University of Mississippi

From the SelectedWorks of Benjamin P Cooper

September 10, 2010

Iqbal's Retro Revolution

Benjamin P Cooper, University of Mississippi School of Law

Available at: https://works.bepress.com/benjamin_cooper/4/
IQBAL’S RETRO REVOLUTION

Benjamin P. Cooper*

---

* Assistant Professor of Law, University of Mississippi School of Law.  J.D. University of Chicago Law School, B.A. Amherst College.  I would like to thank the Lamar Order of the University of Mississippi School of Law for its financial support.  I would also like to thank Georgene Vairo, Howard Wasserman, George Cochran and Mike Hoffheimer for their guidance and thoughts.  D. Eric Schieffer and Patrick Timony provided helpful research assistance.
ABSTRACT

The U.S. Supreme Court’s decisions in Bell Atlantic Corp. v. Twombly and Ascroft v. Iqbal have revolutionized the law on pleading, by shifting from a liberal notice pleading standard to a new heightened “plausibility” regime. The abundant scholarship about these cases consistently posits that Iqbal’s plausibility standard is completely novel with no historical precedent in the modern era. This Article argues that, contrary to this conventional wisdom, although Iqbal is revolutionary (in the sense that it marks a sharp break with what immediately preceded it), the post-Iqbal era is not entirely new. Rather, the current pleading regime bears a sharp resemblance to the turbulent period from 1983-1993, after Federal Rule of Civil Procedure 11 was amended to combat frivolous litigation and before Rule 11 was revised to its current form. Under the 1983 version of Rule 11 – unlike the current rule – sanctions were mandatory, fines were generally payable to the other side, the rule contained no “safe harbor provision” by which an attorney could withdraw an allegedly frivolous pleading with no penalty, and attorneys had to certify that any allegations in the complaint were “well grounded in fact.” Although the “well grounded in fact” language was directed at the sufficiency of the lawyer’s pre-filing investigation and not to the sufficiency of the complaint, courts used Rule 11 to dismiss complaints that were not sufficiently specific, and thereby tightened the liberal pleading standard set forth in Rule 8(a). Indeed, commentators criticized 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. Does this sound familiar?

The similarities do not end there. In a striking parallel to pleading in today’s post-Iqbal era, courts in the 1983-1993 timeframe examined the “plausibility” of the complaint in determining whether it was sanctionable, and the use of that “plausibility” standard in 1983 produced the same criticisms that Iqbal is receiving today. The standard is too subjective and gives judges too much discretion; it has a “chilling effect” on plaintiffs; and it is having a disproportionate effect on certain kinds of litigation – civil rights and employment discrimination cases in particular.

This Article proceeds chronologically. Part I describes pleading from 1938 until 1983 under the notice pleading regime put in place by the 1938 drafters of the Federal Rules of Civil Procedure. Part II surveys the harsh features of the 1983 amendments to Rule 11 and the heightened standard it brought to pleading. Part III details the 1993 amendments to
Rule 11 that restored the notice pleading regime. Part IV discusses the *Twombly* and *Iqbal* decisions and the significant 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.

| Introduction | 4 |
| I. Pleading From 1938-1983 | 9 |
| II. Pleading From 1983-1993 | 11 |
| III. The 1993 Amendments to Rule 11 and the Return to Notice Pleading | 17 |
| IV. *Twombly* and *Iqbal* | 21 |
| A. *Bell Atlantic Corp. v. Twombly* | 22 |
| B. *Ashcroft v. Iqbal* | 23 |
| C. Pleading After *Twombly* and *Iqbal* | 25 |
| V. *Iqbal* and the Resurrection of the 1983 Version of Rule 11 | 27 |
| A. The Heightened Pleading Standard | 28 |
| B. A Defendant’s Tool | 31 |
| C. Chilling Effect | 32 |
| D. Disproportionate Impact | 35 |
| C. Implications | 38 |
| Conclusion | 39 |
INTRODUCTION

The U.S. Supreme Court’s decisions in Bell Atlantic Corp. v. Twombly and Ascroft v. Iqbal represent a “philosophical sea change in American civil litigation.” Although the exact meaning of Twombly and Iqbal remain the topic of vigorous discussion among commentators, there is nearly universal agreement that the decisions have “revolutionized the law on pleading,” by shifting from a liberal notice pleading standard to a new heightened “plausibility” regime.

Given the importance of these cases, it is not at all surprising that Twombly and Iqbal have produced a torrent of legal scholarship. That

---

scholarship has covered a wide array of topics. Many commentators have criticized the cases, others have attempted to define more precisely what the Supreme Court meant in *Iqbal* and *Twombly*, while still others have analyzed the disproportionate impact the decisions are having or may have on particular kinds of cases.

Noticeably, that scholarship has, generally speaking, described the *Iqbal/Twombly* plausibility standard as “novel” and found no historical

---


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

8 See, e.g., Spencer, *supra* note 6. (“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 contemporary pleading doctrine that will hopefully yield a comprehensive theoretical description of its fundamental components and underlying rationale.”).

9 See, e.g., Schneider, *supra* note 6.

precedent for the post-Iqbal era of pleading.¹¹

This Article argues that, contrary to this conventional wisdom, 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 1983-1993, after Federal Rule of Civil Procedure 11 was amended to combat frivolous litigation and before Rule 11 was revised to its current form. Under the 1983 version of Rule 11 – unlike the current rule – sanctions were mandatory, fines were generally payable to the other side, the rule contained no “safe harbor provision” by which an attorney could withdraw an allegedly frivolous pleading with no penalty, and attorneys had to certify that any allegations in the complaint were “well grounded in fact.”¹² Although the “well grounded in fact” language was directed at the sufficiency of the lawyer’s pre-filing investigation and not to the sufficiency of the complaint, it served to “constrain the sweeping scope of Rule 8(a).”¹³ In other words, courts used Rule 11 to dismiss complaints that were not sufficiently specific, and thereby “tightened the liberal pleading standard” set forth in Rule 8(a).¹⁴ Indeed, commentators criticized 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.”¹⁵ Does this sound familiar?

¹¹ Some scholars have compared the post-Iqbal pleading regime to summary judgment. See, e.g., Thomas, supra n. 6. 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.


¹⁴ Note, Plausible Pleadings: Developing Standards for Rule 11 Sanctions 100 HARV. L. REV. 630, 635 n.18; Liggins v. Morris, 749 F. Supp. 967 (D. Minn. 1990) (“Inadequately detailed complaints “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.”); Gallagher v. Kopera, 789 F. Supp 277, 278 (N.D. Ill. 1992) (“allegations made on information and belief violate Rule 11”).

¹⁵ CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1332 (ed.). See also Note, 100 HARV. L. REV at 644 (The 1983 version of the rule “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.”).
Further, in a striking parallel to pleading in today’s post-Iqbal era, courts in the 1983-1993 timeframe examined the “plausibility” of the complaint in determining whether it was sanctionable.\(^\text{16}\) Plausibility, of course, is the hallmark of pleading after Twombly and Iqbal.\(^\text{17}\) In other words, 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 Rule 11. In both eras, the stricter standard of reviewing complaints – whether through Rule 11 in 1983-1993 or through Rule 8 today – has led to more complaints being dismissed at the 12(b)(6) stage based on a plausibility standard.\(^\text{18}\)

Indeed, upon closer examination, the post-Iqbal/Twombly era is strikingly similar to the 1983-1993 era of pleading in still other ways. As an initial matter, both the 1983 version of Rule 11 and the Supreme Court’s decisions in Iqbal and Twombly spawned massive amounts of litigation interpreting what they mean\(^\text{19}\) and copious amounts of scholarship criticizing the courts for imposing a heightened pleading standard – whether through Rule 11 in 1983-1993 or through Rule 8 today – that has led to too many complaints being dismissed at the 12(b)(6) stage.\(^\text{20}\)

\(^{16}\) See, e.g., Moore v. Keegan Management Co., 154 F.R.D. 237, 240-41 (N.D. Cal. 1994) (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.”)

\(^{17}\) Spencer, supra note 5, at 431 (“Notice pleading is dead. Say hello to plausibility pleading.”).

\(^{18}\) A few commentators have noted the relationship between Iqbal’s plausibility requirement and Rule 11 and suggested that the Court “could have less disruptively attained an equivalent of the Twombly and Iqbal regime by aggressively re-reading Rule 11 rather than Rule 8.” Clermont & Yeazell, supra note 4, at 849. See also 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, 1253-54 (2008) (“[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.”); Bradley Scott Shannon, I Have Federal Pleading All Figured Out, 61 CASE W. RES. L. Rev. (Forthcoming) (describing Rule 11 as the “elephant in the room”); Bone, Pleading Rules, and the Regulation of Court Access, in IOWA L. Rev., 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.”). None of these commentators, however, have explored the relationship between Iqbal and the 1983 version of the rule.

\(^{19}\) Supra note ___.

\(^{20}\) Paul D. Carrington and Andrew Wasson, A Reflection on Rulemaking: The Rule 11
specific criticisms of the 1983 version of Rule 11 and *Iqbal* are also remarkably similar:

- Today, critics are calling *Iqbal* and *Twombly* a “defendant’s tool” just as they did with the 1983 version of Rule 11.\(^{21}\)

- Moreover, a significant criticism of *Iqbal* is that it is subjective and gives judges too much discretion,\(^ {22}\) which was a major complaint about the 1983 version of Rule 11.\(^ {23}\)

- Further, critics are condemning *Iqbal* for having a “chilling effect” on plaintiffs,\(^ {24}\) which was a principal criticism of the 1983 version of Rule 11.\(^ {25}\)

- Finally, commentators are noticing that *Iqbal* is having a disproportionate effect on certain kinds of litigation – civil rights and employment discrimination cases in particular\(^ {26}\) – the exact same thing that critics were saying about the 1983 version of Rule 11.\(^ {27}\)

That *Iqbal* and *Twombly* have returned us to the 1983-1993 era of pleading is, perhaps, not surprising, given the opposition of Justices Scalia and Thomas – two of the 5-justice majority in *Iqbal* – to the amendment of Rule 11 in 1993. In opposing the 1993 changes to Rule 11, Justice Scalia said that the 1983 version of Rule 11 had been effective in reducing frivolous litigation and saw no need to weaken the rule: “The proposed revision would render the Rule toothless, by allowing judges to dispense with sanctions, by disfavoring compensation for litigation expenses, and by providing a 21-day ‘safe harbor’ within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all.”\(^ {28}\) Justice Scalia was correct that the 1993 amendment

---

\(^{21}\) *Infra* note __.

\(^{22}\) *Infra* note __.

\(^{23}\) *Infra* note __.

\(^{24}\) *Infra* note __.

\(^{25}\) *Infra* note __.

\(^{26}\) *Infra* note __.

\(^{27}\) *Infra* note __.

severely weakened Rule 11, 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 1938 drafters of the Federal Rules of Civil Procedure. Part II surveys the harsh features of the 1983 amendments to Rule 11 and the heightened standard it brought to pleading. Part III details the 1993 amendments to Rule 11 that returned us to a notice pleading regime. Part IV discusses the *Twombly* and *Iqbal* decisions and the significant 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 1938-1983

“Pleading serves as the gatekeeper for civil litigation.” In setting pleading standards, rulemakers concern themselves primarily with striking the right balance between “citizen access to the justice system and merits adjudications based on the full disclosure of relevant information” on the one hand – which weigh in favor of more liberal pleading standards – and concerns about combating abusive and frivolous lawsuits on the other – which weigh in favor of more restrictive pleading standards. Efforts to resolve the tension 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.

Liberalizing the pleading standards was the primary goal of the drafters of the original 1938 Federal Rules of Civil Procedure in 1938. By promulgating those rules, the Supreme Court launched the modern era of notice pleading ending “centuries of disputes over the words the plaintiff needed to say to start a lawsuit.” 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.” Moreover, courts frequently dismissed

---


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

31 Miller testimony at 2.

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

33 Id.; Spencer, *supra* note 5, at 434 (the “inelegant code pleading system that required the pleading of ‘ultimate facts’ rather than mere ‘evidentiary facts’ or conclusions”); Statement of Stephen B. Burbank: Hearing on Whether the Supreme Court has Limited Americans’ Access to Courts, Before the S. Comm. on the Judiciary, United States, 111th
By contrast, under the new system of notice pleading, the drafters of the rules made clear that “No technical forms of pleadings and motions are required,” 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.” The rulemakers showed “just how serious” they were about simplifying pleading when they attached forms to the rules that demonstrated “how very little was required of plaintiffs.” 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.”

In the landmark 1957 case of Conley v. Gibson, 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.” 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 ground upon which it rests.” Further, the Court uttered its famous statement (which the Twombly Court “retired“): a complaint should not be dismissed unless it is “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

This notice-pleading standard made “starting a lawsuit unsupported...
by evidence very easy.”

“The motivating theory 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…”

Rule 11 was essentially a dead letter during this time period and therefore had no impact on this liberal pleading standard. The drafters of the Federal Rules had included Rule 11 – a specific provision governing attorney conduct – with the goal of increasing attorney responsibility to the court. That initial Rule 11 provided that an attorney’s signature on a pleading or motion 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.” Commentators criticized the rule for its lack of detail and clarity – particularly the subjective “good ground to support” language. 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. As a result of this confusion, courts rarely imposed sanctions. Nevertheless, this ineffective rule remained unchanged for 45 years until the 1983 amendments.

Thus, during the period of 1938-1983, 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 1983-1993

43 Clerman & Yeazell, supra note 4, at 825.
44 Id.; Spencer, supra note 5, at 434 (“subsequent stages of the litigation process would enable the litigants to narrow the issues and test the validity and strength of asserted claims”).
45 GEORGENE VAIO, RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AN PREVENTION 4-5 (Richard G. Johnson ed.) (1998). Before the Federal Rules of Civil Procedure were enacted in 1938, courts had the inherent power to sanction lawyers, but traditionally, that power was rarely used.
46 Fed. R. Civ. P. 11 (1983);
47 VAIO supra note 46, at 6-7.
48 Id.
49 Id. at 9-10 (“Sanctions were imposed only in the most compelling situations.”); WRIGHT & MILLER § 1331 (“By the early 1980s experience had show 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.”).
Increasing concerns about “costs and delay that often accompany contemporary civil litigation in the federal courts”\textsuperscript{50} led to a series of changes to the federal rules in 1983, including substantial changes to Rule 11.\textsuperscript{51} In particular, the Advisory Committee intended the new Rule 11 to address the “rising number of civil lawsuits and increasing costs and delay of litigation, the perceived ineffectiveness of existing sanctions rules in preventing dilatory and abusive practices, and the unwillingness of courts to impose theretofore discretionary sanctions.”\textsuperscript{52} As set forth below, although these changes were not necessarily directed at pleading, they nevertheless had a dramatic impact on pleading.

The 1983 Amendments to Rule 11 included seven major changes,\textsuperscript{53} three of which merit discussion. First, and most importantly, “the significance of the certification requirement was sharpened and its scope was broadened. 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.”\textsuperscript{54} Significantly, the Advisory Committee suggested standards for courts to consider in assessing the reasonableness of the inquiry including “whether the paper was based on a ‘plausible’ view of the law.”\textsuperscript{55}

Although this change in Rule 11 was directed at the sufficiency of the lawyer’s pre-filing investigation, it also had a dramatic effect on pleading; specifically, it served to “constrain the sweeping scope of Rule 8(a).”\textsuperscript{56} On their face, the amended Rule 11 and Rule 8(a) were in direct conflict.\textsuperscript{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

\textsuperscript{50} VAIRO supra note 46, at 3. WRIGHT & MILLER § 1331.
\textsuperscript{51} The other changes involved discovery and case management.
\textsuperscript{52} VAIRO, supra note 46, at 8 (citing Amendments to Federal Rules of Civil Procedure, 97 F.R.D. 165, 190-94).
\textsuperscript{53} WRIGHT & MILLER § 1331.
\textsuperscript{54} FED. R. CIV. P. 11 (1983).
\textsuperscript{55} Id. (emphasis added).
\textsuperscript{56} Redish & Amuluru, supra note 13, at 1315 (This change in Rule 11 “was quite obviously (albeit indirectly) intended to constrain the sweeping scope of Rule 8(a).”).
\textsuperscript{57} See also Stephen N. Subrin, Teaching Civil Procedure While You Watch It Disintegrate, 59 BROOK. L. REV. 1155, 1164 (1993) (Rule 8(a) and Rule 11 as “almost self-contradictory”).
the pleader is entitled to relief” – deliberately “avoids mention of ‘facts’ or causes of action.” \(^{59}\) The 1983 version of Rule 11, by contrast, required that lawyers conduct a pre-filing investigation to establish, among other things, that 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 the lawyer investigate the specific factual and legal bases for the complaint. Thus, the 1983 version of Rule 11 articulated “a standard for avoiding sanctions that require[d] a complaint to specify legal and factual bases to a fuller extent than necessary to avoid a motion to dismiss.” \(^{61}\)

While some courts rejected the notion that Rule 11 increased the pleading requirements of Rule 8, \(^{62}\) many courts used the language of Rule 11 to dismiss complaints that were not sufficiently specific, and thereby “tightened the liberal pleading standard” set forth in Rule 8(a). \(^{63}\) Thus, “Rule 11’s duty of reasonable inquiry seemed to affect the accepted standard for pleading under Rule 8(a)….” \(^{64}\) “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….” \(^{65}\) This was a particular problem in cases in which the defendants

\(^{58}\) FED. R. CIV. P. 8.

\(^{59}\) Id.

\(^{60}\) FED. R. CIV. P. 8 (1983) (emphasis added).

\(^{61}\) Note, supra note 14 at 634.

\(^{62}\) See, e.g., Computer Place, Inc. v. Hewlett-Packard, Co., 607 F. Supp. 822 (N.D. Cal. 1984); 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. United States 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.”).

\(^{63}\) Note, supra note 14, at 635 n.18; Liggins v. Morris, 749 F. Supp. 967 (D. Minn. 1990) (Inadequately detailed complaints “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.”); Gallagher v. Kopera, 789 F. Supp 277, 278 (N.D. Ill. 1992) (“allegations made on information and belief violate Rule 11”).

\(^{64}\) VAIRO, supra note 46, at 14.

controlled the relevant information. Indeed, commentators criticized 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.”

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. Thus, courts, in a remarkable foreshadowing of today’s post-Iqbal practice, sanctioned lawyers who brought claims that were not “plausible.” As the U.S. 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.”

---

66 See Johnson v. United States, 788 F.2d 845 (2d Cir. 1986) (Pratt, J., dissenting) (describing the “Catch 22” facing plaintiffs: no information until litigation, but no litigation without information).

67 WRIGHT & MILLER, supra note 15, § 1332. NOTE, supra note 14 (The 1983 version of the rule “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.”); Melissa S. Nelken, Sanctions Under Amended Federal Rule 11—Some ‘Chilling’ Problems in the Struggle Between Compensation and Punishment, 74 GEO. L. J. 1313, 1342 (“[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 pleading 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.”).

68 ADVISORY COMM. NOTE TO THE 1993 AMENDMENT OF RULE 11. (emphasis added).

69 See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 403-04 (1990). See also Black Hills Institute of Geological Research v. South Dakota School of Mines and Technology, 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) (among the factors for the court to consider in determining whether claims are sanctionable is “the plausibility of the argument”); Port Drum Co. v. Umphrey, 119 F.R.D. 26 (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.”); Repp v. Webber, 142 F.R.D. 398 (S.D.N.Y. 1992) (rejecting sanctions where ‘plaintiffs’ arguments have a plausible basis in fact and existing law”)

---
A second significant amendment to Rule 11 made sanctions mandatory, requiring the district court to impose sanctions if it determined that a violation had occurred. In a third important change, the amended rule explicitly authorized the district court to grant attorneys’ fees and costs for violating the rule. Indeed, although the 1983 version of the rule authorized the district courts to impose a wide variety of “appropriate sanctions,” attorney’s fees became the “Rule 11 sanction of choice.” In most cases, when a court found that a lawyer had violated Rule 11, it imposed costs and attorneys’ fees as a sanction thereby allowing cost-shifting not otherwise available in the American legal system.

These three changes – the indirect change in the substantive law of pleading 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 – had a “dramatic effect on federal court practice” in several respects. First, the amendments caused Rule 11’s “invocation and application” to become “pervasive.” Lawyers, particularly defense counsel, “routinely” filed Rule 11 motions, “to force their adversaries to justify the factual and legal bases underlying motions and pleadings,” and courts were therefore inundated with “satellite” Rule 11 litigation.

Second, perhaps most significantly for present purposes, is that the 1983 version of Rule 11 impacted parties’ substantive rights. In particular, it “harmed plaintiffs, particularly public interest and civil rights plaintiffs” by “chilling vigorous advocacy.” Part of the chilling effect was the result of the vagueness of the “reasonable inquiry” requirement. Several

71 WRIGHT & MILLER, supra note 15, § 1332.
72 Fed. R. Civ. P. 11 (1983) (“the 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.”)
73 WRIGHT & MILLER, supra note 15, § 1336.3, n.28; Nelken, supra note 68 (concluding that courts awarded attorney’s fees as a sanction in 96% of reported cases).
75 WRIGHT & MILLER, supra note 15, § 1331.
76 VAIRO, supra note 75, at 598.
77 VAIRO, supra note 46, at 13 (discussing concerns about “satellite litigation”).
78 WRIGHT & MILLER, supra note 15, § 1332.
79 George Cochran, Rule 11: The Road to Amendment, 61 Miss. L.J. 5, 9 (1991) (“[O]n the same set of facts, almost half of judges surveyed would have sanctioned a complaint as
empirical 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, and antitrust cases brought by smaller companies.” Moreover, the primary focus of defendants’ motions for sanctions was the complaint, which formed the basis of approximately 50% of the requests for sanctions according to one study, and 57.8% of the requests for sanctions according to another.

This empirical evidence led to widespread criticism that the 1983 version of Rule 11 was having a dramatic chilling effect on plaintiffs lawyers by causing them to decide not to bring arguably meritorious cases. While it is difficult to determine how many 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 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.

80 GEORGE V AIRO, REPORT TO THE ADVISORY COMMITTEE ON AMENDED RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE 6 (1987). See also Nelken, supra note 68, 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 14, at 631 (“[A]lthough 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.”). See also VAIRO, supra note 46, at 14 (discussing concerns about chilling effects of 1983 amendments).

81 VAIRO, supra note 46, at 16.

82 Third Circuit Task Force. See also Miller, supra note 66, at 1009 (“[T]he 1983 Rule was criticized for having a disproportionate impact, particularly in areas of the law considered ‘disfavored by some....’”).

83 Federal Judicial Center Study.

84 Miller, supra note 66, at 1007-08 (“After several years of extraordinary activity under the [1983] Rule, a comprehensive study by the Federal Judicial Center (FJC) 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.”); Cochran, supra note 80, at 11 (“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.”); Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1363-64 (9th Cir. 1991) (“Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would be uncompensated. Attorneys, because of fear of sanctions, might turn won cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons 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.”).
reported that they refrained from bringing an arguably meritorious case because they were concerned about sanctions.\textsuperscript{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 and off the record) in order to remind litigants of their ethical obligations and that monetary consequences might follow violations of the rule.”\textsuperscript{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.”\textsuperscript{87}

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

The 1983 version of Rule 11 produced a tidal wave of criticism,\textsuperscript{88} and, 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,”\textsuperscript{89} substantially amended Rule 11 into its current form.\textsuperscript{90} As a result of these changes, “there is no doubt that Rule 11 got some of its teeth pulled....”\textsuperscript{91}

\textsuperscript{85} THOMAS E. WILLGING, THE RULE 11 SANCTIONING PROCESS 174-75 (Fed. Jud. Ctr. 1988) (“Whether it can be classified as chilling or not, lawyers reported a cautioning effect of Rule 11.”).

\textsuperscript{86} VAIRO, supra note 46, at 42-43. Another significant criticism of the amended rule was that district courts were applying it “unpredictably.” WRIGHT & MILLER, supra note 15, § 1332. This inconsistent application of the rule undoubtedly contributed to the chilling effect of the rule.

\textsuperscript{87} Nelken, supra note 68, at 1329.

\textsuperscript{88} See, e.g., Cochran, supra note 80, 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.”).

\textsuperscript{89} WRIGHT & MILLER, supra note 15, § 1331; ADVISORY COMM. NOTE TO THE 1993 AMENDMENT OF RULE 11 (The revision “places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court.”).

\textsuperscript{90} The Federal Rules of Civil Procedure were subsequently restyled, but the restyling was not meant to make any substantive changes to the rules.

\textsuperscript{91} Yablon, supra note 30, at 611. See also WRIGHT & MILLER, supra note 15, § 1331 (“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
First, the 1993 amendments made sanctions discretionary rather than mandatory.\textsuperscript{92} 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.”\textsuperscript{93}

Second, the 1993 amendments added a “safe harbor” provision by which the party seeking Rule 11 sanctions must serve the motion on the offending attorney and give him 21 days to consider withdrawing the offending paper before filing the sanctions motion with the court.\textsuperscript{94} Through this provision, the drafters of the amendments aimed to “mitigate Rule 11’s chilling effect,” and “encourage the withdrawal of papers that violate the rule without involving the district court” thereby reducing Rule 11 litigation.\textsuperscript{95}

Third, the 1993 revisions “change[d] the emphasis with regard to the types of sanctions to be ordered by the district court.” The new rule “envision[ed] public interest remedies such as fines and reprimands as the norm” rather than “private interest remedies,” such as attorney’s fees.\textsuperscript{96} In this regard, the amended rule provides: “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. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing

\textit{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.”}. Carrington & Wasson, \textit{supra} note 20, at 571 (“To the extent that this uneven effect was a consequence of the 1983 rule, the modifications in 1993 that were intended to alleviate the problem included 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.”).

\textsuperscript{92} \textit{Fed. R. Civ. P. 11(c)(1)} (emphasis added) (“If … the court determines that Rule 11(b) has been violated, the court may impose appropriate sanction on any attorney….”). \textit{See also} Wright & Miller, \textit{supra} note 15, § 1336.1 (discussing transition from mandatory to discretionary rule).

\textsuperscript{93} Vairo, \textit{supra} note 46, at 32.

\textsuperscript{94} \textit{Fed. R. Civ. P. 11(c)(2)} (a motion for sanctions “shall not be filed with or presented to the court unless, within twenty-one days after service of the motion … the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.”)

\textsuperscript{95} Wright & Miller, \textit{supra} note 15, § 1337.2.

\textsuperscript{96} Id. at § 1336.3.
payment to the movant of part or all of the reasonable attorney’s fees and other expenses directly resulting from the violation.” Indeed, the Advisory Committee Note accompanying the amendment states that monetary penalties “should ordinarily be paid into the court” rather than the opposing party except under “unusual circumstances.”

Fourth, the 1993 amendments removed the requirement that the litigant certify that the assertions made in the pleading were “well grounded in fact.” Instead, the new version of Rule 11 specifically allows pleaders to make factual contentions even though the pleader lacks evidentiary support at the time 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 have evidentiary support after a reasonable opportunity for further investigation or discovery.”

Notably, Justice Scalia, joined by Justice Thomas, dissented to the 1993 Amendments to Rule 11. Justice Scalia wrote: “The proposed revision would render the Rule toothless, by allowing judges to dispense with sanctions, by disfavoring compensation for litigation expenses, and by providing a 21-day ‘safe harbor’ within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all.”

The 1993 amendments achieved their goal of reducing Rule 11 litigation; since the passage of those amendments, lawyers have filed fewer Rule 11 motions. 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.

---

97 CITE
98 FED. R. CIV. P. 11(b)(3) (emphasis added).
100 Id.
101 Miller, supra note 66, at 1009; Vairo, supra note 75, at 643.
Moreover, the changes to Rule 11 lifted the pressure on pleading standards, and liberal notice pleading returned. “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.” Courts understood that they were to “impose sanctions only where the conduct in question reaches a point of clear abuse.” Indeed, some courts explicitly rejected the notion that Rule 11 could even raise 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.”

Other courts noted that a complaint that contains insufficient factual detail – even barebones, conclusory allegations – is not ordinarily sanctionable. “Although Tahfs 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.”

The U.S. Supreme Court’s 2002 decision in Swierkiewicz confirmed that liberal notice pleading had returned and was the reigning standard...

---

103 VAIRO, supra note 46, at 77; Hadges v. Yonkers Racing Corp., 48 F.3d 1320 (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) (“Courts 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).

104 VAIRO, supra note 46, at 78 (collecting cases).


106 Tahfs v. Proctor, 316 F.3d 584 (6th Cir. 2003).

107 Id. at 594. See also Team Obsolete LTD. v. A.H.R.M.A. LTD., 216 F.R.D. 29 (E.D.N.Y. 2003) (citation omitted) (“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 whenever a complaint was dismissed, thereby transforming it into a fee shifting statute under which the loser pays.’”); Mover’s & Warehousemen’s Ass’n of Greater New York v. Long Island Moving & Storage Ass’n, No. 98 CV 5373 (SJ), 1999 U.S. Dist. LEXIS 20667, at *27 (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.”).
during this period. In *Swierkiewicz*, the Supreme Court in a unanimous decision “provided a full-throated endorsement” of the liberal, notice pleading standard. 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. The Court fully recognized that its 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.” The Court further emphasized that heightened pleading is only required under the circumstances set forth in Rule 9(b). Moreover, the Court reiterated the liberal language of *Conley*: “Given 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.’”

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, the simple notice pleading standard contained in Rule 8(a) held sway from the time that the Supreme Court decided *Conley* for the next fifty years. On occasion, lower courts implemented heightened pleading standards, but the Supreme Court tamped down those efforts as *Swierkiewicz* demonstrated. Then came *Twombly* and *Iqbal*.

---

111 *Id.*
112 *Id.*
113 *Id.* at 514.
114 Spencer, *supra* note 5, at 436 (“Over the next fifty years, the Supreme Court never wavered from these principles.”); Steinman, *supra* note 10, at 62 (“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.”)
A. Bell Atlantic Corp. v. Twombly

In *Twombly*, the plaintiff telephone and Internet subscribers (representing a massive putative class consisting of all “subscribers of local telephone and/or high speed internet services from February 8, 1996 to the present”)\(^{116}\) alleged that the country’s largest telecommunications firms had engaged in an illegal conspiracy in restraint of trade and had therefore violated Section 1 of the Sherman Act.\(^{117}\) In order to state a claim under Section 1 the Sherman Act, plaintiffs must establish that the defendant’s 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). To satisfy Rule 8, the Supreme Court said that the complaint must contain “allegations plausibly suggesting (not merely consistent with) agreement.”\(^ {122}\) The Court held that the allegations concerning a “contract, combination, or conspiracy” were “merely legal conclusions resting on the prior allegations” of parallel conduct.\(^ {123}\) As for the more specific allegations of parallel conduct, the Court emphasized that parallel conduct alone does not violate the Sherman Act. 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

\(^{116}\) *Twombly*, *supra* note 1.

\(^{117}\) *Id.*

\(^{118}\) *Id.* at 548.

\(^{119}\) *Id.* at 550-51 (2006).

\(^{120}\) *Id.* at 551 (quoting paragraph 51 of the plaintiffs’ complaint) (“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 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.”).

\(^{121}\) *Id.*

\(^{122}\) *Id.* at 557.

\(^{123}\) *Id.* at 564.
prompted by common perceptions of the market.” Thus, the Court concluded, “an allegation of parallel conduct and a bare assertion of conspiracy will not suffice.” “Further factual enhancement” was necessary to cross “the line between possibility and plausibility of entitlement to relief.”

In reaching this conclusion, the “Court imposed an entirely new test on the pleading stage, instituting a judicial inquiry into the pleading’s convincingness.” Thus, the Court held that the factual allegations in the complaint “must be enough to raise a right to relief above the speculative level.” Along the way, the Court “retire[d]” Conley’s “no set of facts” language.

The Court’s primary concern seemed to be the high costs of discovery if the Court were to allow the claim to proceed. “Antitrust discovery can be expensive,” the Court wrote, and “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases.”

B. Ashcroft v. Iqbal

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

In Iqbal, the plaintiff, a Pakastani Muslim arrested after the

---

124 Id. at 553-54.
125 Id. at 556.
126 Id. at 557. See also Id. at 570 (“Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”) (The “[f]actual allegations must be enough to raise a right to relief above the speculative level.”).
127 Clerman & Yeazell, supra note 4, at 827.
128 Twombly, supra note 1.
129 Id.
130 Clerman & Yeazell, supra note 4, at 826 (“The obvious concern in this big, complex case was that the claims opened the door to expensive discovery.”).
131 Id. at 559.
132 Steinman, supra note 10, at 1305.
133 Id.
134 Iqbal, supra note 2, at 1306.
September 11, 2001 attacks, filed a *Bivens* action against federal officials, including Attorney General John Ashcroft and FBI Director Robert Mueller, alleging that they subjected him to “harsh conditions of confinement on account of his race, religion or national origin.” 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.” The complaint further alleged that Ashcroft is the “principal architect” of the policy and Mueller was “instrumental in [its] adoption, promulgation, and implementation.”

A sharply divided court (5-4) found that these allegations were not sufficient to survive a motion to dismiss. 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.’” Rather, “a complaint must contain sufficient [nonconclusory] factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”

In applying these principles to the complaint, the Court employed a two-step process. 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 the policies and practices challenged here; and (3) that Mueller “was instrumental in the adoption promulgation and implementation of the policies and practices challenged here – and disregarded them because they are “bare assertions, much like the pleading of conspiracy in *Twombly* [that] amount to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim.”

---

137 *Iqbal*, 129 S. Ct. at 1951.
139 *Iqbal*, 129 S. Ct. at 1951.
140 *Iqbal*, 129 S. Ct. at 1951.
Second, the Court turned to the remaining allegations – that the FBI had rounded up many Arab Muslims and subjected them to harsh conditions of confinement – and determined that they did not plausibly suggest “purposeful, invidious discrimination” because they were entirely consistent with good law enforcement: “The September 11 attacks were carried out 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…. 141 Thus, the Court concluded, Plaintiff’s 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.”

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.”142 Thus, the Court concluded: “Though 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.’”143

C. Pleading After Twombly and Iqbal

Although courts and commentators continue to debate the precise meaning of Twombly and Iqbal, there are a few points of general agreement. First, Twombly and Iqbal are here to stay at least for the foreseeable future.144 Although some commentators have suggested that these decisions may not be as significant as they seem,145 the Supreme Court itself stated that its holdings “are generalized interpretations of Rule 8, not a good-for-this-trip-only reading for antitrust and Bivens cases…. ”146 Moreover, the

141 Id. at.
142 Id.
143 Id.
144 Clermont, supra note 10 (debunking the myth that “The Twombly-Iqbal Justices Didn’t Really Mean It”).
145 Steinman, supra note 10. Allan R. Stein, Confining Iqbal, 45 TULSA L. REV. 277 (2009) (arguing that Iqbal was a special case that will not change pleading standards in ordinary cases).
146 Clermont & Yezell, supra note 4, at 839-840.
lower courts are clearly adopting *Twombly* and *Iqbal*.

Second, liberal notice pleading appears dead. Despite the Supreme Court’s insistence to the contrary, the Court has made it more difficult to satisfy Rule 8’s “short and plain statement” standard. Specifically, the Court “unearthed the requirement that at the pleading stage the plaintiff has the burden of establishing, by nonconclusory allegations, the complaint’s plausibility as to liability on the merits.” In deciding whether a complaint satisfies this standard – and therefore survives a Rule 12(b)(6) motion to dismiss – the Supreme Court has said that the courts are to follow a two-step process. First, the court is to disregard any conclusory allegations. Second, the court is to determine whether the remaining non-conclusory allegations, accepted as true, plausibly suggest an entitlement to relief. The *Iqbal* Court tells us, moreover, that “plausibility” means more than just a “sheer possibility that a defendant has acted unlawfully.” In other words, the complaint must “nudge [plaintiff’s] claims across the line from conceivable to plausible.” In determining whether the complaint has achieved plausibility, the judge is to use his “judicial experience” and “common sense.”

While courts will continue to sort out what exactly constitutes a “plausible” complaint, the primary impact of *Twombly* and *Iqbal* is to “impose a fact pleading requirement on Rule 8.” “The plausibility standard of *Twombly* assesses the factual sufficiency of the allegations. And, the conclusory/non-conclusory dichotomy of *Iqbal* forces a plaintiff to detail factual support for her allegations to avoid having them be deemed

148 See also Clermont & Yeazell, *supra* note 4, at 830 (“[T]he Court in these two cases added a requirement … that goes above and beyond having to give notice.”)
149 *Iqbal*, *supra* note 2.
150 *Id.*
151 *Id.*
152 *Id.*
153 Kasten v. Ford Motor Company, No. 09-11754, 2009 WL 3628012 (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 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,’ *Iqbal*, 129 S.Ct. at 1950, there may be no exacting standard for courts to use in evaluating complaints under Fed. R. Civ. P. 8(a).”)
‘conclusory’ and thus disregarded.”

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 causes of action.”

Over and above providing detail, in order to be “plausible,” the complaint must also be convincing.

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 analyzing Twombly and Iqbal addressing a wide variety of topics.

Noticeably, however, that scholarship has, generally speaking, described the Iqbal/Twombly plausibility standard as “novel” and found little historical precedent for the post-Iqbal pleading era.

As set forth in this section, however, the post-Iqbal era of pleading is not entirely new. To the contrary, the current pleading regime bears a sharp resemblance to pleading under the 1983 version of Rule 11 in several respects. As an initial matter, just as Rule 11 was a focal point of litigation in the 1983-1993 time period, courts are flooded with Iqbal motions today, and Iqbal, like the 1983 version of Rule 11, has become a an extremely popular subject among scholars. Further, the criticisms of Iqbal, strike a remarkably similar chord to the complaints about the 1983 version of Rule 11. Most significantly, Iqbal has tightened pleading standards just the way that the 1983 version of Rule 11 did. Moreover, under both pleading standards, “plausibility” is a touchstone for determining whether a complaint should survive a motion to dismiss. 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—

155 Dodson, supra note 10, at 51.
156 Clermont & Yeazell, supra note 4.
157 Id. (“[F]or the first time, pleadings must undergo a test not for factual detail, but for factual convinciness.”).
158 See supra note 6.
159 See supra note 10.
160 Carrington & Wesson, supra note 20, at 567 (“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.”).
161 Steinman, supra note 10.
civil rights and employment discrimination cases in particular – the same criticism 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 imposed a heightened pleading standard based in large part on whether the complaint is “plausible.”

As discussed above, Rule 11 is directed at the sufficiency of the lawyer’s pre-filing investigation, but the 1983 version of the rule had a dramatic effect on pleading. Specifically, “Rule 11’s duty of reasonable inquiry seemed to affect the accepted standard for pleading under Rule 8(a),”\(^{162}\) with many courts using Rule 11 to dismiss complaints that were not sufficiently specific.\(^{163}\) Commentators criticized 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.”\(^{164}\) 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.\(^{165}\) The 1993 Amendments to Rule 11 lifted the pressure on pleading standards, and liberal notice pleading returned, but now the Supreme Court, through its interpretation of Rule 8 in *Iqbal* and *Twombly*,

---

\(^{162}\) VAIRO, *supra* note 46, at 14.

\(^{163}\) Note, *supra* note 14, at 635 n.18; Liggins v. Morris, 749 F. Supp. 967 (D. Minn. 1990) (Inadequately detailed complaints “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.”); Gallagher v. Kopera, 789 F. Supp 277, 278 (N.D. Ill. 1992) (“allegations made on information and belief violate Rule 11”).

\(^{164}\) WRIGHT & MILLER, *supra* note 15, § 1332; See also CITE (The 1983 version of the rule “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.”); Nelken, *supra* note 68, at 1342 (“[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 pleading 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.”).

\(^{165}\) Id. (emphasis added).
has returned us to a pleading regime that looks a lot like 1983.

First and foremost, *Twombly* and *Iqbal* have replaced the liberal notice pleading standard with a heightened plausibility standard. Specifically, the Court “unearthed the requirement that at the pleading stage the plaintiff has the burden of establishing, by nonconclusory allegations, the complaint’s plausibility as to liability on the merits.” The *Iqbal* Court tells us, moreover, that “plausibility” means more than just a “sheer possibility that a defendant has acted unlawfully.” In other words, the complaint must “nudge [plaintiff]’s claims across the line from conceivable to plausible.” The primary impact of *Twombly* and *Iqbal* is to “impose a fact pleading requirement on Rule 8” that compels lawyers to go element-by-element and “give a particularized mention of the factual circumstances of each element of the causes of action.” Thus, *Iqbal*, just like the 1983 version of Rule 11 has produced “a revival of fact pleading that was antithetical to the spirit (if not the letter) of the Federal Rules of Civil Procedure.”

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

---

166 See also Clermont & Yeazell, *supra* note 15, at 830 (“[T]he Court in these two cases added a requirement … that goes above and beyond having to give notice.”)

167 Id.

168 *Iqbal, supra* note 2.

169 Id.


171 Id.

172 WRIGHT & MILLER, *supra* note 15, § 1332. See also NOTE, *supra* note 14 (The 1983 version of the rule “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.”); Nelken, *supra* note 68, at 1342 (“[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 pleading 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.”).
secured reversals not only of sanctions but also on the merits.\textsuperscript{173}

\textit{Iqbal} is already under attack for the same reason. Under \textit{Iqbal}, the Supreme Court said that judges are to use their “judicial experience” and “common sense”\textsuperscript{174} in determining whether the claim is plausible. This aspect of the \textit{Iqbal} decision “obviously licenses highly subjective judgments…. This is a blank check for federal judges to get rid of cases they disfavor.”\textsuperscript{175}

Finally, \textit{Twombly} and \textit{Iqbal} have restored the tension between Rule 8 and Rule 11. As noted above, on their face, the 1983 version of Rule 11 and Rule 8(a) were in direct conflict.\textsuperscript{176} 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”\textsuperscript{177} – deliberately “avoids mention of ‘facts’ or causes of action”\textsuperscript{178} 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.”\textsuperscript{179} In other words, Rule 11 put pressure on plaintiffs to plead with more factual detail than Rule 8(a) required.

Although the 1993 amendment to Rule 11 relieved that pressure, \textit{Iqbal} has now revived it. As one commentator described that tension: “As things have worked out, the new toughness under \textit{Twombly-Iqbal} does not mesh easily with the relative leniency under Fed. R. Civ. P. 11(b)(3) (providing that the signature warrants that ‘the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery’). On the one hand, a \textit{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

\textsuperscript{173} Cochran, \textit{supra} note 80, at 9.
\textsuperscript{174} Id.
\textsuperscript{175} Liptak, \textit{supra} note 4 (quoting Burbank). \textit{See also} Clermont & Yeazell, \textit{supra} note 4, at 840 (“In merely describing the Supreme 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.’”)
\textsuperscript{176} \textit{See also} Subrin, \textit{supra} note 58, at 1164 (Rule 8(a) and Rule 11 as “almost self-contradictory”).
\textsuperscript{177} \textit{FED. R. CIV. P.} 8.
\textsuperscript{178} Id.
\textsuperscript{179} \textit{FED. R. CIV. P.} 11 (1983) (emphasis added).
could use such specifically identified allegations to circumvent Twombly-Iqbal initially, but would then likely fall to a Rule 11 motion. Indeed, as another commentator 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.”

In particular, the Supreme 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…”. “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.” As noted earlier, this feature of Rule 11(b) that allows plaintiffs to plead facts for which they will “likely have evidentiary support after a reasonable opportunity” 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. Further, the Iqbal Court’s aggressive reading of Rule 8 places it in tension with Rule 11, just as it was during the 1983-1993 time period.

B. Defendant’s Tool

A major criticism aimed at both the 1983 version of Rule 11 and Iqbal is that they are exclusively defendant’s tools that upset the delicate balance between the rights of plaintiffs and the rights of defendants. Commentators frequently complained that the 1983 version of Rule 11 was used primarily by defendants against plaintiffs, even though nothing in the

180 Clermont & Yeazell, supra note 4, at n.104. See also Hoffman, supra note 6 (“[I]mposing a plausibility requirement on 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.”).

181 Clermont & Yeazell, supra note 4, at 849.

182 Spencer, supra note 5, at 469; Clermont & Yeazell, supra note 4 (“One can say then that the Twombly Court’s statement that the plausibility standards would make sure that there is a ‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ 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.”).

183 Spencer, supra note 5, at 471.
rule compels this imbalanced application. Empirical evidence supported this objection. Rule 11 motions were “disproportionately directed at complaints rather than other papers,”184 which formed the basis of approximately 50% of the requests for sanctions185 and therefore inevitably “affect[ed] plaintiffs more adversely than defendants.”186

_Twombly_ and _Iqbal_ are receiving the exact same criticism. Professor Georgene Vairo described the cases as “a defendant’s dream come true.”187 Another commentator said that _Iqbal_ “is quickly becoming the best thing to happen to the products liability defense bar since _Daubert._”188 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 competence places pressure on him to consider an _Iqbal_ motion in almost every case, or at least those cases where the complaints contain minimalist pleading. 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._”189 Further, an _Iqbal_ motion “will provide a cheap form of discovery for the defendant.”190 The plaintiff’s opposition 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.

C. Chilling Effect

Because complaints were the primary target of Rule 11 sanctions in the 1983-1993 time period, many commentators complained that the 1983 version of Rule 11 “harmed plaintiffs, particularly public interest and civil rights plaintiffs” by “chill[ing] vigorous advocacy.”191 Several empirical studies sought to demonstrate that Rule 11 was preventing attorneys from bringing meritorious cases.192 In addition to the empirical evidence,

---

186 Stempel, _supra_ note 184, at 267.
189 Clermont & Yeazell, _supra_ note 4, at 840.
190 _Id._
191 WRIGHT & MILLER, _supra_ note 15, § 1332.
192 WILGING, _supra_ note 86, at 174-75.
anecdotal evidence suggested that plaintiffs lawyers were holding back because of Rule 11.\(^\text{193}\) Whether it can be classified as chilling or not, lawyers reported a cautioning effect of Rule 11.\(^\text{194}\)

Commentators fear that Iqbal will have the same chilling effect.\(^\text{195}\) Although there has not yet 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 and this, in turn, may deter lawyers from bringing potentially meritorious cases.

First, in a large number of cases post-Iqbal, 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.\(^\text{196}\) In the most common scenario in 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 the plaintiff that it should only amend the complaint if it can do so consistent with his obligations under Rule 11.\(^\text{197}\) In making this threat, courts are directly linking the

\(^{193}\) VAIRO, supra note 46, at 42-43.

\(^{194}\) WILLGING supra note 86, at 174-75.

\(^{195}\) 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 Federal Rule of Civil Procedure 12(b)(6), is likely to have a chilling effect on pretext challenges to eminent domain under the federal Constitution.”). But see Spencer, supra note 6, at 26 (“Incoherence from the courts has the potential to create an unpredictability that will underdeter frivolous claims. . . .”).

\(^{196}\) See also Wade v. Fresno Police Dept., No. 1:09-CV-0599, 2010 WL 2353525 (E.D.Cal. June 9, 2010) (“The court does remind Plaintiff and all parties that under Rule 11 of the Federal Rules of Civil Procedure 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. See Fed R.Civ.Pro. 11.”); Safeco Ins. Co. v. O’Hara Corp., No. 08-CV-10545, 2008 WL 2558015 (E.D. Mich. June 25, 2008) (court issued notice to parties admonishing counsel: “Prepare to withdraw without prejudice claims and defenses that are not presently sustainable under Rule 11 in view of evidence in hand.”).

\(^{197}\) See, e.g., Knudson v. Wachovia Bank, 513 F.Supp.2d 1255, 1258 n.1 (M.D. Ala. 2007) (“Should he choose to file an Amended Complaint, Knudson should keep in mind both that he must make his allegations within the strictures of Rule 11 of the Federal Rules of Civil Procedure, 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.”); 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
obligation to plead with specificity under Iqbal’s heightened pleading standard with the plaintiff’s obligation to only assert claims if the lawyer has a good faith basis for doing so under Rule 11(b)(3). \(^\text{198}\) This was 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), Fed.R.Civ.P. Also, any amendment must ‘contain sufficient factual matter, accepted as true, to “state a claim plausible on its face”’. She must allege more than conclusions. \(\text{Twombly, 127 S.Ct. at 1955.}\) Floyd v. CIBC World Markets, 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.”); Figueiredo v. Loan, No. C 09-4784 BZ, 2010 WL 935323 (N.D. Cal. Mar. 15, 2010) (“It is plaintiff’s obligation to plead facts sufficient to state a plausible claim for relief. See Ashcroft v. Iqbal . . . . 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…..”); Goodman v. Merrill Lynch & Co., No. 09 Civ. 5841(SAS), 2010 WL 1404155, at *6 (S.D.N.Y. 2010) (“Therefore, before 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.”); 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 that any of these elements are satisfied….Accordingly, Count 2 is properly dismissed, but relators may re-plead this claim if they can do so consistently with Rule 11.”); 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 Fed. R. Civ. P.11(b)(3); 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 Fed. R. Civ. P. 11(b)(3).”); Forba Holdings v. Licsac, L.L.C., No. 09-cv-02305-CMA-MJW, 2010 WL 148267 (D. Colo. Jan. 11, 2010) (warning plaintiff to file an amended complaint only if Plaintiff can do so “in good faith” under Rule 11(b)(3)); Smith v. Pizza Hut, Inc., 694 F. Supp. 2d 1227, 1230-31 (D. Colo. 2010) (“The Court … GRANTS Plaintiff leave to file within twenty-one (21) days an amended complaint that complies with the Twombly/Iqbal plausibility standard. If plaintiffs cannot, in good faith [citing Rule 11(b)(3)], file such a complaint … this case will be dismissed with prejudice.”); Darrow v. WKRP Management, L.L.C., No. 09-cv-01613-CMA-BNB2010, WL 1416799 (D. Colo. Apr. 6, 2010) (same); Weaver v. Derichebourg ICS Multiservices, No. 09 Civ. 1611(LTS)(DF), 2010 WL 517595 (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 of the Federal Rules of Civil Procedure will have to abide the filing of the amended complaint and any motion practice directed thereto.”); Cooke v. Jaspers, No. H-07-3921, 2010 WL 918342 (S.D. Tex. Mar. 10, 2010) (“There is no allegation that puts [defendant] on notice of the basis of the claim or shows the plaintiffs’ entitlement to relief….[citing Iqbal and Twombly]. The motion to dismiss is granted. The plaintiffs have leave to amend, consistent with Rule 11…..”).

\(^\text{198}\) Moreover, in at least a few post-Iqbal cases, courts have sanctioned plaintiff’s lawyers for filing complaints with facts insufficient to meet the Iqbal standard. See Catcove Corp. v. Heaney, 685 F. Supp. 2d 328 (E.D.N.Y. 2010); Bloomfield Condominium Assocs. v. Drasco, No. 08-6159, 2010 WL 2652465 (D.N.J. 2010).
precisely the situation in the 1983-1993 time period 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.”

In one recent case – a suit under Section 1983 alleging that plaintiff was passed over for the position of Fire Marshal for political reasons – the district court presented with defendants’ 12(b)(6) motion to dismiss, took the unusual step of ordering a preliminary hearing under the little used Rule 12(i). 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 Defendants’ objections to the pleadings, specifically the threshold legal issues upon which, under the Twombly and Iqbal plausibility test, the sufficiency of Kregler’s retaliation claim is grounded.” The court also said that this hearing “would serve as an occasion for the Court to probe, in accordance with Rule 11(b), the extent to which some of Kregler’s conclusory allegations have factual support and were formed after an inquiry reasonable under the circumstances.”

Moreover, defense firms are encouraging clients to challenge complaints, not only via a motion to dismiss but also through the use of Rule 11 motions. Again, it remains to be seen whether Iqbal will have the same kind of chilling effect as the 1983 version of Rule 11 did, but early signs suggest that it will.

D. Disproportionate Impact

199 Nelken, supra note 68, at 1329. See also VARIO, supra note 46, at 42-43 (“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 and off the record) in order to remind litigants of their ethical obligations and that monetary consequences might follow violations of the rule.”).


201 Id. at 475.

202 Id. After the hearing, the district court dismissed the complaint and denied plaintiff leave to amend, though it did not consider sanctioning the plaintiff. Id. at 570. On appeal, in a summary, unpublished opinion, the Second Circuit reversed and held that plaintiff’s motion for leave to amend should have been granted. Kregler v. City of New York, No. 09-3840-cv, 2010 WL 1740806 (2d Cir. 2010). The court expressed “no opinion … as to the use of [the Rule 12(i)] procedure or the impact of the facts adduced therein.” Id. at *2 n.1.

203 Jones Day Client Alert (“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.”).
In another remarkable echo of the old, bad days of Rule 11, critics of *Twombly* and *Iqbal* have argued that these cases are having a disproportionate impact on civil rights and employment discrimination cases, just as they did in the 1983-1993 timeframe.  

As discussed earlier, one of the most significant criticisms of the 1983 version of Rule 11 was that it “harmed plaintiffs, particularly public interest and civil rights plaintiffs” by “chill[ing] vigorous advocacy.” 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, and antitrust cases brought by smaller companies.”

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.  

For example, Professor Howard Wasserman has written that,

---

204 Schneider, supra note 6, 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.”).

205 WRIGHT & MILLER, supra note 15, § 1332. See also Miller, supra note 66, at 1009 (2003) (“[T]he 1983 Rule was criticized for having a disproportionate impact, particularly in areas of the law considered ‘disfavored by some….’”).

206 GEOGENE VAIRO, REPORT TO THE ADVISORY COMMITTEE ON AMENDED RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE 6 (1987). See also Note, supra note 14, at 631 (“[A]lthough 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.”). See also VAIRO, supra note 46, at 14 (discussing concerns about chilling effects of 1983 amendments).

207 See, e.g., Schenider, supra note 6, 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 Stempel, supra note 184, 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.”); Spencer, supra note 6, 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
“Civil Rights is one substantive area in which *Iqbal* will empower courts to increase scrutiny over pleadings….”

In his testimony before Congress about *Twombly* and *Iqbal*, Professor Arthur Miller made a similar prediction: “[the new pleading standard] probably will affect litigants bringing complex claims the hardest. Those cases – many involving Constitutional and statutory rights that seek the enforcement of important national politics 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.”

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 of employment discrimination claims.”

As for claims of discrimination under the Americans with Disabilities Act, 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.

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, but several empirical studies have studied this issue and suggest that *Twombly* and *Iqbal* are already having a disproportionate impact on these “disfavored” cases. Anecdotal evidence also supports the view that courts are 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.”

---

208 Wasserman, *supra* note 6, at 160. See also A. Benjamin Spencer, *Pleading Civil Rights Claims in a Post-Conley Era*, 52 How. L.J. 99, 103 (2008) (citing concern that “*Twombly* will serve as yet another procedural reform that will stymie civil rights claims and other seemingly disfavored actions.”).

209 Miller testimony.

210 Seiner, *supra* note 6, at 1027-29.


212 See Patricia W. Hatamayar, *The Tao of Pleading: Do Twombly and Iqbal Matter*
applying *Iqbal* particularly harshly in these “disfavored” cases.\textsuperscript{213}

E. 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 decision\textsuperscript{214} or argue that its impact will be minimal,\textsuperscript{215} most contend that *Iqbal* is ill-conceived for all of the reasons discussed in this article. The criticism about *Iqbal*, however, lacks a lot of 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 don’t 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*,\textsuperscript{216} but no action seems imminent. It took ten years for the rulemakers to

\textsuperscript{213} Schneider, * supra* note 6, at 533-535 (discussing a number of lower court decisions in which district courts have dismissed civil rights and employment cases); Miller testimony (“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.”).

\textsuperscript{214} See, e.g., Scott Dodson, *Comparative Convergence of Pleading Standards*, 158 U. Pa. L. Rev. 441 (2010) (arguing that the *Iqbal* standard conforms to the pleading standard in other countries).

\textsuperscript{215} Steinman, * supra* note 10.

amend Rule 11 in order 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 \textit{Iqbal}.

CONCLUSION

\textit{Twombly} and \textit{Iqbal} have revolutionized pleading by replacing liberal notice pleading with a heightened plausibility regime. But the pleading regime that the Court has spawned is a familiar one. We are back in 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 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 \textit{Iqbal} and \textit{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 \textit{Iqbal}.