reason. In *Iqbal*, the Court specifically directed district courts to use their "judicial experience" and "common sense" to determine whether the claim is plausible. This aspect of the *Iqbal* decision "obviously licenses highly subjective judgments . . . [and] is a blank check for federal judges to get rid of cases they disfavor."¹⁷⁹

172. *Id.* at 649–51.

173. *See supra* Part IV.C; *see also* Clermont & Yeazell, *supra* note 4, at 829 ("[T]he Court in these two cases added a requirement . . . that goes above and beyond having to give notice." (footnote omitted)).

174. *Bell Atl. Corp. v. Twombly* 550 U.S. 544, 570 (2007); *see* Clermont & Yeazell, *supra* note 4, at 826.

175. Dodson, *Presuit Discovery*, *supra* note 11, at 51.

176. Clermont & Yeazell, *supra* note 4, at 830.

177. 5A WRIGHT & MILLER, *supra* note 17, § 1332, at 491 (discussing the 1983 version of Rule 11).

178. Cochran, *supra* note 84, at 9 (footnote omitted).

179. Liptak, *supra* note 4 (quoting Professor Stephen B. Burbank); *see also* Clermont & Yeazell, *supra* note 4, at 840 ("In merely describing the Supreme

Finally, *Iqbal* has restored the tension between Rule 8 and Rule 11 that existed under the 1983 version of Rule 11.¹⁸⁰ Rule 8(a)'s liberal notice pleading standard—requiring only that the complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief”¹⁸¹—deliberately “avoids mention of ‘facts’ or causes of action,”¹⁸² while the 1983 version of Rule 11 required that lawyers conduct a pre-filing investigation to establish, among other things, that any allegations in the complaint were “well grounded in fact.”¹⁸³ Courts used the former Rule 11's investigation requirement to force plaintiffs to plead with more factual detail than Rule 8(a) required.

Although the 1993 amendment to Rule 11 relieved that pressure, *Iqbal* has now revived it.¹⁸⁴ As Professors Clermont and Yeazell explained, “[O]ne could have less disruptively attained an equivalent of the *Twombly* and *Iqbal* regime by aggressively rereading Rule 11 rather than Rule 8.”¹⁸⁵ During the period from 1993 (when Rule 11 was amended) until the Court decided *Twombly* and *Iqbal*, a plaintiff's lawyer who filed an insufficiently detailed complaint could sleep well knowing that he generally would suffer nothing worse than a dismissal of the complaint under Rule 12(b)(6).¹⁸⁶ Indeed, courts consistently held that an insufficiently pled complaint by itself was not sanctionable under Rule 11, and that sanctions should be reserved for more egregious conduct.¹⁸⁷ *Iqbal*, however, has thrown that notion into question. A plaintiff's lawyer who files an insufficiently detailed complaint today faces the prospect of sanctions under Rule 11, just as he did from 1983 to

Court's new test, we all but established that its meaning is very unclear. . . . Judges will vary in finding nonconclusory allegations of a complaint implausible after considering the specific ‘context’ of the case and applying ‘judicial experience and common sense.’”

180. See Subrin, *supra* note 57, at 1163–64 (arguing that Rule 8(a) and Rule 11 are “almost self-contradictory”).

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

182. Note, *supra* note 16, at 647.

183. FED. R. CIV. P. 11 (1983) (amended 1993).

184. Hoffman, *supra* note 7, at 1253–54 (“[I]mposing a plausibility requirement at Rule 8(a)(2) is probably close—if not (at least sometimes) equivalent—to the Rule 11(b)(3) proscription against asserting claims for which there is no evidentiary support and no likelihood of evidentiary support after a reasonable opportunity for further discovery.”); see also Clermont & Yeazell, *supra* note 4, at 849 n.104 (“As things have worked out, the new toughness under *Twombly-Iqbal* does not mesh easily with the relative leniency under [Rule] 11(b)(3). On the one hand, a *Twombly-Iqbal* dismissal should not necessarily imply a Rule 11 violation for lack of evidentiary support. On the other hand, a plaintiff with very little knowledge of the facts apparently could use such specifically identified allegations to circumvent *Twombly-Iqbal* initially, but would then likely fall to a Rule 11 motion.” (citation omitted)).

185. Clermont & Yeazell, *supra* note 4, at 849.

186. See *supra* Part III.

187. See *supra* notes 103–08 and accompanying text.

1993.¹⁸⁸ Although we have seen only a few courts in the post-*Iqbal* era actually sanction plaintiffs for filing insufficiently detailed complaints, there has been a veritable explosion of threatened sanctions,¹⁸⁹ and surely more sanctions will follow. To illustrate further the way in which courts are conflating Rules 8 and 11, one district judge has been citing Rule 11 alongside *Twombly* and *Iqbal* as the standard governing the sufficiency of a plaintiff's complaint.¹⁹⁰

Another manifestation of this tension between Rule 8 and Rule 11 is the Supreme Court's strict reading of Rule 8(a)(2) to require factual detail that seems to conflict with Rule 11(b)(3), which allows pleadings with "factual contentions . . . [that] will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."¹⁹¹ Professor Benjamin Spencer has noted this tension:

By moving from notice pleading to plausibility pleading requiring factual allegations, the Court seems to be precluding the very types of complaints contemplated and permitted by Rule 11(b). That is, although Rule 11(b) allows for the possibility that the pleader will require discovery to obtain supportive facts, plausibility pleading does not make such an allowance. Rather, plaintiffs are required to offer such facts at the pleading phase before discovery may occur.¹⁹²

188. *Compare* *Bloomfield Condo. Assocs. v. Drasco*, No. 08-6159, 2010 WL 2652465, at *4 (D.N.J. June 25, 2010) (sanctioning plaintiff for complaint that contained "no plausible basis [for relief], other than bald assertions"), and *Catcove Corp. v. Heaney*, 685 F. Supp. 2d 328, 338–39 (E.D.N.Y. 2010) (sanctioning plaintiff for filing a "wholly conclusory Amended Complaint"), with *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985).

189. *See infra* Part V.C.

190. *Cooney v. BAC Home Loans Servicing, LP*, No. 10-4066 (JBS/JS), 2011 WL 2517045, at *2 (D.N.J., June 22, 2011) (citing *Twombly*, *Iqbal*, and FED. R. CIV. P. 11(b)(3) for the proposition that "a complaint must allege, in more than legal boilerplate, [plausible] facts about the conduct of each defendant giving rise to liability"); *Sampson v. Sampson*, No. 10-2008 (JSB/KMW), 2011 WL 2473389, at *2 (D.N.J., June 20, 2011) (same); *T.B. ex rel. J.K. v. Mount Laurel Bd. of Educ.*, No. 09-4780 (JBS/KMW), 2011 WL 2473327, at *5 (D.N.J., June 20, 2011) (same); *Major Tours, Inc. v. Colorel*, 720 F. Supp. 2d 587, 603–04 (D.N.J. 2010) (same).

191. FED. R. CIV. P. 11(b)(3); *see also* Spencer, *Plausibility Pleading*, *supra* note 5, at 469 ("[T]he Court's strict reading of Rule 8(a)(2) is at odds with . . . Rule 11(b)'s allowance of pleadings that depend on future discovery for their validation . . ."); *id.* at 485–86 ("One can say then that the *Twombly* Court's statement that the plausibility standard would make sure that there is a 'reasonably founded hope that the [discovery] process will reveal relevant evidence' in support of the claim steps directly on the toes of Rule 11 because under that rule counsel already are certifying that asserted claims and allegations are warranted by the evidence or are likely to have such support after discovery." (alteration in original) (footnote omitted)).

192. Spencer, *Plausibility Pleading*, *supra* note 5, at 471.

As noted earlier, this feature of Rule 11(b) was put in place in 1993, along with a variety of procedural mechanisms to soften Rule 11. By undercutting a plaintiff's ability to plead in this way, *Iqbal* is taking pleading directly back to the 1983–1993 time period.

B. Defendants' Tools

A major criticism aimed at both the 1983 version of Rule 11 and *Iqbal* is that they are exclusively defendants' tools that upset the Federal Rules' delicate balance between the rights of plaintiffs to gain access to the courts and the rights of defendants to avoid abusive lawsuits. Commentators frequently complained that the 1983 version of Rule 11 was used primarily by defendants against plaintiffs, even though nothing in the rule compelled this imbalanced application.¹⁹³ Empirical evidence supported this objection. Contemporaneous studies found that Rule 11 motions were "disproportionately directed at complaints rather than other papers,"¹⁹⁴ which formed the basis of approximately fifty percent of the requests for sanctions¹⁹⁵ and therefore inevitably "affect[ed] plaintiffs more adversely than defendants."¹⁹⁶

Critics today are saying the exact same thing about *Iqbal*. Professor Georgene Vairo described the cases as "a defendant's dream come true."¹⁹⁷ Another commentator said that *Iqbal* "is quickly becoming the best thing to happen to the products liability defense bar since *Daubert*."¹⁹⁸ Filing an *Iqbal* motion provides many benefits to the defense lawyer. First, of course, the defendant may actually get the case dismissed. Indeed, the defense lawyer's professional duty of competence¹⁹⁹ places pressure on him to at least consider an *Iqbal* motion in almost every case, or at least those cases where the complaint contains any thinly pled allegations. Arguably, "any defendant's lawyer, faced with a complaint employing the minimalist pleading urged by Rule 8's wording and the appended Forms' content, commits legal malpractice if he or she fails to move to dismiss with liberal citations to *Twombly* and *Iqbal*."²⁰⁰ Even an

193. By its terms, the rule applied (and continues to apply) to "[e]very pleading, written motion, and other paper" submitted to the court except discovery materials. FED. R. CIV. P. 11 (1983).

194. Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 *FORDHAM L. REV.* 257, 267 (1991).

195. VAIRO, *supra* note 14, at 16.

196. Stempel, *supra* note 194, at 267.

197. Georgene Vairo, *Who Makes the Rules*, L.A. *DAILY J.*, Aug. 26, 2009, at 6.

198. Alison Frankel, *Two More 'Iqbal' Dismissals Emerge in Product Liability Cases*, *AM. LAW.* (Aug. 3, 2009), <http://www.law.com/jsp/tal/digestTAL.jsp?id=1202432731838>.

199. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007).

200. Clermont & Yeazell, *supra* note 4, at 840.

Iqbal motion that is likely to fail has benefits for defendants—the plaintiff's response to the motion will provide the defendant with a great deal of information about the plaintiff's case and maybe even lock the plaintiff into a story.²⁰¹

C. Chilling Effect

Because complaints were the primary target of Rule 11 sanctions from 1983 to 1993, many commentators complained that the 1983 version of Rule 11 “harmed plaintiffs, particularly public interest and civil rights plaintiffs” by “chill[ing] vigorous advocacy.”²⁰² Several empirical studies sought to demonstrate that the rule was preventing attorneys from bringing meritorious cases.²⁰³ In addition to the empirical evidence, anecdotal evidence suggested that plaintiffs' lawyers were holding back because of Rule 11.²⁰⁴ “Whether it can be classified as chilling or not, lawyers reported a cautioning effect of rule 11.”²⁰⁵

Commentators fear that *Iqbal* will have the same chilling effect.²⁰⁶ Although there has not yet been any hard evidence about whether the new pleading standard is deterring lawyers from bringing meritorious cases, there is some anecdotal evidence that courts and defense lawyers are using *Iqbal* aggressively; this, in turn, may deter lawyers from bringing potentially meritorious cases.

First, in a large number of post-*Iqbal* cases, courts have cited the heightened pleading requirement imposed by *Iqbal* and threatened plaintiffs with Rule 11 sanctions if they file complaints that fail to meet that standard.²⁰⁷ In the most common scenario in

201. *Id.* (“The plaintiff's response to [an *Iqbal*] motion will provide a cheap form of discovery for the defendant”). Although *Iqbal* remains almost exclusively a defendant's tool, some courts have applied the heightened pleading standard to affirmative defenses. See generally Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 WM. & MARY L. REV. (forthcoming 2012) (collecting cases and arguing in favor of applying the plausibility standard to affirmative defenses).

202. 5A WRIGHT & MILLER, *supra* note 17, § 1332, at 489.

203. See, for example, the 1988 study conducted by the Federal Judicial Center, WILLGING, *supra* note 83, at 174–75.

204. VAIRO, *supra* note 14, at 42–43.

205. WILLGING, *supra* note 83, at 167.

206. See, e.g., Carol L. Zeiner, *When Kelo Met Twombly-Iqbal: Implications for Pretext Challenges to Eminent Domain*, 46 WILLAMETTE L. REV. 201, 254 (2009) (“The ‘reinterpretation’ of *Conley* by the arrival of *Twombly-Iqbal*, and the duo's new test under [Rule] 12(b)(6), is likely to have a chilling effect on pretext challenges to eminent domain under the federal Constitution.”). But see Spencer, *Pleading Doctrine*, *supra* note 7, at 26 (“Incoherence from the courts has the potential to create an unpredictability that will underdeter frivolous claims . . .”).

207. See, e.g., *Golden v. Nadler Pritikin & Mirabelli*, No. 05 C 0283, 2010 WL 5373876, at *2 n.3 (N.D. Ill. Dec. 21, 2010) (denying motion to dismiss under *Iqbal* but warning plaintiff that “[b]efore proceeding, [plaintiff] should strongly consider whether he can do so while upholding his Rule 11

the post-*Iqbal* world, the court grants a defendant's Rule 12(b)(6) motion under *Iqbal* and permits the plaintiff leave to amend the complaint but warns that he should only amend the complaint if he can do so consistent with his obligations under Rule 11.²⁰⁸ This veiled (or perhaps not-so-veiled) threat from a judge can certainly make a lawyer think twice about refileing a complaint, and this has become an extremely common occurrence. In making this threat, courts are directly linking the obligation to plead with specificity under *Iqbal*'s heightened pleading standard with the plaintiff's obligation to assert claims only if the lawyer has a good faith basis for doing so under Rule 11(b)(3).²⁰⁹ This was precisely the situation from 1983 to 1993, when "courts warned plaintiffs whose claims were dismissed with leave to amend that they would be subject to sanctions if the amended complaint did not correct the factual or legal deficiencies that led to dismissal."²¹⁰ This practice seemed to be in decline after Rule 11 was amended in 1993 but is now occurring again on a regular basis.

Second, defense firms are openly encouraging clients to challenge complaints, not only via motions to dismiss, but also through Rule 11 motions.²¹¹

obligations"); *Wade v. Fresno Police Dep't.*, No. 1:09-CV-0599 AWI DLB, 2010 WL 2353525, at *8 (E.D. Cal. June 9, 2010) ("The court does remind Plaintiff and all parties that under Rule 11 . . . an award of sanctions is appropriate if a parties' claims, defenses, and/or other legal contentions are frivolous, the factual contentions have no evidentiary support, and the factual denials are not warranted by the evidence, reasonable belief, or lack of information."); *Safeco Ins. Co. of Am. v. O'Hara Corp.*, No. 08-CV-10545, 2008 WL 2558015, at *1 (E.D. Mich. June 25, 2008) (admonishing counsel to "[p]repare to withdraw without prejudice claims and defenses that are not *presently* sustainable under Rule 11 in view of evidence in hand"); *Knudson v. Wachovia Bank*, 513 F. Supp. 2d 1255, 1258 n.1 (M.D. Ala. 2007) ("Should he choose to file an Amended Complaint, [the plaintiff] should keep in mind both that he must make his allegations within the strictures of Rule 11 . . . and that under *Bell Atlantic Corp. v. Twombly*, a 'plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" (alteration in original) (citation omitted) (quoting *Twombly*, 550 U.S. 444, 555 (2007))).

208. See Appendix, *infra*, for cases in which this has occurred.

209. Moreover, in at least a few post-*Iqbal* cases, courts have sanctioned plaintiffs' lawyers for filing complaints with facts insufficient to meet the *Iqbal* standard. See, e.g., *Bloomfield Condo. Assocs. v. Drasco*, No. 08-6159, 2010 WL 2652465, at *4-5 (D.N.J. June 25, 2010); *Catcove Corp. v. Heaney*, 685 F. Supp. 2d 328, 337-38 (E.D.N.Y. 2010).

210. Nelken, *supra* note 65, at 1329; see also VAIRO, *supra* note 14, at 42-43 (noting that judges under the 1983 rule frequently reminded litigants of their Rule 11 obligations and that monetary consequences might follow violations of the rule).

211. See, e.g., Caroline Mitchell & David Wallach, *Ashcroft v. Iqbal: Taking Twombly a Step Further*, ANTITRUST CHRON., Summer 2009, vol. 7, release 2, at 7-8, available at <http://www.jonesday.com/files/Publication/6858c3ef-d7e4-4c90-ad95-966de4581eb0/Presentation/PublicationAttachment/c4560553-6cf8-4dbf-a>

Finally, one court presented with a defendants' 12(b)(6) motion to dismiss under *Iqbal* took the unusual step of ordering a preliminary hearing under the little-used Rule 12(i).²¹² The court stated that the hearing would serve dual purposes. First, the parties could "present the testimony of live witnesses and other evidence limited to the defendants' objections to the pleadings, specifically the threshold legal issues upon which, under the *Twombly* and *Iqbal* plausibility test, the sufficiency of [the plaintiffs] retaliation claim is grounded."²¹³ "Second, the hearing would serve as an occasion for the Court to probe, in accordance with Rule 11(b), the extent to which some of [the plaintiffs] conclusory allegations have factual support and were formed after an inquiry reasonable under the circumstances."²¹⁴ This kind of aggressive approach might make plaintiffs gun shy about filing complaints, though it remains to be seen whether other courts will use this tactic.

In short, it is still too early to know whether *Iqbal* will have the same kind of chilling effect as the 1983 version of Rule 11, but early signs suggest that it might.

D. Disproportionate Impact

In still another striking parallel, critics of *Iqbal* argue that it is having a disproportionate impact on civil rights and employment discrimination cases, which is the same objection that commentators lodged against the 1983 version of Rule 11.²¹⁵

As discussed earlier, one of the most significant complaints about the 1983 version of Rule 11 was that it "harmed plaintiffs, particularly public interest and civil rights plaintiffs" by "chill[ing]

304-a2776e5b7adf/Mitchell-JULY-09_2_.pdf ("In some instances, where allegations in the complaint are obviously wrong or 'information and belief' pleadings seem suspiciously thin, defendants may want to challenge the basis for the allegations by serving a Rule 11 motion under the safe harbor provision, to determine how willing plaintiffs are to stand by them.").

212. *Kregler v. City of New York*, 608 F. Supp. 2d 465, 475–77 (S.D.N.Y. 2009).

213. *Id.* at 475.

214. *Id.* After the hearing, the district court dismissed the complaint and denied plaintiff leave to amend, though it did not consider sanctioning the plaintiff. *Kregler v. City of New York*, 646 F. Supp. 2d 570, 571 (S.D.N.Y. 2009). On appeal, the Second Circuit, in a summary, unpublished opinion, reversed and held that the plaintiff's motion for leave to amend should have been granted. *Kregler v. City of New York*, 375 F. App'x 143, 144 (2d Cir. 2010). In that opinion, the court noted that it "express[ed] no opinion . . . as to the use of [the Rule 12(i)] procedure or the impact of the facts adduced therein." *Id.* at 144 n.1.

215. *Schneider*, *supra* note 7, at 519 ("[T]he greatest impact of this change in the landscape of federal pretrial practice is the dismissal of civil rights and employment discrimination cases from federal courts in disproportionate numbers.").

vigorous advocacy.”²¹⁶ Moreover, commentators conducted empirical studies, just as they are doing today, to determine whether Rule 11 was being applied more strictly to certain kinds of cases. And several of those studies concluded that sanctions were being imposed “disproportionately against plaintiffs, particularly in certain types of litigation such as civil rights, employment discrimination, securities fraud cases brought by investors, and antitrust cases brought by small companies.”²¹⁷

Commentators are criticizing *Twombly* and *Iqbal* on the exact same ground. Among the large amount of academic commentary produced in the wake of *Twombly* and *Iqbal* are a number of articles—including several empirical studies—expressing concern that *Twombly* and *Iqbal* are likely to have or are already having a “disproportionate” impact in certain kinds of cases.²¹⁸ For example, Professor Howard Wasserman has written that “[c]ivil rights is one substantive area in which *Iqbal* will empower courts to increase scrutiny over pleadings.”²¹⁹ Professor Arthur Miller made a similar prediction before Congress:

216. 5A WRIGHT & MILLER, *supra* note 17, § 1332, at 489; *see* Miller, *supra* note 65, at 1007–08 (“[T]he 1983 Rule was criticized for having a disproportionate impact, particularly in areas of the law considered ‘disfavored’ by some, such as civil rights cases, which arguably was tantamount to the feared chilling effect.” (footnote omitted)); *supra* notes 79–87 and accompanying text.

217. Vairo, *Critical Analysis*, *supra* note 79, at 200; *see also* VAIRO, *supra* note 14, at 14–15 (discussing concerns about chilling effects of 1983 amendments); Stempel, *supra* note 194, at 268 (“There also remains the disturbing although incomplete statistical picture that suggests that civil rights and discrimination claims are more frequently subjected to Rule 11 sanctions.”); Note, *supra* note 16, at 631 (“Although almost every major lawsuit now includes at least the threat of a rule 11 motion, sanctions are more likely to be imposed in public interest litigation, such as civil rights and employment discrimination cases, than in other types of federal litigation.” (footnote omitted)).

218. *See, e.g.*, Schneider, *supra* note 7, at 520 (“Empirical studies of the effect of *Twombly* and *Iqbal* suggest that these decisions have resulted in the disproportionate dismissal of civil rights cases.”); *see also* Spencer, *Pleading Doctrine*, *supra* note 7, at 33–34 (“What characteristics distinguish those claims requiring the pleading of few facts from those requiring additional factual detail? The key dividing line seems to be between claims that require suppositions to connote wrongdoing and those based on facts that indicate impropriety on their own. For example, contract claims appear to be the kind of claim for which suppositions are not necessary to state a valid claim. . . . Conversely, products liability, civil conspiracy, antitrust, and civil rights claims . . . are more challenging to allege because each claim requires the proffering of a supposition of some sort to turn what happened into an actionable event.”).

219. Wasserman, *supra* note 7, at 160; *see also* A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 103 (2008) (“*Twombly* will serve as yet another procedural reform that will stymie civil rights claims and other seemingly disfavored actions.”).

Twombly and *Iqbal* . . . probably will affect litigants bringing complex claims the hardest. Those cases—many involving Constitutional and statutory rights that seek the enforcement of important national policies and often affecting large numbers of people—include claims in which factual sufficiency is most difficult to achieve at the pleading stage and tend to be resource consumptive.²²⁰

Similarly, Professor Joseph Seiner has examined the specific effect of *Twombly* on both employment discrimination claims brought under Title VII and disability discrimination claims brought under the Americans with Disabilities Act (“ADA”). With respect to the former (conducted after *Twombly* but before *Iqbal*), Professor Seiner concluded that *Twombly* “has already made the pleading requirements more difficult (and certainly more confusing) for Title VII litigants,” and that the district courts are aggressively using *Twombly* to “rais[e] the bar as to what an employment discrimination plaintiff must plead” to survive dismissal.²²¹ As for claims of disability discrimination, Professor Seiner’s empirical study concluded that courts are 14.1% more likely to grant a motion to dismiss in an ADA claim after *Twombly* than before.²²²

Professor Seiner’s work only tells us that pleading employment discrimination and disability discrimination claims after *Twombly* is more difficult than it was before *Twombly* and does not speak to whether these categories of cases are receiving disproportionate treatment. Several other empirical studies have studied this issue, however, and suggest that *Twombly* and *Iqbal* are already having at least some disproportionate impact on these “disfavored” cases.²²³

220. *Miller Testimony*, *supra* note 3, at 17–18.

221. Seiner, *supra* note 7, at 1037–38.

222. Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 121 (2010).

223. *E.g.*, Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (concluding that motions to dismiss were granted in constitutional civil rights cases at a higher rate (53%) than in cases overall (49%)); *see also* Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1838 (2008) (concluding that post-*Twombly*, a civil rights action was 39.6% more likely to be dismissed than the average case). Additionally, in a recent empirical study, Professor Alexander Reinert sought to determine the impact of *Iqbal* by looking at a dataset of cases from 1990 to 1999 with “thin” pleadings—presumably those that would be most affected by *Iqbal*—and comparing their “rate of success to the entire set of litigated cases over the same time period.” Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 126 (2011). Professor Reinert concluded that “thinly pleaded cases are at least as successful as the generality of cases. Furthermore, for some types of cases, most surprisingly civil rights cases, thinly pleaded cases may achieve an even higher level of success than similar actions supported by more detailed or convincing pleadings.” *Id.*

The Federal Judicial Center (“FJC”) recently produced the most comprehensive study of *Iqbal* and *Twombly* to date.²²⁴ The FJC study compared motion-to-dismiss activity in twenty-three federal judicial district courts before *Twombly* (cases filed from October 2005 through June 2006) and after *Iqbal* (cases filed from October 2009 through June 2010).²²⁵ The FJC found that defendants filed motions to dismiss in 6.2% of cases after *Iqbal* compared to only 4% of cases before *Twombly*, and reported this increase as statistically significant.²²⁶ With regard to the success of such motions, however, the FJC concluded:

After controlling for identifiable effects unrelated to the Supreme Court decisions, such as differences in caseload across individual districts, we found a statistically significant increase in the rate at which motions to dismiss for failure to state a claim were granted only in cases challenging financial instruments. . . . We found no increase in the rate at which motions to dismiss were granted, with or without opportunity to amend, in other types of cases.²²⁷

The FJC’s conclusion concerning the dismissal rate was controversial and became a hot topic among commentators, leading some to suggest that the impact of *Twombly* and *Iqbal* may have been exaggerated.²²⁸ Further, the FJC study is being cited by those who believe that no change is necessary in the pleading standard after *Iqbal*.²²⁹

Professor Lonny Hoffman has reexamined the FJC study, however, and concluded that the FJC’s overemphasis on statistical significance may cause “some readers to overlook the considerable changes in dismissal practices and outcomes the researchers did

224. See generally JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf).

225. *Id.* at 5.

226. *Id.* at 7, 8 tbl.1.

227. *Id.* at 21.

228. See, e.g., Howard Wasserman, *Reports of Pleading’s Demise May Have Been Exaggerated*, PRAWFSBLAWG (Mar. 29, 2011, 8:46 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/03/reports-of-pleadings-demise-may-have-been-exaggerated.html>.

229. See, e.g., MARK R. KRAVITZ, ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 53 (2011) (“The FJC study—and the promise of its next study—combines with the review of judicial decisions to suggest there is no urgent need for immediate action on pleading standards.”), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2011.pdf>.

observe in comparing dismissal motions and orders before *Twombly* with motions and orders after *Iqbal*.”²³⁰

First, Professor Hoffman emphasizes the FJC’s findings that “after *Iqbal*, a plaintiff was twice as likely to face a motion to dismiss”²³¹ and stresses the importance of this finding, remarking that “[t]his sizeable increase in the rate of Rule 12(b)(6) motion activity represents a marked departure from the steady filing rate observed over the last several decades.”²³² As Professor Hoffman concludes, the fact “[t]hat more motions are being filed carries real consequences for litigants.”²³³ Indeed, “[t]he FJC’s study confirms early predictions that *Twombly* and *Iqbal* would incentivize defendants to more frequently challenged the sufficiency of the plaintiff’s complaint.”²³⁴

Second, Professor Hoffman reexamines the FJC’s data concerning grant rates on motions to dismiss and again notes the FJC’s own data demonstrate important changes: “[O]n average, defendants were more successful in bringing motions to dismiss post-*Iqbal*.”²³⁵ On this issue, Professor Hoffman notes that the FJC data show that “in the three largest case categories (Other, Financial Instruments and Civil Rights), it was much more likely after *Iqbal* that a court would grant a motion to dismiss with leave to amend”—12.8%, 30.5%, and 11.7%, respectively.²³⁶ Additionally, even the “remaining three categories (Contract, Torts and Employment Discrimination) show smaller but still clearly increasing grant rates”²³⁷—9.2%, 7.7%, and 5.6% respectively.²³⁸

230. Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss 5-6* (Oct. 27, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1904134>.

231. *Id.* at 16 (citing CECIL ET AL., *supra* note 224, at 10 & tbl. 2).

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 13.

236. *Id.* (citing CECIL ET AL., *supra* note 224, at 14 tbl.4).

237. *Id.*

238. CECIL ET AL., *supra* note 224, at 14 & tbl.4. Professor Hoffman goes on to offer a variety of criticisms of the FJC’s empirical analysis and concludes that “by emphasizing only whether the effects they observed were statistically significant, but not explaining what that technical terminology means, the study unintentionally confuses readers into thinking that the study proved *Twombly* and *Iqbal* were not responsible for the substantively significant changes in dismissal practices and outcomes that were found.” Hoffman, *supra* note 234, at 39. Based on the variety of issues he found with the FJC’s analysis, Professor Hoffman ultimately concludes that “perhaps . . . empirical study cannot resolve all of the policy questions that *Twombly* and *Iqbal* raise.” *Id.* at 40.

In addition to this empirical evidence, anecdotal evidence also supports the view that courts are applying *Iqbal* particularly harshly in these “disfavored” cases.²³⁹

VI. IMPLICATIONS

What are the implications of this dramatic parallel between the pleading landscape today and the pleading landscape under the 1983 version of Rule 11? Principally, this historical analysis should bring critical data and a fresh perspective to the current debate about *Iqbal*. Although some commentators defend the decision²⁴⁰ or argue that its impact will be minimal,²⁴¹ most contend that *Iqbal* is ill-conceived for the reasons discussed in this Article. The criticism of *Iqbal*, however, lacks significant evidence—empirical or otherwise—since we are still very early in the post-*Iqbal* era. This is where the comparison to the 1983–1993 time period is useful. We do not need to spend a lot more time waiting to find out how plausibility pleading will play out in the lower courts. We have been here before, and we know how it works.

Iqbal's critics have been calling on Congress to overturn *Iqbal*, but no action seems imminent.²⁴² It took ten years for the rule makers to amend Rule 11 to fix the mischief caused by the 1983 version of Rule 11. Given what the 1983–1993 time period tells us about plausibility pleading, it should not take that long for policymakers to take action to address the problems caused by *Iqbal*.

CONCLUSION

This Article has examined the previously overlooked parallels between pleading under the 1983 version of Rule 11 and pleading in the post-*Iqbal* era. In many ways, *Iqbal* has returned us to 1983. Courts are judging the sufficiency of complaints based on a heightened plausibility standard. Critics are complaining that the use of that standard is antithetical to the spirit, if not the letter, of the Federal Rules of Civil Procedure and its adoption of notice pleading. Further, commentators are saying that the plausibility standard is too subjective, gives judges too much discretion, has a

239. See, e.g., *Miller Testimony*, *supra* note 3, at 18 (“Already, recent decisions suggest that complex cases, such as those involving claims of discrimination, conspiracy, and antitrust violations, have been treated as if they were disfavored actions.”); *Schneider*, *supra* note 7, at 533–36 (discussing a number of lower court decisions in which district courts have dismissed civil rights and employment cases).

240. See, e.g., *Dodson, Comparative Convergences*, *supra* note 7, at 463–71 (arguing that the *Iqbal* standard makes U.S. pleading practice more similar to that of other countries, and that this presents an opportunity for “valuable comparative study and analysis”).

241. See, e.g., *Steinman*, *supra* note 11.

242. See, e.g., *Herrmann et al.*, *supra* note 7.

chilling effect on plaintiffs, and is disproportionately harming plaintiffs with certain kinds of disfavored claims (civil rights and employment discrimination cases in particular). In short, the Supreme Court, through its interpretation of Rule 8 in *Iqbal* and *Twombly*, has achieved something very similar to what the 1983 rulemakers accomplished through Rule 11. Policymakers should look to the 1983–1993 experience under the old Rule 11 as a reason to move forward and address the problems with *Iqbal*.

APPENDIX: GRANTING LEAVE TO AMEND COMPLAINT AND RULE 11

In the following cases, courts granted a defendant's Rule 12(b)(6) motion under *Iqbal* because the complaint was insufficiently detailed and permitted the plaintiff leave to amend but warned that the plaintiff should only amend if he could do so consistent with his obligations under Rule 11. These cases were selected after a review of the results of a Westlaw search for "Iqbal and Rule 11" during the time period June 2009 to January 2011.

Singh v. Wells Fargo Bank, N.A., No. C-09-2035 SC, 2009 WL 2365881, at *7 (N.D. Cal. Jul. 30, 2009) ("Plaintiff is strongly encouraged to bring only those claims that have, or are likely to have, evidentiary support. See [Rule] 11(b)(3).").

Osorio v. United States, No. 08-80459-CIV, 2009 WL 2430889, at *3 (S.D. Fla. Aug. 6, 2009) ("Plaintiff may amend her complaint to attempt to assert a valid claim consistent with this order. Of course, Plaintiff may only assert such a claim if she has a good faith basis to do so. See Rule 11(b)(3). Also, any amendment must 'contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'. She must allege more than conclusions.'" (citation omitted) (quoting *Twombly*, 550 U.S. at 570)).

Floyd v. CIBC World Mkts., Inc., 426 B.R. 622, 633 (S.D. Tex. 2009) ("Plaintiff's Amended Complaint accordingly has not stated a plausible claim for relief . . . The Court nevertheless will grant Plaintiff leave to amend if it is able to do so within the strictures of Rule 11.").

Jones v. Premier One Funding, Inc., No. C-09-3858 SC, 2009 WL 4510138, at *5 (N.D. Cal. Nov. 30, 2009) ("Plaintiffs are strongly encouraged to bring only those claims that they believe have evidentiary support. See [Rule] 11(b)(3).").

Forba Holdings, L.L.C. v. Licsac, L.L.C., No. 09-cv-02305-CMA-MJW, 2010 WL 148267, at *2 (D. Colo. Jan. 11, 2010) ("The Court . . . grants grants Plaintiff leave to file within 21 days an emended compliant that complies with the *Twombly/Iqbal* plausibility standard. If Plaintiff cannot, in good faith, file such a complaint . . . the case will be dismissed with prejudice." (footnote omitted) (citing Rule 11(b)(3))).

Weaver v. Derichebourg ICS Multiservices., No. 09 Civ. 1611(LTS)(DF), 2010 WL 517595, at *3 (S.D.N.Y. Feb. 3, 2010) ("The determination of whether Plaintiff can articulate facts sufficient plausibly to state such a claim and comply with Rule 11 . . . will have to abide the filing of the amended complaint . . .").

Cooke v. Jaspers, No. H-07-3921, 2010 WL 918342, at *6 (S.D. Tex. Mar. 10, 2010) ("There is no allegation that puts [the defendant] on notice of the basis of the claim or shows the plaintiffs' entitlement to relief. The motion to dismiss is granted. The plaintiffs have leave to amend, consistent with Rule 11" (citations omitted)).

Smith v. Pizza Hut, Inc., 694 F. Supp. 2d 1227, 1230–31 (D. Colo. 2010) (“The Court . . . [grants] Plaintiff leave to file . . . an amended complaint that complies with the *Twombly/Iqbal* plausibility standard. If Plaintiffs cannot, in good faith, file such a complaint, . . . this case will be dismissed with prejudice.” (footnotes omitted) (citing Rule 11(b)(3))).

Figueiredo v. Aurora Loan, No. C 09-4784 BZ, 2010 WL 935323, at *1 (N.D. Cal. Mar. 15, 2010) (“It is plaintiff’s obligation to plead facts sufficient to state a plausible claim for relief. The Court will not presume facts that plaintiff failed to allege in order to defeat a motion to dismiss. If plaintiff cannot allege that the property was owner-occupied consistent with her obligations under Rule 11, then plaintiff cannot state a cause of action” *(citation omitted)).

Darrow v. WKRP Mgmt., L.L.C., No. 09-cv-01613-CMA-BNB, 2010 WL 1416799, at *3 (D. Colo. Apr. 6, 2010) (“The Court . . . [grants] Plaintiff leave to file . . . an amended complaint that complies with the *Twombly/Iqbal* plausibility standard. If Plaintiffs cannot, in good faith, file such a complaint, . . . this case will be dismissed with prejudice.” (footnotes omitted) (citing Rule 11(b)(3))).

Goodman v. Merrill Lynch & Co., 716 F. Supp. 2d 253, 262 (S.D.N.Y. 2010) (“[B]efore repleading, plaintiff should carefully consider whether she can allege additional facts that would make her claims plausible rather than possible, keeping in mind the requirements of—and the sanctions authorized by—Rule 11.”).

Zendejas v. GMAC Wholesale Mortg. Corp., No. 1:10-CV-00184 OWW GSA, 2010 WL 2490975, at *4 (E.D. Cal. June 16, 2010) (“Defendants’ motion to dismiss any claims . . . for lack of standing is [granted with leave to amend] consistent with Rule 11.”).

United States *ex rel.* Davis v. Prince, No. 1:08CV1244, 2010 WL 2679761, at *4 (E.D. Va. July 2, 2010) (“Simply put, the complaint’s factual allegations do not create a plausible inference Thus, Count 2 reads as nothing more than a ‘threadbare recital’ of the [legal] elements Accordingly, Count 2 is properly dismissed, but relators may re-plead this claim if they can do so consistently with Rule 11.” (citation omitted) (quoting *Iqbal*, 129 S. Ct. at 1949)).

Ravenswood Ctr., L.L.C. v. FDIC, No. 10 C 1064, 2010 WL 2681312, at *4 (N.D. Ill. July 6, 2010) (“We also grant [the plaintiff] leave to file an amended complaint . . . to the extent that it is able to do so consistent with this order and Rule 11.”).

Desperado Motor Racing & Motorcycles, Inc. v. Robinson, No. H-09-1574, 2010 WL 2757523, at *4 (S.D. Tex. July 13, 2010) (“The Court, in the interests of justice, grants Defendant leave to amend and replead these causes of action if he can do so within the strictures of Rule 11.”).

Wedgeworth v. Result Matrix, Inc., No. 02:10cv184-WHA, 2010 WL 2794594, at *3 (M.D. Ala. July 15, 2010) (“In deciding whether to file an amendment to the [complaint] . . . the Plaintiffs should consider whether they can allege [a cognizable claim], consistent with the requirements of Rule 11”).

Bonner v. Select Portfolio Servicing, Inc., No. 10-00609 CW, 2010 WL 2925172, at *13 (N.D. Cal. July 26, 2010) (“If he files an amended complaint, Plaintiff’s failure to make a good faith effort to comply with Rule 11 will result in the imposition of sanctions and a referral to the State Bar of California.”).

Warner v. Township of S. Harrison, No. 09-6095 (JBS/JS), 2010 WL 3001969, at *5 n.6 (D.N.J. July 26, 2010) (“If Plaintiff believes that he is able to allege that he was an ‘employee’ who suffered an ‘adverse employment decision’ motivated by his political affiliation, and that such a pleading would satisfy counsel’s obligations under Rule 11, then Plaintiff is free to seek leave to file a second amended complaint promptly.” (citation omitted)).

La Gorce Palace Condo Ass’n v. QBE Ins. Corp., 733 F. Supp. 2d 1332, 1335 (S.D. Fla. 2010) (“If there are facts to support such a claim consistent with Rule 11 . . . Plaintiff may file [sic] an amended Count I.”).

Bolton v. Fed. Home Loan Mortg. Corp., No. 2:10cv171-WHA, 2010 WL 3270022, at *5 (M.D. Ala. Aug. 17, 2010) (“[S]hould Plaintiff choose to file an amended complaint, he should keep in mind that he must make his allegations within the strictures of Rule 11 . . .”).

Muczynski v. Lieblich, No. 10-cv-0081, 2010 WL 3328203, at *7 (N.D. Ill. Aug. 19, 2010) (“Plaintiff . . . [may] file an amended complaint if he can do so consistent with Rule 11.”).

Abdul-Aziz v. Show Dept., Inc., No. 09-cv-7609, 2010 WL 3516157, at *3 (N.D. Ill. Aug. 25, 2010) (“Plaintiff . . . [may] file a Second Amended Complaint if he can do so consistent with Rule 11.”).

McGinnis v. GMAC Mortg. Corp., No. 2:10-cv-00301-TC, 2010 WL 3418204, at *6 (D. Utah Aug. 27, 2010) (“[The plaintiff] may file a motion to amend his complaint . . . only so long as his amended complaint . . . complies with Rule 11 . . .”).

Kopperl v. Bain, No. 3:09-CV-1754 (CSH), 2010 WL 3490980, at *4 (D. Conn. Aug. 30, 2010) (“In drafting any amended counterclaim pursuant to this Ruling, the . . . Defendants and counsel must keep in mind the provisions of Rule 11 . . .”).

MacPherson v. Town of Southampton, 738 F. Supp. 2d 353, 375 (E.D.N.Y. 2010) (“Plaintiffs are cautioned . . . that any amendment is subject to scrutiny under Rule 11.”).

Ginsburg v. Concordia Univ., No. 4:10CV3064, 2010 WL 3720186, at *5 n.3 (D. Neb. Sept. 14, 2010) (“The court is providing [the plaintiff] an opportunity to cure the noted defects in his complaint provided such amendments can be made within the parameters of Rule 11 and the plaintiff wants to proceed with this case. However, the plaintiff is hereby notified that attorney fees may be awarded if his claim lacks a factual basis and he nonetheless continues to pursue this litigation.”).

Miller v. Correctional Med. Servs., Inc., No. 2:10cv583-WHA-WC, 2010 WL 3723998, at *6 (M.D. Ala. Sept. 16, 2010) (“[S]hould Plaintiff choose to file an amended complaint, she should keep in mind that she must make her allegations within the strictures of Rule 11 . . .”).

Garback v. Lossing, No. 09-cv-12407, 2010 WL 3733971, at *5 (E.D. Mich. Sept. 20, 2010) (“The Court will grant [the plaintiff] leave to file an amended complaint, consistent with Rule 11 . . .”).

London v. Aurora Loan Servs., No. C-10-02789 EDL, 2010 WL 3751812, at *5 (N.D. Cal. Sept. 24, 2010) (“The Court cautions Plaintiff that she must comply with Rule 11 in amending her complaint.”).

Veltex Corp. v. Matin, No. CV 10-1746 ABC (PJWx), 2010 WL 3834045, at *8 n.12 (C.D. Cal. Sept. 27, 2010) (“In light of the Court’s granting Plaintiff leave to amend . . . however, the Court reminds Plaintiff of its Rule 11(b) obligations with respect to any new allegations pled.”).

Shugart v. Ocwen Loan Servicing, L.L.C., 747 F. Supp. 2d 938, 947 (S.D. Ohio 2010) (“The Court reminds Plaintiff’s counsel of its obligations pursuant to [Rule] 11(b)(3) and grants Plaintiff’s request for leave to amend Count Two . . .”).

A-W Land Co. v. Anadarko E & P Co., No. 09-cv-02293-MSK-MJW, 2010 WL 3894107, at *5 n.10 (D. Colo. Sept. 29, 2010) (“Should the Plaintiffs believe they can, within the strictures of [Rule] 11(b)(3), amend the Complaint to state a cognizable claim . . . they may move for leave to do so . . . and the Court will evaluate that motion on its merits.”).

Ideyi v. State Univ. of N.Y. Downstate Med. Ctr., No. 09-CV-1490 (ENV)(RML), 2010 WL 3938411, at *8 (E.D.N.Y. Sept. 30, 2010) (“[T]he following causes of action are dismissed without prejudice with leave to replead, provided that plaintiff can do so in compliance with his Rule 8 and Rule 11 obligations . . .”).

Hall v. Dixon, No. H-09-2611, 2010 WL 3909515, at *48 (S.D. Tex. Sept. 30, 2010) (“Any such amendment must be consistent with this Memorandum and Opinion and Rule 11 . . . and must not be futile.”).

Burton v. Progressive N. Ins. Co., No. CIV-10-921-W, 2010 WL 4167392, at *7 (W.D. Okla. Oct. 21, 2010) (“[T]he [plaintiffs] should be granted the opportunity to amend their amended complaint in accordance with *Twombly*, *Iqbal*, extant Oklahoma law and Rule 11 ‘to frame a ‘complaint with enough factual matter (taken as true) to suggest’ that . . . [they are] entitled to relief . . .’” (third and fourth alterations in original) (citation omitted) (quoting *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008))).

Carter v. Countrywide Home Loans, Inc., No. 3:10cv503-WHA-CSC, 2010 WL 4269149, at *6 (M.D. Ala. Oct. 28, 2010) (“The court will dismiss this Count without prejudice, to allow Plaintiffs an opportunity to amend this claim, if they wish to do so and can, within the requirements of Rule 11 to include allegation of facts showing how they reasonably relied on the alleged misrepresentations and why the two year statute of limitations has not run on the claim.” (citation omitted)).

Avant-Garde, L.L.C. v. Mountain Spa Props., L.L.C., No. CV10-1499-PHX-NVW, 2010 WL 4537057, at *6 (D. Ariz. Nov. 3, 2010) (“This denial is without prejudice to a subsequent motion to amend, but the Court emphasizes that, if [plaintiff] chooses to amend, its factual allegations must either (i) ‘have evidentiary support,’ or (ii) be ‘specifically . . . identified’ as facts that ‘will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.’” (second alteration in original) (quoting Rule 11(b)(3))).

Kaminski v. BWW Sugar Land Partners, No. H-10-551, 2010 WL 4817057, at *3 (S.D. Tex. Nov. 19, 2010) (“Plaintiffs shall file an amended complaint . . . consistent with Rule 11 . . .”).

Ward v. Ala. Dep’t of Conservation and Natural Res., No. 1:10cv745-WHA-SRW, 2010 WL 5014343, at *6 (M.D. Ala. Dec. 3, 2010) (“The court is not suggesting that the Plaintiff should file an Amended Complaint, or that, if he does, an Amended Complaint will withstand a new Motion to Dismiss. The Plaintiff is merely being given an opportunity to do so, if he so chooses, and if he can do so considering Rule 11.” (citation omitted)).

Ballard v. Chase Bank USA, N.A., No. 10cv790 L(POR), 2010 WL 5114952, at *8 (S.D. Cal. Dec. 9, 2010) (“Counsel is reminded that ‘Rule 11 authorizes a court to impose a sanction on any attorney, law firm, or party that brings a claim for an improper purpose or without support in law or evidence.’” (quoting Sneller v. City of Bainbridge Island, 606 F.3d 636, 638–39 (9th Cir. 2009))).

Kucheynik v. Mortg. Elec. Registration Sys., Inc., No. C10-451Z, 2010 WL 5174540, at *5 n.4 (W.D. Wash. Dec. 15, 2010) (“The Court notes that amendment would be futile, unless Plaintiffs can allege facts, subject to Rule 11(b) requirements, that would entitle them to equitable tolling and to cure the factual deficiencies in the complaint. Nevertheless, the Court is persuaded that the Plaintiffs should be permitted an opportunity to amend at this early stage of the proceedings.”).

Cruz Reyes v. United States, No. 08-00005, 2010 WL 5207583, at *7 n.8 (D. Guam Dec. 15, 2010) (“The court is skeptical that Plaintiff can amend his negligence claims and his contract claim in keeping with Rule 11 . . .”).

Lindgren v. Spears, No. H-10-1929, 2010 WL 5437270, at *4 (S.D. Tex. Dec. 27, 2010) (“Spears’s motion to dismiss under Rule 12(b)(6) is granted, without prejudice and with leave to amend, consistent with Rule 11 . . .”).

Meram v. Citizens Title & Trust, Inc., No. 10cv1388 L(POR), 2011 WL 11463, at *5 (S.D. Cal. Jan. 3, 2011) (“The Court will grant plaintiffs’ request for leave to amend, so that plaintiffs may attempt to cure the deficiencies noted herein. But plaintiffs’ are advised that ‘Rule 11 authorizes a court to impose a sanction on any attorney, law firm, or party that brings a claim for an improper purpose or without support in law or evidence.’” (quoting *Sneller v. City of Bainbridge Island*, 606 F.3d 636, 638–39 (9th Cir. 2009))).

Rashdan v. Geissberger, No. C 10-00634 SBA, 2011 WL 197957, at *7 (N.D. Cal. Jan. 14, 2011) (“Plaintiff is granted leave to amend this claim if she can—in good faith and consistent with the requirements of Rule 11 . . .”).

Mitchell v. Bank of Am., No. 10cv432 L(WVG), 2011 WL 334988, at *3 (S.D. Cal. Jan. 31, 2011) (“[P]laintiffs will be granted leave to file an amended complaint . . . Counsel is reminded that ‘Rule 11 authorizes a court to impose a sanction on any attorney, law firm, or party that brings a claim for an improper purpose or without support in law or evidence.’” (quoting *Sneller v. City of Bainbridge Island*, 606 F.3d 636, 638–39 (9th Cir. 2009))).