



# **Plausibility Pleading: Barring the Courthouse Door to Deserving Claimants**

**By CPR Member Scholars William Funk,  
Thomas McGarity, and Sidney Shapiro,  
and CPR Policy Analyst James Goodwin**

May 2010

## About the Center for Progressive Reform

Founded in 2002, the Center for Progressive Reform (CPR) is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes that sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes that people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information. CPR is grateful to the Robert L. Habush Endowment for funding this white paper, as well as to the Deer Creek Foundation, the Bauman Foundation, the Public Welfare Foundation, and the Open Society Institute for their generous support of its work in general.

This white paper is a collaborative effort of the following Member Scholars and staff of the Center for Progressive Reform: **William Funk** is a Professor of Law at Lewis & Clark Law School in Portland, Oregon and a Member Scholar of the Center for Progressive Reform. **Thomas McGarity** holds the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas in Austin, is a member of the Board of Directors of the Center for Progressive Reform, and is the immediate past president of the organization. **Sidney Shapiro** holds the University Distinguished Chair in Law at the Wake Forest University School of Law, is the Associate Dean for Research and Development, and is a member of the Board of Directors of the Center for Progressive Reform. **James Goodwin** is a Policy Analyst with the Center for Progressive Reform.

We appreciate the assistance of **Sandra Zellmer**, Associate Professor of Law, University of Nebraska College of Law, and Member Scholar of the Center for Progressive Reform. We are also grateful to **Charles Silver**, Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law, for reviewing drafts of this white paper and for providing helpful suggestions and feedback.

For more information about the authors, see page 19.

[www.progressivereform.org](http://www.progressivereform.org)

For media inquiries contact Matthew Freeman at [mfreeman@progressivereform.org](mailto:mfreeman@progressivereform.org)  
or Ben Somberg at [bsomberg@progressivereform.org](mailto:bsomberg@progressivereform.org).

For general information, email [info@progressivereform.org](mailto:info@progressivereform.org)

© 2010 Center for Progressive Reform

### Acknowledgments

**The Center for  
Progressive Reform is  
grateful to the  
Robert L. Habush  
Endowment  
for its generous  
support of  
this project.**

Printed in the U.S.A.



## Introduction

For much of American history, the courthouse has served as a place where people air their complaints and obtain justice. Inside these courthouses, ordinary people have been able to desegregate schools, stop the destruction of the scenic Hudson River valley, prevent a large software company from infringing upon a small software developer's patented data compression technology, and hold tobacco companies accountable for concealing the harms of their products. The courthouse doors have become harder to open in recent years, however, as large corporations and other entities seeking to avoid judicial review launched a successful multi-front war on citizen access to courts. Their latest victory came in the form of two United States Supreme Court opinions, *Bell Atlantic v. Twombly*<sup>1</sup> and *Ashcroft v. Iqbal*,<sup>2</sup> which raised the pleading standard that plaintiffs must satisfy in order to get their case into court.

In civil litigation, pleading serves as the key to the courthouse door. The pleading (or, more precisely, a complaint or petition) is a document that the plaintiff files with the court, explaining how the defendant has harmed the plaintiff and what remedies the plaintiff seeks from the court. For example, a small business owner might file a complaint alleging that a group of large corporations had harmed the small business by engaging in anticompetitive activities, and therefore requesting compensation for this harm.

Rule 8(a)(2) of the Federal Rules of Civil Procedure establishes the minimum requirements for a proper pleading in most types of federal civil cases. Prior to the *Twombly* and *Iqbal* cases, federal judges had treated Rule 8(a)(2) as requiring plaintiffs to assert a set of facts that explained how the defendant had harmed the plaintiff, and, in doing so, violated the plaintiff's rights. The discovery process then commenced. Under the new standard, referred to as "plausibility pleading," plaintiffs must in effect prove their case before they have even had the chance to obtain evidence from the defendant through the discovery process.

The practical effect of the heightened pleading standard is that many deserving plaintiffs will be unable to have their claims heard in court, since they will not have access to any crucial facts that the defendant is able to keep out of public view. As such, the plausibility pleading standard places a nearly impossible burden on many deserving plaintiffs, making it significantly harder for them to get past the pleadings stage of civil litigation. As one might expect, valid complaints will often be wrongly dismissed if plaintiffs are required to prove factual allegations before having an opportunity to gather evidence. The required evidence will remain safely in wrongdoers' files, hidden from public view.

As this paper will show, the Supreme Court's creation of the plausibility pleading standard bears many of the hallmarks of judicial activism. Citing various policy considerations, the Court created a heightened pleading standard that is inconsistent with both the plain language of Rule 8(a)(2)<sup>3</sup> and the overarching goal of the Federal Rules of Civil Procedure. In creating this standard, the Court overturned a half century's worth of well-established precedent. In the past, the Court has held that it must follow past decisions unless there is a "compelling justification," such as a determination that these past decisions "are unworkable

or are badly reasoned.”<sup>4</sup> Neither the *Twombly* nor *Iqbal* decisions contain this rigorous analysis, however.<sup>5</sup> Nor did either case present any empirical evidence that unwarranted complaints are excessively common. Even more problematically, the Court deviated from Congress’ legislative instructions by changing a Federal Rule of Civil Procedure through a judicial decision, rather than resorting to the rulemaking procedures that Congress created for amending the Federal Rules of Civil Procedure through the Rules Enabling Act.<sup>6</sup>

This white paper explains why Congress should take immediate legislative action to reverse the *Twombly* and *Iqbal* decisions. It first explains the concept of plausibility pleading, contrasting it with the more objective pleading standard that prevailed for nearly 70 years before the *Twombly* and *Iqbal* cases. The paper then indicates how plausibility pleading will limit the capacity of the civil law system to protect small businesses, civil rights, public health, safety, and the environment, after which it examines and rejects the policy arguments offered in favor of plausibility pleading.

## Background: Nearly 70 Years of a Pleading Standard that Opened Access to the Courts

First adopted in 1938, the Federal Rules of Civil Procedure (the Rules) are a set of judicially-enforceable rules—promulgated by the U.S. Supreme Court and authorized by federal law—that govern the conduct of federal civil litigation. While the Rules have undergone several significant revisions since then, they have always been designed with one overarching goal in mind: the determination of a case’s merits following an adequate opportunity for full disclosure of relevant information. Consistent with this goal, the Rules provide for open citizen access to the courts, generous discovery, and a flexible pretrial process for formulating triable issues. The Rules’ original drafters intended for these innovations to minimize the number of cases resolved on the basis of procedural technicalities, rather than on their substantive merits.<sup>7</sup>

One of the crucial pillars of the Rules’ approach has been a straightforward pleading standard. Since 1938, Rule 8(a)(2) has required that a complaint contain only “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>8</sup> Under this standard, the purpose of the pleading is to give the defendant and the court *notice* of the general nature of the plaintiff’s claims, with the understanding that factual development and formulation of legal issues will be addressed during subsequent stages of the pretrial litigation process. The Rules intended for the simple pleading standard to replace the hypertechnical pleading requirements found in the common law and code systems that preceded the Rules.<sup>9</sup>

The example forms appended to the Rules demonstrate the simplicity of the “notice pleading” standard.<sup>10</sup> Form 11 provides an example of a complaint for negligence, and it states the negligence claim in one simple sentence: “On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.”<sup>11</sup>

Despite the simplicity of notice pleading, the Rules still provide defendants with a vehicle for challenging complaints that fail to meet even this straightforward standard. Rule 12(b)(6) empowers defendants to seek dismissal of complaints that fail “to state a claim upon which relief can be granted.”<sup>12</sup> Because Rule 8(a)(2) established such a low threshold for pleading sufficiency, federal trial courts have long treated motions to dismiss complaints under Rule 12(b)(6) as a disfavored way of resolving a case, except in those instances when a claim obviously has no legal merit.<sup>13</sup>

The Supreme Court officially endorsed the notice pleading standard in *Conley v. Gibson*,<sup>14</sup> which established that a court should not dismiss a complaint “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>15</sup> In other words, a reviewing court should dismiss a complaint “only when proceeding to discovery or beyond would be futile.”<sup>16</sup> The Court rejected the notion that Rule 8(a)(2) “required a complainant to set out in detail the facts upon which he based

his claim.” Instead, the Court observed, a plaintiff must only provide “‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>17</sup> Decided more than 50 years ago, *Conley* created an objective, easily-applied rule for measuring the sufficiency of a complaint that has served as the definitive interpretation of Rule 8(a)(2) ever since.<sup>18</sup>

## The Emergence of ‘Plausibility Pleading’

The notice pleading standard prevailed for almost 70 years until the Court’s decisions in *Twombly* and *Iqbal*.

### *Twombly*

*Twombly* involved a lawsuit alleging that the defendants, a group of local telephone companies, had engaged in anticompetitive behavior in violation of the Sherman Act. The complaint alleged that the defendants had agreed not to compete with each other in order to prevent new companies from entering the market for providing local telephone service. While the complaint provided no details about the particulars of this agreement, it asserted that the agreement could be inferred from certain “parallel conduct” that the defendants had undertaken, such as failing to pursue potentially profitable business opportunities.

The Court, in holding that the complaint should be dismissed under Rule 12(b)(6), created a new standard for assessing the sufficiency of complaints: To satisfy Rule 8(a)(2), a complaint must now include “enough facts to state a claim to relief that is *plausible* on its face.”<sup>19</sup> Under this new standard, plaintiffs must do more than plead facts that are “consistent” with the defendant’s liability, which is all that was required under the notice pleading standard. Instead, a complaint must include the kind of “factual enhancement” that will push its allegations from the realm of the merely “possible” into the realm of “plausibility.”<sup>20</sup>

The majority relied primarily on policy considerations to justify abandoning notice pleading in favor of plausibility pleading. By raising the pleading standard, the majority sought to enhance a federal judge’s gatekeeping role at the pleading stage, so that the judge can protect defendants from frivolous or abusive cases, reduce defendants’ discovery costs, and ease the federal trial courts’ caseload.<sup>21</sup> At the same time, the majority concluded, with little evidence, that traditional case management techniques, such as summary judgment or strict control of discovery under Rule 26, had not been effective for weeding out abusive cases and minimizing discovery costs.<sup>22</sup> This also marked a departure for the Court, which had consistently endorsed case management in the past.<sup>23</sup> Finally, although this decision marked a significant departure from precedent, prior to the *Iqbal* decision, it was believed that this new pleading standard only applied to complex antitrust lawsuits, such as the one in *Twombly*.

### *Iqbal*

*Iqbal* arose from the Federal Bureau of Investigation’s (FBI) massive anti-terrorist investigation following the September 11th attacks, which resulted in the arrest and detainment of over 750 people—including the plaintiff, a Pakistani Muslim—on criminal and immigration charges. The complaint named various government officials as defendants, including former Attorney General John Ashcroft and former FBI Director Robert Mueller.

The *Twombly* Court relied primarily on policy considerations to justify abandoning notice pleading in favor of plausibility pleading.

According to the complaint, Ashcroft and Mueller designed and carried out a policy to target the plaintiff and other Arab Muslims located in New York City and to confine them under harsh conditions because of their religion and nationality in violation of their First and Fifth Amendment rights.

A sharply divided Supreme Court<sup>24</sup> held by a slim 5-to-4 majority that the complaint did not include enough facts to state a claim that was plausible on its face,<sup>25</sup> which made it clear that *Twombly's* plausibility pleading standard applied to all types of federal civil litigation.

The majority also offered guidance on how federal judges are supposed to apply the new standard. First, judges are supposed to distinguish between the complaint's factual allegations and its legal conclusions. According to the majority, only factual allegations should be accepted as true, while legal conclusions should be eliminated from any further consideration. For example, if a plaintiff plead the "defendant *negligently* drove a motor vehicle against plaintiff," as in the Rules' sample form for negligence, the court would disregard the assertion that there had been negligence because this is a legal rather than factual claim. Second, looking at only the remaining factual allegations, the judge should subjectively determine whether the complaint states a plausible claim for relief on its face. The majority explained that this second step is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."<sup>26</sup>

### **Impact of the New Pleading Paradigm**

Plausibility pleading represents a stark departure from the notice pleading regime that existed for nearly 70 years. By raising the pleading standard, it changes the role that pleading plays in civil litigation in several troubling ways.

First, plaintiffs must anticipate what types of claims in their complaints will be regarded as legal conclusions as opposed to factual allegations. The distinction between a legal conclusion and a factual allegation is far from clear-cut, and making this distinction is subjective and messy. The system of pleading that preceded enactment of Rule 8(a)(2) required plaintiffs to make a similar distinction. The futility of this exercise was one of the key motivations behind the adoption of the Rules

Furthermore, *Iqbal* authorizes judges to evaluate plausibility through the subjective lenses of "judicial experience" and "common sense," putting plaintiffs in the difficult position of having to predict what combination of facts that their judge might regard as offering a plausible claim. This requirement robs plaintiffs of the benefit of the longstanding rule requiring judges to draw all reasonable inferences in favor of the plaintiff.<sup>27</sup> Judges have long given plaintiffs the benefit of the doubt in this manner as a way of giving effect to the simplicity of the notice pleading standard, as contemplated by the Rules.

Second, plausibility pleading alters the traditional understanding of the Rule 12(b)(6) motion to dismiss, so that it is now seen as a test of a case's facts and merits, rather than just an

opportunity to determine whether a plaintiff would be entitled to relief if the facts alleged in the complaint were proved. The traditional focus of Rule 12(b)(6) motions on legal sufficiency made sense. After all, it is impossible to accurately assess the factual strength or merits of a case until the plaintiff has had the benefit of discovery. Accordingly, the 12(b)(6) motion focused on those issues that could be accurately assessed at the earliest stage in the litigation process—namely, issues of legal sufficiency.

Now that the Rule 12(b)(6) motion is understood to encompass an evaluation of a case's facts and merits, judges will no longer disfavor the motion as a way to stop allegedly insufficient claims. As discussed later in the paper, however, judges can use other rules and judicial practices—such as summary judgment and strict control of discovery under Rule 26—that are better suited for curbing abusive litigation and excessive discovery costs.<sup>28</sup> The upshot is that providing increased protection of defendants from abusive litigation and excessive discovery at the pleading stage will come at the expense of broad and equal citizen access to the courts.

Third, the second step of the *Iqbal* analysis authorizes judges to draw on their “judicial experience and common sense” to determine whether the complaint's factual allegations establish a plausible claim for relief. The *Iqbal* decision does not explain how judges are supposed to apply these highly subjective considerations. Thus, judges have virtually unlimited discretion for deciding whether a plaintiff's theory of liability is more plausible than some alternative innocent explanation.

Finally, *Iqbal*'s two-step analysis provides judges with enough leeway to base their Rule 12(b)(6) motion rulings on improper considerations, such as their ideologically-based views of the plaintiff or of the underlying substantive law. This will encourage plaintiffs to engage in judge or forum shopping before bringing their claim. Moreover, even if judges apply each step's analysis in good faith, the subjective nature of this analysis will likely produce inconsistent results in virtually identical cases.

## Negative Consequences of Plausibility Pleading

### Increased Dismissal of Meritorious Cases

In 1998, after working for nearly 20 years, Lilly Ledbetter was on the verge of retiring from her job as a supervisor at the Goodyear Rubber and Tire plant in Gadsden, Alabama when she received an anonymous note. The note compared Ledbetter’s monthly salary to that of three male counterparts, revealing that she was making substantially less money. Like all of Goodyear’s salaried employees, Ledbetter and her male counterparts were eligible for periodic merit-based pay raises awarded on the basis of good job evaluations. Goodyear kept all its evaluations and compensation information confidential, so Ledbetter had no way to know how her salary compared to those of her male counterparts, or to track how these pay disparities had grown over time.<sup>29</sup> Ledbetter was eventually able to obtain this information during discovery, but only because her case was allowed to go forward beyond the pleading stages. As a result, Ledbetter was able to prove her discrimination case before a jury, and the trial court awarded her damages and back pay.<sup>30</sup> If plausibility pleading had been in place at the time, however, Ledbetter’s complaint probably would not have survived a Rule 12(b)(6) motion to dismiss, since she likely would have been unable to draft a complaint containing the kind of specific and plausible facts needed to satisfy the heightened pleading standard.

Plausibility pleading will increase the likelihood that potentially meritorious cases like Lilly Ledbetter’s will be dismissed prematurely. Because of the heightened pleading requirements, many plaintiffs—acting in good faith and without the benefit of discovery—will not be able to plead the kind of factual matter needed to build a “plausible” claim.

Plausibility pleading is already resulting in a greater number of dismissals, according to a recent study of randomly selected federal district court opinions ruling on Rule 12(b)(6) motions. The study (see Table 1) found that the percentage of cases in which the motion

	All Cases	Torts Cases	Civil Rights Cases	Statutory Cases
Under <i>Conley</i>	46	40	50	53
Under <i>Twombly</i>	48	46	53	50
Under <i>Iqbal</i>	56	52	58	72

was granted rose to 56 percent of cases decided under *Iqbal* from 48 percent after *Twombly* and from 46 percent during the two-year period before *Twombly*. More specifically, the study found that the number of 12(b)(6) motions that have been granted in tort, civil rights, and statutory cases has increased.<sup>31</sup>

The dismissal of meritorious cases will have a devastating impact on affected plaintiffs. For many

injured persons, the civil courts offer the only opportunity for obtaining justice. Civil courts are particularly important for plaintiffs who are harmed by unregulated products or activities. For example, in the last few years, hundreds of thousands of American homeowners have suffered extensive property damage and health problems because of the toxic drywall that was installed in their homes. The Consumer Product Safety Commission (CPSC) did

not have a regulatory program in place at the time to protect consumers from defective drywall—right now the agency is still considering whether and how to regulate drywall<sup>32</sup>—making the corrective justice that the civil litigation system potentially offers to affected homeowners all the more important.<sup>33</sup> The excessive burden that plausibility pleading places on plaintiffs like these threatens to deny many of them the only justice available to them by barring the courthouse doors to their meritorious claims.

More broadly, the increased dismissals of meritorious cases will undermine the critical role that civil litigation plays in our democratic form of government. The civil courts are unique in that they must always remain open to hear complaints brought by ordinary people. In contrast, the legislative or executive branches can ignore citizens' concerns, either by shirking their responsibilities or by becoming captured by interest groups. For example, citizens used nuisance litigation to address pollution long before legislatures enacted environmental laws. Similarly, the torts suits brought by the civil rights movement helped pave the way for later civil rights legislation.

Congress recognizes the importance of harnessing citizen-initiated civil litigation to vindicate community standards and values. In many statutes, Congress has included a citizens' suit provision to ensure that interested members of the public have a meaningful opportunity to help enforce the statute's requirements.<sup>34</sup> The heightened pleading requirements of plausibility pleading threaten to undermine the efficacy of these provisions.

### **Greater Information Asymmetries in Civil Litigation**

In October 2000, Joe Kiger of Lubeck, West Virginia, received an unusual notification from his utility company informing him that the water that he and 8,000 of his neighbors had been consuming for the last several years contained a contaminant with the mysterious name "C-8." Kiger immediately contacted various local, state, and federal health and environmental officials about the notice, but all they could tell him was that C-8 is a "perfluorinated" organic compound with a technical name of perfluorooctanoic acid (PFOA). The public health and environmental officials knew little else about the chemical, because it was completely "unregulated." Meanwhile, E. I. DuPont de Nemours & Co. (DuPont) had known for over two decades that the chemical, which it produced and used to manufacture Teflon® and related products, was potentially very toxic to humans. In particular, DuPont was aware that PFOA had been linked to various reproductive defects in human babies, including malformed eyes and nostrils; liver disease; and prostate cancer.

Kiger and other citizens concerned about PFOA began filing lawsuits against DuPont, seeking cleanup of their water supplies and compensation for their injuries. While little was known about PFOA at the outset of this litigation, documents produced in discovery revealed many of the risks posed by the chemical as well as the extent of DuPont's knowledge about these risks. The Environmental Protection Agency (EPA) later used this information to issue the largest fine ever under the Toxic Substances Control Act (TSCA)

for failing to file adverse information with the agency. Before the litigation, EPA had ordered DuPont to submit all information in its possession regarding the human health risks of PFOA. DuPont failed to submit many of the documents uncovered in discovery, revealing that the company had failed to comply with EPA's order.<sup>35</sup> Thus, through discovery, ordinary citizens were able to reduce the information asymmetries that existed between DuPont and the public regarding the health hazards of PFOA.

Plausibility pleading will exacerbate the negative consequences that flow from information asymmetries that characterize many important types of civil litigation, including products liability and environmental cases, by short-circuiting a plaintiff's case before it can reach the discovery phase. Information asymmetries arise when crucial information regarding a claim remains in the sole possession of the defendant. Indeed, in many cases, the plaintiff must rely on discovery to uncover evidence of the defendant's harmful actions, since the defendant has been able to conceal this evidence so effectively.<sup>36</sup> This problem frequently occurs in cases involving dangerous pharmaceuticals and medical devices, defective automobiles, toxic chemicals and pesticides, and unsafe consumer products, since manufacturers typically have exclusive access to information regarding how these goods are designed and produced and the potential hazards they pose. Information asymmetries are also common in civil rights and employment discrimination cases, as illustrated by the Lilly Ledbetter case, as well as in business cases that involve allegations by small businesses of anticompetitive conduct by their larger competitors, such as antitrust actions or actions claiming patent or trademark violations. In all of these types of cases, the defendant inherently possesses all the factual information.

Before *Twombly* and *Iqbal*, the Rules addressed the problem of information asymmetries through simplified pleading rules and a relatively liberal discovery process. Plausibility pleading undermines the efficacy of these provisions. Plausibility pleading imposes on plaintiffs the challenge of pleading a factually plausible case before they have had a chance to use the tools of discovery to uncover the kind of evidence that would make their claim plausible. In fact, the most egregious civil rights or environmental violations are often implausible. With their cases dismissed, many deserving plaintiffs will be left unable to vindicate their rights. Moreover, because these claims never reach discovery, evidence of the defendant's harmful actions will remain hidden from public view and often from the relevant regulatory agencies.

The civil justice system also provides manufacturers of pharmaceuticals and medical devices, automobiles, chemicals and pesticides, and consumer products a strong incentive to ensure the safety of their goods, thereby decreasing risk of harm to consumers, workers, and the environment.<sup>37</sup> Plausibility pleading weakens these incentives by helping to insulate these entities from the discovery process, rendering them more likely to hide evidence of risk to the public and less likely to improve product safety.

## Hampering Civil Litigation's Role as a Source of Information for the Federal Regulatory System

By precluding discovery in many cases, the plausibility pleading standard threatens to undermine the valuable informational role that the civil law plays for the federal regulatory system. As such, the heightened plausibility pleading standard will disrupt the proper functioning of the federal regulatory system as well as the civil law system.

The civil law system adds a crucial set of institutional actors who have a strong incentive to gather information that will enhance the effectiveness of federal regulations.<sup>38</sup> For example, in the context of tort or contracts cases, the goal of monetary recovery by plaintiffs and their lawyers can lead to the revelation of information not considered when past regulatory decisions were made. Indeed, civil discovery often reveals information about regulated products that was overlooked, withheld, or not in existence at the time when a government agency was considering some regulatory action with regard to the product.<sup>39</sup>

Moreover, not all regulatory agencies have a mechanism for continuously monitoring goods that are within their regulatory jurisdiction, and if they do, these mechanisms rarely function well. In contrast, civil discovery offers an active and determined monitoring system for these goods. For example, the Food and Drug Administration's (FDA) efforts to investigate and monitor drugs after approval has long been plagued by problems, as illustrated by the case of GlaxoSmithKline's anti-diabetic drug Avandia—once one of the biggest selling drugs in the world thanks to the company's aggressive multimillion dollar advertising campaign. Soon after the FDA approved Avandia in 1999, evidence quickly began to mount that use of the drug significantly increased the risk of heart attacks and strokes. According to a recent FDA report, about 500 heart attacks and 300 cases of heart failure could be averted every month if diabetic patients took a competing drug called Actos instead of Avandia. In the third quarter of 2009 alone, 304 Avandia-related deaths were reported.<sup>40</sup> The FDA was unable to detect these harmful side effects of Avandia sooner, because it did not have the resources to monitor the long-term risks of the drug after it had been approved. The civil litigation system, however, can fill this gap by enabling plaintiffs to employ the discovery process to investigate and monitor previously approved drugs.<sup>41</sup>

The heightened plausibility pleading standard will disrupt the proper functioning of the federal regulatory system as well as the civil law system.

## Rejecting the Supreme Court's Policy Arguments in Support of Plausibility Pleading

The Supreme Court created plausibility pleading in order to protect defendants from frivolous or abusive cases, reduce defendants' discovery costs, and ease the federal trial courts' caseload, but these policy arguments do not hold up under closer scrutiny.

First, the arguments are based on a false premise. No evidence exists that frivolous and abusive cases plague the civil law system.<sup>42</sup> Instead, a few isolated anecdotes provide the only real basis for these concerns. Indeed, it is not even clear what constitutes frivolous or abusive litigation, given that no universally recognized definition exists for distinguishing these concepts from legitimate advocacy. Despite their concerns with curbing frivolous and abusive litigation, neither the *Twombly* nor the *Iqbal* Courts attempted to define these concepts, leaving it to federal judges to apply their own subjective perception of this problem when evaluating the sufficiency of complaints.

Similarly, the available evidence suggests that discovery costs are minimal in the vast majority of civil cases. A recent study conducted by the Federal Judicial Center found that discovery costs fell between 1.6 and 3.3 percent of the total value at stake in a given case. The study's survey of practicing attorneys confirms the relative reasonableness of discovery costs: More than half of the respondents believed that discovery costs were the "right amount" in proportion to the stakes involved in the case.<sup>43</sup> To be sure, a small fraction of cases will appropriately require extensive discovery, resulting in large discovery costs. Such cases are not indicative of an unhealthy civil litigation system, and they certainly do not justify the massive burden that plausibility pleading will impose on the vast majority of cases that entail only reasonable discovery costs. Instead, the best method for addressing excessive discovery in these rare cases is through amendments to the Rules' discovery provisions, rather than the general pleading standard.

In reality, the concerns over abusive and frivolous litigation and excessive discovery costs are myths that certain institutional defendants—such as polluting industries and negligent products manufacturers—have created and perpetuated to support their broader agenda of limiting citizen access to courts in order to insulate themselves from civil liability.<sup>44</sup> This agenda also includes supporting claims that federal regulations preempt state tort law, denying citizens the right to sue when they have been harmed by the unreasonably dangerous or reckless actions of regulated industries.<sup>45</sup> Supporters of federal regulatory preemption have likewise relied upon dubious policy arguments—such as protecting businesses from being subjected to a patchwork of state laws—when, in reality, their primary concern is avoiding tort obligations altogether.

For example, certain corporate interests relied on the same frivolous litigation and excessive discovery costs myths when they were able to convince Congress to pass the Private Securities Litigation Reform Act of 1995 (PSLRA), raising the pleading standard in securities fraud litigation. One of Congress' stated objectives in passing that law was to curb the

No evidence exists that frivolous and abusive cases plague the civil law system.

“abusive practices committed in private securities litigation.” The PSLRA has increased the rate of dismissal of securities fraud cases, effectively insulating many instances of securities fraud from civil liability. According to some observers, this drop in securities fraud cases was a contributing factor in the 2008 financial collapse.<sup>46</sup>

Second, the Supreme Court’s policy analysis was decidedly one-sided, focusing only on the interests of defendants. The Court barely acknowledged the negative consequences that plausibility pleading would have on plaintiffs—namely, the dismissal of meritorious cases before discovery. It also ignored the negative consequences that plausibility pleading would have on society as a whole. As noted above, a robust civil litigation system along with generous discovery plays a critical role in our democratic government, deters unreasonably dangerous and reckless actions, and improves the functioning of the federal regulatory system.

Third, even if the Supreme Court’s policy concerns were valid, the Rules provide federal trial judges with several alternative case-management tools for addressing them—all of which better accomplish the Rules’ central goal of merit-based case resolution following adequate opportunity to uncover relevant facts:

- *Rule 11.*<sup>47</sup> Rule 11(b)(3) requires attorneys to certify that “the allegations and other factual contentions [contained in their complaints] have evidentiary support or . . . are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery,” while Rule 11(c) authorizes a trial judge to sanction an attorney for violating this requirement. Enforced strongly and consistently, these provisions will discourage the filing of frivolous and abusive litigation without depriving deserving plaintiffs of a simplified pleading standard.
- *Rule 12(e).*<sup>48</sup> Under this rule, if a complaint is “vague or ambiguous,” the defendant can request that the judge order the plaintiff to amend her complaint to include more facts and details. Significantly, this tool allows for an amended complaint—rather than the more drastic consequence of a dismissal under a Rule 12(b)(6) motion—whenever a complaint lacks sufficient factual detail. Moreover, it enables judges to make a more nuanced evaluation of the allegations in a complaint. In ruling on a Rule 12(e) motion, a judge can order a plaintiff to include more of the facts that can reasonably be obtained prior to discovery, while relying on the attorney’s Rule 11 certification for those facts that cannot be obtained without discovery.
- *Rule 16.*<sup>49</sup> This rule provides federal trial judges with a variety of tools—including conferences and strict timetables—for governing the pretrial process. The rule directs judges to employ these tools in order to formulate the legal issues of a case as expeditiously as possible to avoid unnecessary expense and delay in resolving the case’s merits.
- *Rule 23.*<sup>50</sup> This rule encourages efficient disposition of numerous cases by authorizing class-action lawsuits, or suits in which large groups of similarly-situated plaintiffs can

bring their identical claims in a single case. These suits avoid unnecessary duplication of discovery and other pretrial activities.

- *Rule 26.*<sup>51</sup> This rule provides federal trial judges with a variety of tools for governing the discovery process, and, as necessary, limiting discovery requests. For example, Rule 26(b)(2) authorizes judges to limit the number of depositions and interrogatories that the parties to a case can use. By employing these tools, judges can appropriately balance the expense of discovery with the value of revealing potentially relevant information for the case.
- *Rule 37.*<sup>52</sup> This rule describes various common forms of discovery abuse—including failure to make required disclosures or otherwise cooperate with discovery requests—and authorizes federal trial judges to sanction attorneys who engage in them. Enforced strongly and consistently, this rule can help constrain discovery expenses by discouraging costly discovery abuse.
- *Rule 56.*<sup>53</sup> This rule allows parties to a case to move for summary judgment—that is, to seek the dismissal of any non-meritorious claims after discovery has finished, but before trial begins. In contrast to Rule 12(b)(6) motion to dismiss, the Rule 56 motion for summary judgment takes place after discovery has finished, thereby enabling trial judges to better assess the factual strength and merits of a challenged claim.

Fourth, if the Supreme Court's real concern was that these alternative case management tools were insufficient to address the problems it identified, then the proper remedy would be to use the procedures established by Congress to amend the Rules—not to raise the pleading standard through a judicial opinion.<sup>54</sup> The Court should have charged the Judicial Conference of the United States—the body that is primarily responsible for providing the Court with recommendations for modifying the Rules—to investigate and develop recommended changes. In contrast to the Court, the Judicial Conference of the United States is institutionally well designed to gather and consider a broad range of data and perspectives concerning such complex policy matters as changing citizen access to the courts.<sup>55</sup>

## Conclusion

For nearly 70 years, the civil litigation system has operated under a simple and objective pleading standard that promoted the Rules' central goal of merit-based case resolution following adequate opportunity to uncover relevant facts. In *Twombly* and *Iqbal*, the Supreme Court has created plausibility pleading, a new heightened pleading standard that subverts this goal. Plausibility pleading fundamentally alters the role that pleading plays in the litigation process by giving federal trial judges virtually unfettered discretion to dismiss a plaintiff's complaint based on their subjective evaluation of the complaint's factual presentation. As a result, the Court has transformed the Rule 12(b)(6) motion from a test of the complaint's legal sufficiency into a test of its facts and merits, placing on plaintiffs the nearly impossible burden of trying to "win" their case before they have even had a chance to conduct discovery.

The Supreme Court achieved this result through a blatant act of judicial activism. The Court ignored the plain language of Rule 8(a)(2) and the overarching goal of the Rules in order to raise the pleading standard so that it would address dubious policy concerns. The *Twombly* and *Iqbal* opinions overturn 50 years of well-established precedent interpreting and applying the notice pleading understanding of Rule 8(a)(2). Worse still, through these opinions, the Court has defied Congress' legislative will by amending the Rules without employing the procedures that Congress has created for making such changes.

In practice, plausibility pleading produces much harm and little, if any, good. The heightened pleading standard will increase the dismissal of meritorious cases at the pleading stages before plaintiffs get a chance to benefit from the Rules' liberal discovery provisions. Not only does this harm affected plaintiffs, it harms society as well by undermining the critical role that civil litigation plays in our democracy, making it harder to hold businesses accountable for their harmful actions, and depriving federal regulators of vital information needed for improving the regulations that protect people and the environment.

Meanwhile, the problems that the heightened pleading standard is intended to address—protecting defendants from frivolous or abusive cases, reducing defendants' discovery costs, and easing the federal trial courts' caseload—have been exaggerated by entities that have an economic or ideological interest in limiting citizen access to the courts. To the extent that these problems exist at all, the Supreme Court had better options for addressing them, including using the alternative case management techniques provided by the Rules or going through the formal rulemaking process to update the Rules.

The parties who stand to benefit the most under plausibility pleading are the corporate<sup>56</sup> and government defendants that wish to avoid their civil law obligations. In this regard, plausibility pleading seems to be part of a broader agenda to limit citizen access to the courts, best exemplified by the movement to use federal regulations to preempt state tort law and to limit citizen standing in cases challenging unlawful government action. As such, the policy arguments offered in favor the heightened pleading should be viewed with skepticism.

Given the harm that plausibility pleading is having and will continue to have, Congress should reinstate the original notice pleading understanding of Rule 8(a)(2), a standard that worked successfully for nearly 70 years.

## Endnotes

- <sup>1</sup> 550 U.S. 544 (2007).
- <sup>2</sup> 129 S.Ct. 1937 (2009).
- <sup>3</sup> A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV., 431, 469-73 (2008).
- <sup>4</sup> See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *Hilton v. S.C. Public Rys. Comm'n*, 502 U.S. 197, 202 (1991); *Dickerson v. United States*, 530 U.S. 428, 429 (2000).
- <sup>5</sup> Spencer, *supra* note 3, at 461-69.
- <sup>6</sup> 28 U.S.C. § 2072.
- <sup>7</sup> Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase--Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) [hereinafter Clark, *The New Federal Rules*]. Significantly, Charles E. Clark was a key architect of the rules and the reporter of the committee that drafted them.
- <sup>8</sup> FED. R. CIV. P. 8(a)(2).
- <sup>9</sup> Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458 (1943) [hereinafter Clark, *Simplified Pleading*]. In theory, the complex pleading conventions of the common law and code systems were intended to aid in the discovery of facts and identification of relevant legal issues. In reality, though, they delayed proceedings and limited court access, particularly for poorer and less sophisticated plaintiffs who were unable to avoid the traps set by lawyers for well-endowed defendants. AM. BAR ASS'N, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES AT CLEVELAND, OHIO 240 (William W. Dawson ed.) (1938).
- <sup>10</sup> Rule 84 affirms that these forms “are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.” FED. R. CIV. P. 84.
- <sup>11</sup> FORM 11, COMPLAINT FOR NEGLIGENCE, FORMS APP., FED. RULES CIV. P.
- <sup>12</sup> FED. R. CIV. P. 12(b)(6).
- <sup>13</sup> Patricia Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 562 (2010).
- <sup>14</sup> 355 U.S. 41 (1957).
- <sup>15</sup> *Id.* at 45-46.
- <sup>16</sup> *Twombly*, 550 U.S. at 577 (Stevens, J., dissenting).
- <sup>17</sup> *Conley*, 355 U.S. at 47 (citing FED. R. CIV. P. 8(a)(2)).
- <sup>18</sup> See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).
- <sup>19</sup> *Twombly*, 550 U.S. at 570 (emphasis added).
- <sup>20</sup> *Id.* at 557.
- <sup>21</sup> *Id.* at 557-60.
- <sup>22</sup> *Id.* at 559-60. In civil litigation, a summary judgment is a determination made by a trial judge to resolve a claim in a case after discovery has ended and before trial begins. Rule 56 authorizes the parties in a case to petition the judge to make a summary judgment determination in their favor. In making the determination, the judge must conclude that the parties agree on the critical facts underlying the claim, and that in light of these facts, the law requires the judge to rule in favor of one party or the other. In contrast to a Rule 12(b)(6) motion ruling, the summary judgment determination is a better occasion for evaluating facts since it takes place after discovery. Rule 26 provides federal judges with various tools to govern discovery in order to limit discovery costs.
- <sup>23</sup> See, e.g., *Leatherman*, 507 U.S. at 168-69 (1993); *Swierkiewicz*, 534 U.S. at 512-13 (2002).
- <sup>24</sup> Significantly, Justice Souter, who had authored the opinion in *Twombly*, wrote a vigorous dissent in *Iqbal*.
- <sup>25</sup> *Iqbal*, 129 S.Ct. at 1950-51.
- <sup>26</sup> *Id.* at 1949-50.
- <sup>27</sup> Hatamyar, *supra* note 13, at 562; Spencer, *supra* note 3, at 483.
- <sup>28</sup> Clark, *Simplified Pleading*, *supra* note 9, at 366.
- <sup>29</sup> Kate Pickert, *2-Minute Bio: Lilly Ledbetter*, TIME, Jan. 29, 2009, available at <http://www.time.com/time/nation/article/0,8599,1874954,00.html>.
- <sup>30</sup> In a ruling commonly described as judicial activism, the U.S. Supreme Court overturned the trial court in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). There, the Court adopted a crabbed reading of federal civil rights law to conclude that Ledbetter's claim had been blocked for failing to sue in a timely manner. Congress quickly passed the Lilly Ledbetter Fair Pay Act to undo the Court's decision.
- <sup>31</sup> Hatamyar, *supra* note 13, at 597-609.
- <sup>32</sup> Identifying Labels for Drywall Under Section 14(c) of the Consumer Product Safety Act, 74 Fed. Reg. 66,622 (Dec. 16, 2009).
- <sup>33</sup> THOMAS O. MCGARITY, THE PREEMPTION WAR 201 (2008); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1831 (1997).
- <sup>34</sup> See OLIVER A. HOUCK, TAKING BACK EDEN: EIGHT ENVIRONMENTAL CASES THAT CHANGED THE WORLD (2009); Zygmunt J.B. Plater, *Environmental Law and Three Economies: Navigating a Sprawling Field of Study, Practice, and Societal Governance in Which Everything is Connected to Everything Else*, 23 HARV. ENVTL. L. REV. 359, 383 n.54 (1999).

- <sup>35</sup> Thomas O. McGarity, *The Complementary Roles of Common Law Courts and Federal Agencies in Producing and Using Policy-Relevant Scientific Information*, 37 ENVTL. L. 1027, 1033-47 (2007).
- <sup>36</sup> Spencer, *supra* note 3, at 481-82.
- <sup>37</sup> See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1589 (2007).
- <sup>38</sup> *Id.*
- <sup>39</sup> *Id.* at 1598-99; Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2068-70 (2000).
- <sup>40</sup> Gardiner Harris, *Research Ties Diabetes Drug to Heart Woes*, N.Y. TIMES, Feb. 19, 2010, available at <http://www.nytimes.com/2010/02/20/health/policy/20avandia.html?pagewanted=1>.
- <sup>41</sup> Buzbee, *supra* note 37, at 1583; Thomas O. McGarity, *The Regulation-Common Law Feedback Loop in Non-Preemptive Regimes*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION, ch. 11 (William W. Buzbee ed., 2009).
- <sup>42</sup> See STEPHANIE MENCIMER, BLOCKING THE COURTHOUSE DOOR (2006); WILLIAM HALTOM & MICHAEL McCANN, DISTORTING THE LAW (2004); CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA (2001); Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1 (2002).
- <sup>43</sup> EMERY G. LEE III & THOMAS E. WILLGING, FED. JUD. CTR., NATIONAL CASE-BASED CIVIL RULES SURVEY, PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).
- <sup>44</sup> See MENCIMER, *supra* note 42; BOGUS, *supra* note 42; Rustad & Koenig, *supra* note 42.
- <sup>45</sup> See, e.g., THOMAS MCGARITY ET AL., THE TRUTH ABOUT TORTS: REGULATORY PREEMPTION AT THE FEDERAL RAILROAD ADMINISTRATION (CPR White Paper 910, Oct. 2009), available at <http://www.progressivereform.org/articles/RailroadPreemption910.pdf>; WILLIAM FUNK ET AL., THE TRUTH ABOUT TORTS: REGULATORY PREEMPTION AT THE CONSUMER PRODUCT SAFETY COMMISSION (CPR White Paper 807, Dec. 2008), available at [http://www.progressivereform.org/articles/Truth\\_About\\_Torts\\_CPSC\\_807.pdf](http://www.progressivereform.org/articles/Truth_About_Torts_CPSC_807.pdf); WILLIAM FUNK ET AL., THE TRUTH ABOUT TORTS: REGULATORY PREEMPTION AT THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION (CPR White Paper 804, July 2008), available at [http://www.progressivereform.org/articles/NHTSA\\_Preemption\\_804.pdf](http://www.progressivereform.org/articles/NHTSA_Preemption_804.pdf).
- <sup>46</sup> AMY WIDMAN & JOANNE DOROSHOW, LEGAL ABANDON: HOW LIMITING LAWSUITS LED TO THE FINANCIAL COLLAPSE AND WHAT TO DO ABOUT IT (Center for Justice & Democracy White Paper 19, Feb. 2010), available at <http://www.centerjd.org/archives/studies/LegalAbandonWPaperF.pdf>.
- <sup>47</sup> FED. R. CIV. P. 11.
- <sup>48</sup> FED. R. CIV. P. 12(e).
- <sup>49</sup> FED. R. CIV. P. 16.
- <sup>50</sup> FED. R. CIV. P. 23.
- <sup>51</sup> FED. R. CIV. P. 26.
- <sup>52</sup> FED. R. CIV. P. 37.
- <sup>53</sup> FED. R. CIV. P. 56.
- <sup>54</sup> Through the Rules Enabling Act, Congress has authorized the Court to develop new or modify existing rules to address emerging problems in civil litigation. 28 U.S.C. § 2072.
- <sup>55</sup> Stephen B. Burbank, *Pleading and the Dilemmas of General Rules*, 2009 WIS. L. REV. 535, 537 (2009).
- <sup>56</sup> The U.S. Chamber of Commerce and large corporations recognize that they uniquely benefit from the plausibility pleading standard announced in *Twombly* and *Iqbal*, and they have actively supported this heightened pleading standard in public policy debates. For example, in October of 2009, they sent a letter to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the U.S. House Committee on the Judiciary strongly opposing the subcommittee's planned legislative efforts to overturn the two decisions. Letter from AEGON USA, LLC, et al., to The Honorable Jerrold Nadler, Chairman, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Committee on the Judiciary, U.S. House of Representatives, et al. (Oct. 26, 2009), available at <http://www.instituteforlegalreform.com/images/stories/documents/pdf/legislation/iqbalcoalitionletter102609.pdf>.

## About the Authors



**William Funk** is a Professor of Law at Lewis & Clark Law School in Portland, Oregon, and a Member Scholar of the Center for Progressive Reform. He has published widely in the fields of administrative law, constitutional law, and environmental law. In particular, Professor Funk has focused on the intersections of administrative law and environmental law and of constitutional law and environmental law. While in academia, he has remained actively involved in the everyday world of environmental law and regulatory practice. He has been active in the American Bar Association's Section of Administrative Law and Regulatory Practice.



**Thomas McGarity** holds the Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law at the University of Texas in Austin. He is a member of the Board of Directors of the Center for Progressive Reform, and the immediate past president of the organization. Professor McGarity has published widely in the areas of regulatory law and policy. His recent scholarship on issues of regulatory preemption includes numerous law review articles and his recent book, *The Preemption War*, published by Yale University Press.



**Sidney Shapiro** holds the University Distinguished Chair in Law at the Wake Forest University School of Law and is the Associate Dean for Research and Development. He is a member of the Board of Directors of the Center for Progressive Reform. Professor Shapiro has taught and written in the areas of administrative law, regulatory law and policy, environmental policy, and occupational safety and health law for 25 years. Professor Shapiro has been an active participant in efforts to improve health, safety, and environmental quality in the United States. He has testified before congressional committees on administrative law and occupational safety and health issues.



**James Goodwin** works with CPR's "Clean Science" and "Government Accountability" issue groups. Mr. Goodwin joined CPR in May of 2008. Prior to joining CPR, Mr. Goodwin worked as a legal intern for the Environmental Law Institute and EcoLogix Group, Inc. He is a published author with articles on human rights and environmental law and policy appearing in the *Michigan Journal of Public Affairs* and the *New England Law Review*.





To see more of CPR's work or to contribute,  
visit CPR's website at [www.progressivereform.org](http://www.progressivereform.org).

455 Massachusetts Avenue, NW  
# 150-513  
Washington, DC 20001

202-747-0698 (phone/fax)



RETURN UNDELIVERABLES TO:

Center for Progressive Reform  
455 Massachusetts Avenue, NW  
# 150-513  
Washington, DC 20001