ARE *TWOMBLY* & *IQBAL* AFFECTING WHERE PLAINTIFFS FILE? A STUDY COMPARING REMOVAL RATES BY STATE

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This Article originated from a 2010-2011 study the Federal Judicial Center conducted to examine the impact, if any, of the Supreme Court's decisions in Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal *on civil litigation in the United States federal courts. To examine this impact, we compared the removal rates of cases to federal courts between states using notice-pleading standards and states using fact-pleading standards. We predicted that heightened pleading standards in federal courts would encourage plaintiffs in cases with federal and state claims—especially plaintiffs alleging a violation of their civil rights—to file in state courts to benefit from the courts' liberal notice pleading standard. Therefore, defendants would be more likely to remove cases filed in notice pleading state courts to federal courts to take advantage of the newly announced heightened pleading standard. After reviewing both existing commentary and empirical research about the impact of* Twombly *and* Iqbal*, this Article explains the methodology for our removal study, presents the results of a preliminary study examining removal rates of four states, and presents the results of our expanded examination of removal rates of all fifty states and the District of Columbia. The results, however, demonstrate that our initial expectations were not met. The results indicate no systematic increase in the rate of removal after* Twombly *and* Iqbal *and that the effect was not more pronounced in notice-pleading states compared to fact-pleading states, questioning the assertion that cases are being diverted from federal courts to state courts due to heightened pleading standards.*

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I. INTRODUCTION

This Article originated from a 2010-2011 study the Federal Judicial Center (FJC) conducted in response to a request from the Advisory Committee on Civil Rules to examine the impact, if any, of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* on motions to dismiss for failure to state a claim.[1] The FJC's study found an increase in the rate at

1. *See* Ashcroft v. Iqbal, 556 U.S. 662, 677-87 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-70 (2007). The results of this study were first summarized in a memorandum to Jim Eaglin, Director of the FJC Research Division. *See* Memorandum from Jill Curry & Matthew Ward to Jim Eaglin, Director, FJC Research Division (Feb. 14, 2011) (on file with authors). The study of removal rates discussed in this Article was part of the FJC's March 2011 examination of *Iqbal*'s impact. *See* JOE S. CECIL ET AL., FED. JUDICIAL

which motions to dismiss for failure to state a claim are filed but no general increase in the rate at which the courts grant such motions.[2] One response to the FJC study was the suggestion that cases that otherwise would be filed in federal court are being diverted to state courts with notice-pleading standards in order to avoid the stricter pleading standards in federal courts set forth in *Twombly* and *Iqbal*.[3] The study presented in this Article seeks to assess the likelihood that cases are being diverted to state courts.[4]

We indirectly examined the likelihood of cases being diverted to state courts by comparing the removal rates of cases to federal courts between states using notice-pleading standards and states using fact-pleading standards.[5] We predicted that heightened pleading standards in federal courts would encourage plaintiffs to file in state courts to benefit from the liberal notice pleading standard; therefore, defendants would be more likely to remove such cases filed in notice pleading state courts to take advantage of the heightened pleading standard in federal courts.[6] The results, however, demonstrate that these expectations were not met.[7] There was no systematic increase in the rate of removal from state to federal courts after *Twombly* and *Iqbal*, and the effect was not more pronounced in notice-pleading states compared to fact-pleading states.[8]

We first summarize the *Twombly* and *Iqbal* decisions and their associated commentary, which predicted that the heightened pleading standards following these two decisions would negatively affect plaintiffs—especially plaintiffs alleging a violation of their civil rights—by making it harder for plaintiffs to properly plead a claim.[9] We then discuss existing empirical research to evaluate the impact of the *Twombly* and *Iqbal* decisions.[10] Next, we describe the removal study we conducted, including the benefits of using the removal metric, our hypothesis, and metrics for measurement.[11] We then explain how we characterized states as notice-pleading or fact-pleading states.[12] Next, results from the four-state preliminary study are presented, followed by the

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CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* 11 (2011) [hereinafter CECIL ET AL., MOTIONS], *available at* http://www.fjc.gov/public/pdf. nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf. The FJC updated its study in November 2011. *See* JOE S. CECIL ET AL., FED. JUDICIAL CTR., UPDATE ON RESOLUTION OF RULE 12(b)(6) MOTIONS GRANTED WITH LEAVE TO AMEND 1 (2011) [hereinafter CECIL ET AL., UPDATE], *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf. Both studies are discussed *infra* in Part III.G.

2. CECIL ET AL., MOTIONS, *supra* note 1, at 8-19.

3. *See infra* Part II.B.

4. *See infra* Part IV.

5. *See infra* Part IV. As used throughout this Article, "state" or "states" includes the District of Columbia. Accordingly, lists of states total fifty-one. *See infra* Part VI.B.

6. *See infra* Part IV.B.1.

7. *See infra* Parts VI-VII.

8. *See infra* Part VI.

9. *See infra* Part II.

10. *See infra* Part III.

11. *See infra* Part IV.

12. *See infra* Part V.

results from an examination of all states.[13] We finish the study with the discussion, conclusion, and appendix.[14]

II. BACKGROUND

Rule 8(a) of the Federal Rules of Civil Procedure provides, "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."[15] Rule 8(a) replaced common law pleading rules that required "a plaintiff to jump through procedural hoops," thus reflecting a preference for having cases decided on their merits.[16] The Supreme Court explained in *Conley v. Gibson* that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle [the pleader] to relief."[17] In short, Rule 8 favors the pleader.[18] In contrast, pleading particularity is required only when the complaint alleges mistakes or offensive matters such as fraud or deceit.[19]

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13. *See infra* Part VI.

14. *See infra* Parts VII-IX.

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

16. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41 SUFFOLK U. L. REV. 851, 854 (2008). The development of the Federal Rules of Civil Procedure and its pleading standards are well documented. *See* Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 9-21 (2008) [hereinafter Campbell, *Plausible Showing*] (tracing the development of pleading requirements together with the development of the Federal Rules of Civil Procedure); Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the* Conley-Iqbal *Dilemma*, 114 PENN ST. L. REV. 1191, 1198-1203 (2010) [hereinafter Campbell, *Getting a Clue*] (same); Thomas P. Gressette, Jr., *The Heightened Pleading Standard of* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal*: A New Phase in American Legal History Begins*, 58 DRAKE L. REV. 401, 402-17 (2010); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437-51 (1986) (tracing the history of pleading standards); James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on* Iqbal*, A Day in Court and a Decision According to Law*, 114 PENN ST. L. REV. 1257, 1270-80 (2010) (same); Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly & Iqbal, 33 HARV. J.L. & PUB. POL'Y 1107, 1111-22 (2010); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 18-25 (2009) (discussing the underlying values of the pleading doctrine); John P. Sullivan, Twombly *and* Iqbal*: The Latest Retreat from Notice Pleading*, 43 SUFFOLK U. L. REV. 1, 8-26 (2009) (reviewing the history of notice pleadings). Professor Fairman noted that pleadings have historically served four functions: "(1) providing notice of a claim or defense, (2) stating facts, (3) narrowing issues to be litigated, and (4) allowing for quick disposition of sham claims and defenses." Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 556 (2002); *see also* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1347 (2010) (summarizing the purposes of pleading as notice-giving, process-facilitating, and merits-screening).

17. Conley v. Gibson, 355 U.S. 41, 45-46 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

18. McMahon, *supra* note 16, at 854.

19. *See* Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2) (2006); FED. R. CIV. P. 9(b); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319-20 (2007) (articulating heightened pleading requirements in a private securities complaint); *see also* Y2K Act, 15 U.S.C. §§ 6601-6617 (2006); 15 U.S.C. § 6607(b)-(d) (requiring claims to include "specific information" of damages and "a statement of the facts" showing scienter). Professor Fairman provides four reasons for imposing particularity in fraud cases: (1) protection of reputation, (2) deterrence of frivolous cases, (3) defenses of completed transactions,

A. Twombly & Iqbal

In *Bell Atlantic Corp. v. Twombly*, the plaintiffs brought a class action suit against defendant telephone companies, alleging that the companies violated antitrust laws by conspiring to not compete with one another in the local telecommunication market.[20] The Supreme Court affirmed the grant of the defendant telephone companies' 12(b)(6) motion to dismiss by holding that a pleading must state enough factual allegations to raise a right above the level of speculation.[21] The Court noted, however, that it was not requiring heightened fact pleading of specifics.[22]

Twombly had an immediate impact, despite being one of the least anticipated decisions from the 2007 Term.[23] *Twombly* was cited over 13,000 times by its one-year anniversary,[24] and the lower courts "reached every conceivable answer"[25] in applying the Court's "mixed signals."[26]

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and (4) providing adequate notice. Fairman, *supra* note 16, at 563. For an overview of causes of actions in which courts historically required heightened pleadings, see generally Christopher Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003).

20. *Twombly*, 550 U.S. at 550-51.

21. *Id.* at 555.

22. *Id.* at 570.

23. McMahon, *supra* note 16, at 852.

24. Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 ILL. L. REV. 1011, 1022; *see* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 n.4 (2010) (comparing the number of cases that cite *Twombly* to other cases). Commenting on the frequency of citing *Twombly* has become just as popular as citing *Twombly*. *See* Smith v. Duffey, 576 F.3d 336, 339-40 (7th Cir. 2009) (remarking that, according to Judge Posner, *Twombly* is the "citation du jour in Rule 12(b)(6) cases"); Jeremiah J. McCarthy & Matthew D. Yusick, Twombly *and* Iqbal*: Has the Court "Messed Up the Federal Rules?,"* 4 FED. CTS. L. REV. 121, 122 (2010) (stating that no bar members are unfamiliar with *Twombly* and *Iqbal* "[u]nless they have been living in a cave"); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 51 (2010) (noting that plausibility is the Court's word du jour).

25. McMahon, *supra* note 16, at 858.

26. Spencer, *supra* note 16, at 7. Before *Iqbal* clarified that *Twombly*'s holding extended to all civil cases, there was confusion over the scope of *Twombly*'s holding. *See* Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009); *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting); Douglas G. Smith, *The Evolution of a New Pleading Standard:* Ashcroft v. Iqbal, 88 OR. L. REV. 1053, 1077 (2010) (noting the debate over *Twombly*'s extent); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 457 n.147 (2008) (same); Steinman, *supra* note 16, at 1305 (same); *see also* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 612-13 (2010) (discussing which circuits were more likely to grant a 12(b)(6) motion); Anthony Martinez, Note, *Plausibility Among the Circuits: An Empirical Survey of* Bell Atlantic Corp. v. Twombly, 61 ARK. L. REV. 763, 771-85 (2009) (describing the differences among circuits in applying *Twombly*).

Part of the confusion stems from the Court's per curiam holding in *Erickson v. Pardus*, announced a few weeks after *Twombly*. *See* Erickson v. Pardus, 551 U.S. 89, 89 (2007). In *Erickson*, the Court cited *Twombly* to support its holding that Rule 8(a)(2) does not require specific facts but, instead, that the pleading need only give the defendants fair notice of what the claim is. *Id.* at 93. The plaintiff was a prisoner filing a pro se complaint, and the Court suggested that the pleading filed by a pro se plaintiff should be liberally construed. *Id.* at 89, 94. But, the Court has always "emphasized the need to take a liberal view of pro se pleadings." Marcus, *supra* note 16, at 478.

Two years later, the Supreme Court decided *Ashcroft v. Iqbal*.[27] *Iqbal* held that *Twombly*'s pleading requirements apply in all civil claims, not just those arising in complex antitrust litigation.[28] *Iqbal* creates a two-step analysis for evaluating a claim's sufficiency when the claim is challenged under a 12(b)(6) motion to dismiss.[29] First, the court must disregard conclusory or bold allegations.[30] Second, the court must examine the plausibility of the remaining allegations to determine whether the allegations suggest a violation of the claimant's substantive rights.[31] Like *Twombly*, *Iqbal* had an immediate impact: *Iqbal* was cited 3,312 times in the six months after the Court's decision.[32]

B. Barring Civil Rights Claimants and Other Commentary

In response to *Twombly* and *Iqbal*, many commentators predicted that plaintiffs alleging violations of their civil rights would face greater difficulty in gaining access to the courts because they may be less likely to satisfy the heightened pleading standards although the claims have merit.[33] In turn, a lack of access to the courts would result in a denial of justice.[34]

Such predictions reflect historical underpinnings that liberal notice-pleading standards were essential for plaintiffs to proceed with their civil rights claims.[35] Civil rights litigants have used the federal courts to seek remedies

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27. *See* Ashcroft v. Iqbal, 556 U.S. 662, 662, 669-70 (2009). For additional background on *Iqbal*, see Dawinder S. Sidhu, *First* Korematsu *and Now* Ashcroft v. Iqbal*: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims of Discrimination*, 58 BUFF. L. REV. 419, 428-66 (2010) (providing background on *Iqbal* from the author of an amicus brief in support of the respondent).

28. *Iqbal*, 556 U.S. at 684.

29. *Id.* at 678-80.

30. *Id.*

31. *Id.*

32. Elizabeth Thornburg, *Law, Facts, and Power*, 114 PENN ST. L. REV. PENN STATIM 1, 8 (2009); *see* Steinman, *supra* note 16, at 1357-60 (providing tables showing cases by their citation and rate of citation). *But see Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 6-7 (2009) [hereinafter *Access to Courts Hearing*] (statement of Gregory G. Garre, Partner, Latham & Watkins LLP) (noting that mere frequency of citations does not explain how many cases would have survived under *Conley*); Michael Huston, Note, *Pleading with Congress to Resist the Urge to Overrule* Twombly *and* Iqbal, 109 MICH. L. REV. 415, 431 (2010) (reiterating that the frequency of citations does not project survival under *Conley*).

33. *See, e.g.*, A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-*Conley *Era*, 52 HOW. L.J. 99, 161 (2008).

34. *See id.* ("When pleading standards are tightened to a degree that makes it more difficult for people with legitimate grievances to have their claims heard, that undermines the goals of civil rights legislation and renders those laws dogs with more bark than bite."); Spencer, *supra* note 16, at 2 ("Vital to . . . our civil justice system . . . [is] the ease with which those who have been aggrieved are able to seek relief from the federal courts.").

35. *Access to Courts Hearing*, *supra* note 32, at 4-6 (statement of John Payton, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.); *Access to Justice Denied:* Ashcroft v. Iqbal*: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 77-78 (2009) [hereinafter *Justice Denied Hearing*] (statement of Debo P. Adegbile, NAACP Legal Defense and Education Fund); Alvin B. Rubin, Francis R. Kirkham, Weyman I. Lundquist & Jerrold E. Salzman, *Colloquy on Complex Litigation*, 1981 B.Y.U. L. REV. 741, 752 ("Except for notice pleading the discrimination would have never come to the fore."); Spencer, *supra* note 33, at 106; *see* Brown

from harmful conduct and to obtain protection against harm.[36] Beginning with *Conley*, in which black railroad workers alleged their union was discriminating against them,[37] the Supreme Court guaranteed that civil rights claims would at least get into court[38] and reiterated *Conley*'s holding that civil rights claims enjoy liberal notice-pleading standards.[39] Additionally, the conventional wisdom surrounding *Conley* was that cases were rarely dismissed for failing to state a claim.[40]

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v. W. Ry. of Ala., 338 U.S. 294, 298 (1949) (holding that pleading standards can be integral for enforcing federal rights). Civil rights claims generally refer to claims asserted under federal civil rights legislation such as § 1983 actions. *See* Rehabilitation Act of 1973, 29 U.S.C. § 504 (2006); 42 U.S.C. § 1983 (2006); Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2006); Americans with Disabilities Act, 42 U.S.C. § 12101 (2006); Spencer, *supra* note 33, at 102.

36. *Access to Courts Hearing*, *supra* note 32, at 4-6, 258 (statement of John Payton, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.) ("[*Conley*'s] liberal pleading standards were a critical prerequisite to ensure that victims of discrimination could take full advantage of the emerging federal substantive law on civil rights."); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 524 (2010) ("Historically, federal courts were the place for civil rights relief."); Spencer, *supra* note 33, at 100. For a history of pleading requirements in civil rights cases, see Spencer, *supra* note 33, at 102-24.

Liberal pleading standards also reflect the need for private litigation to advance civil rights and other national policies. Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 528 (2012) ("Many laws require private enforcement . . . ."); Miller, *supra* note 24, at 5-6, 76 (noting the emergence of private enforcement to implement key national policies); Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 96 (2009) ("U.S. civil enforcement relies heavily upon private attorneys general to secure compliance with the substantive law. . . . [P]rivate enforcement is an important cog in the civil justice wheel . . . ." (footnote omitted)); Edward A. Tamm & Paul C. Reardon, *Warren E. Burger and the Administration of Justice*, 1981 B.Y.U. L. REV. 447, 483 (noting that Congress relies on the federal courts to enforce a variety of substantive rights); *see* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987) (noting that the Clayton Act was intended to bring "the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate").

37. *See* Conley v. Gibson, 355 U.S. 41, 42-43 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

38. Spencer, *supra* note 33, at 102. *But see* Luke Meier, *Why* Twombly *Is Good Law (But Poorly Drafted) and* Iqbal *Will Be Overturned*, 87 IND. L.J. 709, 723-25, 731 (2012) (noting dispute of *Conley*'s "no set of facts" language).

39. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513-15 (2002) (noting that the pleading standard is a "liberal" one); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (stating that it would be "impossible to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules"); McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 246 (1980) ("It is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" (quoting *Conley*, 355 U.S. at 45-46)); Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746-47 (1976) (quoting *Conley*'s no set of facts language and noting that "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly" (citation omitted) (quoting Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962))).

40. Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 24 (2010) [hereinafter Thomas, *New Summary Judgment*]; Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1851 (2008); *see also* Hatamyar, *supra* note 26, at 562 (noting that Courts' characterizations of rarely granting 12(b)(6) motions was previously accurate but now is a gross understatement).

Nevertheless, throughout the 1970s, 1980s, and 1990s, district and circuit courts recognized a heightened pleading standard for civil rights claims.[41] As a result, some commentators have suggested that a heightened pleading standard existed in civil rights claims before *Twombly* was decided.[42]

Yet, regardless of what lower courts were actually doing, the *Twombly* and *Iqbal* decisions were not favorably received. The *Twombly* decision was labeled controversial[43] and heavily criticized for how[44] it adopted heightened pleading standards[45] and their potential impact.[46]

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41. Fairman, *supra* note 19, at 995 ("[U]nwarranted judicial concern over the rise in frivolous civil rights litigation led the federal courts to require heightened pleading."); Fairman, *supra* note 16, at 574-82; Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 331-32 (2001); Marcus, *supra* note 16, at 463-64; Spencer, *supra* note 33, at 112-13; *see* Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 308 (2008) (reporting a 3% win rate for plaintiffs bringing suit under Title I of the Americans with Disabilities Act (ADA)).

42. *See* Hatamyar, *supra* note 26, at 567-68 (noting that lower courts continually evaded the notice pleading standard, essentially ignoring *Swierkiewicz* and *Leatherman*, and noting the justifications courts used for employing heightened pleading standards); Hillel Y. Levin, Iqbal, Twombly, *and the Lessons of the* Celotex *Trilogy*, 14 LEWIS & CLARK L. REV. 143, 149-50 (2010) (arguing that, in developing a heightened pleading standard, the Supreme Court merely recognized what lower courts were currently doing); Miller, *supra* note 24, at 10 (noting that *Twombly* and *Iqbal* are the latest steps of a long term that has favored early case disposition); Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 495 (2008) ("On the whole, federal judges have indeed made it increasingly difficult for employment discrimination plaintiffs to prevail."); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 132 (2011) ("[T]he transition to heightened pleading has been a long time in the making."); Spencer, *supra* note 33, at 124.

Moreover, civil rights cases were not the only ones subjected to heightened pleading standards. Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997, 2007 (2010) (noting that class action consumer fraud claims have also been subject to a form of heightened pleading); Miller, *supra* note 24, at 92 (recognizing that courts have historically applied heightened pleading to antitrust, discrimination, securities law, and suits against government officials).

43. McMahon, *supra* note 16, at 852 (noting that *Twombly* has been described as "one of the most controversial decisions").

44. *See* Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 549, 554 (arguing that the Court needs to use the Rules Enabling Act to change pleading standards and that the Court "changing the Federal Rules outside of the Enabling Act Process without admitting that it was doing so understandably yielded a confusing opinion"); *see also* Edward D. Cavanagh, Twombly, *the Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 887-88 (2008) (critiquing the Court's refusal to account for ways judges can control discovery costs).

45. *See* Spencer, *supra* note 16, at 4 (arguing that *Twombly* departs from simple notice pleading); Spencer, *supra* note 26, at 431. Professor Thomas characterized *Twombly* as "significantly chang[ing] the standard for the motion to dismiss." Thomas, *New Summary Judgment*, *supra* note 40, at 24.

46. *See* Burbank, *supra* note 44, at 561 ("Perhaps the most troublesome possible consequence of *Twombly* is that it will deny court access to those who . . . have meritorious claims[but] cannot satisfy its requirements . . . ."); McMahon, *supra* note 16, at 867 (noting *Twombly* makes it harder for plaintiffs to allege enough facts to meet the plausibility standard in those claims when factual information is largely controlled by the defendant, such as employment discrimination claims); Spencer, *supra* note 16, at 11 (arguing that *Twombly*'s lack of clarity is problematic because claimants will be uncertain about what they must plead, thereby emboldening defendants to challenge the sufficiency of claims); Brian Thomas Fitzsimons, Note, *The Injustice of Notice & Heightened Pleading Standards for Antitrust Conspiracy Claims: It Is Time to Balance the Scale for Plaintiffs, Defendants, and Society*, 39 RUTGERS L.J. 199, 225 (2007) (suggesting that *Twombly* "should be respectfully set aside").

As with *Twombly*, the *Iqbal* decision, announced two years after *Twombly*, was heavily criticized.[47] There are several categories of criticism. Commentators criticized the Supreme Court for averting the proper rulemaking process,[48] for reducing plaintiffs' access to trials and juries,[49] and for increasing scrutiny over pleadings in civil rights cases,[50] leading to inconsistent rulings.[51]

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47. *E.g.*, *Access to Courts Hearing*, *supra* note 32, at 86 (statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania) (arguing that *Twombly* and *Iqbal* challenge the "twin commitments to an independent and accountable judiciary and to the institutions and values of democracy"); *Justice Denied Hearing*, *supra* note 35, at 72 (statement of John Vail, Vice President and Senior Litigation Counsel, Center for Constitutional Litigation) ("*Iqbal* returns us to the kind of legal practice Dickens condemned in *Bleak House* and we had the good sense to put to rest."); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 867-76 (2010) (critiquing *Iqbal*'s two-pronged approach as "incoherent" and its higher pleading standard, despite his prior approval for *Twombly*'s ruling to screen out truly meritless suits); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1934 (2009) (criticizing the Supreme Court for acting without empirical support); Clermont & Yeazell, *supra* note 24, at 823 (arguing that *Iqbal* and *Twombly* "destabilized the entire system of civil litigation"); Effron, *supra* note 42, at 2028-29 (critiquing the Court's assumption that the size of a class in a class action suit equates to high litigation costs); Ramzi Kassem, *Implausible Realities:* Iqbal*'s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443, 1444-46 (2010) (stating that *Iqbal* "profoundly transformed the jurisprudential landscape" to undermine the rights of minority groups); Kenneth S. Klein, Ashcroft v. Iqbal *Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261, 262-65 (2009) (arguing that *Iqbal*'s new pleading standard violates the Seventh Amendment's right to a jury in civil trials); Maxeiner, *supra* note 16, at 1259 (arguing that *Iqbal* "confirms the breakdown of contemporary American civil procedure"); Henry S. Noyes, *The Rise of the Common Law of Federal Pleading:* Iqbal, Twombly, *and the Application of Judicial Experience*, 56 VILL. L. REV. 857, 895-99 (2012) (critiquing *Iqbal* for destabilizing the adversarial process by injecting judicial experience into evaluating pleadings); Jeffrey J. Rachlinski, *Why Heightened Pleading—Why Now?*, 114 PENN ST. L. REV. 1247, 1248 (2010) ("Plaintiffs have less ability to uncover wrongdoing after *Iqbal* than before."); Alex Reinert, *Pleading as Information-Forcing*, 75 L. & CONTEMP. PROBS 1, No. 1, at 32-35 (2012) (critiquing decisions for substituting notice-pleading for information-forcing rules); Sidhu, *supra* note 27, at 426 ("*Korematsu* is universally recognized as one of the worst decisions in Supreme Court history[,] and . . . *Iqbal* approaches *Korematsu* in the spectrum of Supreme Court jurisprudence."); Steve Subrin, Ashcroft v. Iqbal*: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 571 (2012) ("*Ashcroft v. Iqbal* is an embarrassment . . . ." (footnote omitted)); Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1649-50 (2011) (arguing that plaintiffs will have to plead far more than what is required under *Swierkiewicz* to satisfy the *Twombly* and *Iqbal* standards); Michelle Spiegel, Comment, Ashcroft v. Iqbal*: The Question of a Heightened Standard of Pleading in Qualified Immunity Cases*, 4 DUKE J. CONST. L & PUB. POL'Y SIDEBAR 375, 388 (2009) (arguing that heightened pleading hinders investigation of governmental officials committing constitutional violations).

48. *See Access to Courts Hearing*, *supra* note 32, at 8 (statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania) ("[T]he Court evaded the statutorily mandated process [for changing procedural rules]."); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 621, 648, 656 (2010) (critiquing the Supreme Court for disregarding the rulemaking process and rewriting civil rules to reflect their political preferences); Mark Herrmann, James M. Beck & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule* Twombly *and* Iqbal*?*, 158 U. PA. L. REV. PENNUMBRA 141, 148 (2009) (arguing that the Court illegitimately changed the pleading standards); McCarthy & Yusick, *supra* note 24, at 12 (arguing that *Twombly* and *Iqbal* possibly violated the Rules Enabling Act, 28 U.S.C. §§ 2071-2077 (2006)); Cristina Calvar, Note, *"Twiqbal": A Political Tool*, 37 J. LEGIS. 200, 215-16 (2012) (critiquing the Supreme Court for *how* it changed pleading standards).

49. Raymond H. Brescia, *The* Iqbal *Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 241, 254-55 (2012) ("*Twombly* and *Iqbal* are consistent with a general trend . . . that has sought to limit access to courts . . . ."); Stephen B. Burbank & Stephen N.

Commentators also criticized the impact that heightened pleading standards will have on those plaintiffs who rely on discovery to gain the information necessary to properly assert a claim. Commentators have argued that plaintiffs must now essentially prove their cases before they can obtain evidence from the defendants through the discovery process.[52] This leads to a classic catch-22: plaintiffs cannot state a claim because they do not have access to discovery, but they will not have access to discovery until they state a claim.[53] Precluding discovery makes it more difficult for plaintiffs to allege cases when subjective motivations or concealed conditions or activities are essential to establishing liability, as defendants are rarely forthcoming about their improper conduct.[54] For example, Lilly Ledbetter did not learn what her

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Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 403 (2011) ("[*Twombly* and *Iqbal*] are an implicit attack on the jury trial and, in turn, our democracy."); Levin, *supra* note 42, at 145 (predicting a reduction in plaintiffs' access to trials and juries); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of* Iqbal *on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 85 (2010) ("*Iqbal* has ushered in a new pleading paradigm that threatens the viability of potentially meritorious civil rights claims."); Miller, *supra* note 24, at 14 (stating that *Twombly* and *Iqbal* "may well have come at the expense of access to the . . . courts and the ability of citizens to obtain an adjudication of their claims' merits"); Michael Moffitt, Iqbal *and Settlement*, 114 PENN ST. L. REV. PENN STATIM 51, 59 n.17 (2010) (remarking that he could not imagine justifying the decision of a defendant's attorney who chooses *not* to file a 12(b)(6) motion); Schneider, *supra* note 36, at 533 (arguing that the Court's concern over discovery is misplaced because most civil rights and employment discrimination cases in the federal courts are individualized cases); Sidhu, *supra* note 27, at 491; Sullivan, *supra* note 16, at 59 (critiquing the Court's plausibility standard as applied in *Twombly* and *Iqbal*); Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 160-61 (2010) (predicting a "significant decrease" in enforcement of federal constitutional and civil rights). *But see* Lee Goldman, *Trouble for Private Enforcement of the Sherman Act:* Twombly, *Pleading Standards, and the Oligopoly Problem*, 2008 BYU L. REV. 1057, 1072-75 (predicting that *Twombly* will not affect routine cases).

50. Sidhu, *supra* note 27, at 491 (arguing that the *Iqbal* decision will likely make it more difficult for civil rights complainants to surpass the motion to dismiss hurdle); Wasserman, *supra* note 49, at 160-61 (arguing that *Iqbal* will empower courts to increase scrutiny over pleadings in civil rights cases, resulting in a "significant decrease" in enforcement of federal constitutional and civil rights).

51. Miller, *supra* note 24, at 30 (predicting inconsistent rulings because judges have different subjective views of what allegations are plausible).

52. WILLIAM FUNK ET AL., CTR. FOR PROGRESSIVE REFORM, PLAUSIBILITY PLEADING: BARRING THE COURTHOUSE DOOR TO DESERVING CLAIMANTS 1 (2010); Coleman, *supra* note 36, at 535 ("*Twombly* and *Iqbal* [are] especially debilitating to a vanishing plaintiff because she will not have the resources necessary to find the required 'factual content' in advance of filing her complaint.").

53. *See* Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. Rev. 43, 53 (2010); Rakesh N. Kilaru, *The New Rule 12(b)(6):* Twombly, Iqbal, *and the Paradox of Pleading*, 62 STAN. L. REV. 905, 927 (2010); Marcus, *supra* note 16, at 468 ("To insist on details as a prerequisite to discovery is putting the cart before the horse."); Spencer, *supra* note 16, at 28 (noting that a person fired for an illegitimate reason would not be able to access the courts under the current pleading standards if the motivation for the firing is revealed only in documents the plaintiff has not seen or by witnesses the plaintiff has yet to depose).

54. Bone, *supra* note 47, at 878-79 (noting that *Iqbal*'s thick pleading standard is problematic because plaintiffs will not be able to get past the pleading stage when the defendant has critical information, especially in civil rights cases); Kilaru, *supra* note 53, at 920, 926 (noting that defendants in discrimination cases are rarely upfront about their improper conduct); Malveaux, *supra* note 49, at 89-92 (noting that evidence of illegal motive or institutional practices is often difficult to unearth absent discovery); Miller, *supra* note 24, at 45 (noting that the problem of information asymmetry is likely to affect civil rights and employment discrimination cases); Spencer, *supra* note 16, at 28; Wasserman, *supra* note 49, at 168-69 (adding that facts

male coworkers made until she could access pay records through discovery.[55] This informational asymmetry—when critical information remains in control of the defendants and plaintiffs can no longer access it through discovery[56]—will likely thwart plaintiffs alleging claims of antitrust,[57] conspiracy,[58] employment discrimination,[59] medical malpractice,[60] eminent domain challenges,[61] and violations of civil rights.[62]

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about one's state of mind rest with defendants and are discoverable through an opportunity for deposition in discovery).

55. *See* FUNK ET AL., *supra* note 52, at 8; *see also* Brooke D. Coleman, *What If?: A Study of Seminal Cases As If Decided Under a* Twombly/Iqbal *Regime*, 90 OR. L. REV. 1147, 1163 (2012) (suggesting that, if *Twombly* and *Iqbal* had existed, the individual plaintiffs in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), would not have been successful at the pleading stage because both plaintiffs lacked full information when they filed their complaints).

56. *See* FUNK ET AL., *supra* note 52, at 8-9; Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 54 (2010) (stating that plaintiffs need facts to properly plead claims and survive a motion to dismiss but that they may not be able to discover those facts without first surviving a motion to dismiss); Sybil Dunlop & Elizabeth Cowan Wright, *Plausible Deniability: How the Supreme Court Created a Heightened Pleading Standard Without Admitting They Did So*, 33 HAMLINE L. REV. 205, 239 (2010) (stating that *Twombly* and *Iqbal* will discourage suits when plaintiffs need discovery to substantial claims); Malveaux, *supra* note 49, at 87 (noting that factual allegations in civil rights cases are more likely to be subjective to multiple interpretations, placing civil rights cases at greater risk for dismissal); A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 195 n.59 (2010) (noting the plaintiffs who will be most burdened by *Iqbal* are those plaintiffs facing information asymmetry). *But see Justice Denied Hearing*, *supra* note 35, at 2 (statement of Rep. Nadler, Chairman, S. Comm. on the Constitution, Civil Rights, and Civil Liberties) ("[*Iqbal*] will reward any defendant who succeeds in concealing evidence of wrongdoing, . . . effectively slam[ming] shut the courthouse door on legitimate plaintiffs . . . . Rights without remedies are no rights at all."); T.S. Ellis, III & Nitin Shah, Iqbal, Twombly, *and What Comes Next: A Suggested Empirical Approach*, 114 PENN ST. L. REV. PENN STATIM 64, 69 (2010) (classifying an employment discrimination claim as similar to a contract claim in that both are easy to plead facts creating a plausible entitlement to relief compared to an antitrust suit or conspiracy claim); 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, 1261 (2008) ("It is not uncommon for information that is needed to demonstrate the existence of a viable claim to lie solely within the exclusive knowledge and control of another."); Stancil, *supra* note 36, at 114 (stating that notice pleading helps address informational asymmetry and "mitigate[s] potential agency costs associated with recourse to the dispute resolution system"); Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 293 (2008) ("[W]here the plaintiffs do not have access to the factual information needed to comply with such pleading standards, those standards effectively foreclose a plaintiff's ability to enforce its substantive rights.").

57. *See, e.g.*, Richard A Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH U. J.L. & POL'Y 61, 84 (2007) (proposing a limit to discovery because antitrust conspirators know their actions are subject to penalty and "therefore take major steps to conceal them"); Sullivan, *supra* note 16, at 2 (noting that defendants understandably keep their knowledge of illegal activities as a closely guarded secret).

58. *See* Cavanagh, *supra* note 44, at 889 ("The *Twombly* ruling will mean that conspiracies, already difficult enough to prove, will escape detection.").

59. *See Access to Courts Hearing*, *supra* note 32, at 96 (statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania) ("Employment discrimination cases are one category likely to suffer at the hands of district judges implementing a contextual plausibility regime."); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 112 (2009) (noting that the majority of employment discrimination cases turn on intent); Schneider, *supra* note 36, at 556 (noting that judges are likely to dispose of civil rights and employment cases at the earliest possible stage); Seiner, *supra* note 24, at 1034 n.158 (noting the difficulty in determining the merits of an employment discrimination case until discovery is

In response, Congress introduced two bills to overturn the Court's decisions.[63] Senator Arlen Specter (D-Pa.) introduced the Notice Pleading Restoration Act of 2009.[64] Representative Jerrold Nadler (D-N.Y.) introduced the Open Access to Courts Act of 2009.[65] Both legislators held hearings on their bills, yet neither bill was brought to a vote during the 111th Congress. In

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conducted); Spencer, *supra* note 56, at 200 (predicting that employees will find it more difficult to state a claim because the facts needed to satisfy the plausibility standard are unavailable to the plaintiff); Spencer, *supra* note 16, at 24, 28, 33 (noting that the mere suspicion of discrimination will not allow the plaintiff's claim to proceed); Thomas, *New Summary Judgment*, *supra* note 40, at 32 (arguing that employment discrimination will be one of the most affected areas and predicting that judges will be more likely to grant defendant-corporations' motions to dismiss). *But see* Rebecca Love Kourlis, Jordan M. Singer & Natalie Knowlton, *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245, 264-65 (2010) (arguing that procedural mechanisms already exist to secure access to relevant facts despite the claims of opponents of fact-based pleading).

60. *See* Hoffman, *supra* note 56, at 1261.

61. *See* Carol L. Zeiner, *When* Kelo *Met* Twombly-Iqbal*: The Implications for Pretext Challenges to Eminent Domain*, 46 WILLAMETTE L. REV. 201, 244-45 (2009) (arguing that *Twombly* and *Iqbal* create an "insuperable hurdle" for condemnees challenging a state's taking under eminent domain).

62. *See* Dodson, *supra* note 56, at 66 (noting that information asymmetry is most likely to occur in claims for civil rights, discrimination violations, corporate wrongdoings, unlawful conspiracies, and intentional torts); Kassem, *supra* note 47, at 1464 ("*Iqbal*'s injection of increased judicial subjectivity into the pleading analysis has already worked to the detriment of minority plaintiffs."); Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 120 (2010) ("Heightened pleading standards affect . . . substantive rights, litigation outcomes, and the enforcement of rights[]. . . [especially] in cases where plaintiffs observe questionable behavior by the defendant but lack detailed factual information . . . [thereby affecting] civil-rights and employment-discrimination cases." (footnote omitted)); Rubin et al., *supra* note 35, at 751 (noting the difficulty of trying to determine the scope of racial discrimination before discovery); Muhammad Umair Khan, Note, *Tortured Pleadings: The Historical Development and Recent Fall of the Liberal Pleadings Standards*, 3 ALB. GOV'T L. REV. 460, 489 (2010) ("[A] heightened standard will burden most civil rights plaintiffs, who generally have fewer resources and less information than the governmental defendant. . . . [H]eightened pleading standard[s] undeniably sound[] the death knell to civil rights plaintiffs . . . ." (footnote omitted)).

63. *See infra* notes 64-65 and accompanying text. Some commentators argued that these bills would not succeed in restoring the lower notice pleading standard. *See, e.g.*, Wendy Gerwick Couture, Conley v. Gibson*'s "No Set of Facts" Test: Neither Cancer nor Cure*, 114 PENN ST. L. REV. PENN STATIM 19, 27-30 (2010) (arguing that restoring the "no set of facts" language will not alleviate access to courts because that language does not address factual insufficiency); Huston, *supra* note 32, at 438-44 (critiquing Congress's hasty response and failure to use the Rules Enabling Act).

64. *See* Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009). The bill states,

> Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).

Id. (emphasis added).

65. *See* Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 2 (2009). The bill states,

> A court shall not dismiss a complaint under subdivision (b)(6), (c), or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.

Id.

addition to congressional discussion, the Committee on Rules of Practice and Procedure of the federal judiciary debated—but declined to change—the pleading rules during either its January 2008 or April 2011 meetings.[66]

Nevertheless, other commentators refuted the criticisms discussed above,[67] supported the plausibility requirements the Court's *Twombly*[68] and *Iqbal* decisions imposed,[69] and argued for adopting fact pleading.[70] Such commentators argued that *Twombly* and *Iqbal* were decided correctly; remained consistent with decades of precedent and protected defendants from being

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66. Hoffman, *supra* note 56, at 1223-24; *see* ADVISORY COMM. CIVIL RULES, FIXING *TWOMBLY & IQBAL* 173-80 (2011), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-04.pdf.

67. *See, e.g.*, Stephen R. Brown, *Reconstructing Pleading:* Twombly, Iqbal, *and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1267 (2010) (arguing that criticism against *Twombly* and *Iqbal* is unjustified); Bradley Scott Shannon, *I Have Federal Pleading All Figured Out*, 61 CASE W. RES. L. REV. 453, 455, 475-85 (2011) (same).

68. *See* Richard A. Epstein, *Of Pleading and Discovery: Reflections on* Twombly *and* Iqbal *with Special Reference to Antitrust*, 2011 U. ILL. L. REV. 187, 188 (arguing that *Twombly* was correctly decided); Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39, 50-53 (2008) (using economic models to show the need for heightened pleading standards). In deciding *Twombly*, the majority opinion cited four circuit cases and two articles in support of its decision. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562 (2007) (citing Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989); McGregor v. Indus. Excess Landfill, Inc., 856 F.2d 39, 32-43 (6th Cir. 1988); Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984); O'Brien v. DiGrazia, 544 F.2d 543, 546 & n.3 (1st Cir. 1976); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998); Marcus, *supra* note 16, at 463-65).

69. *See* Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. PA. J. BUS. & EMP. L. 627, 640-42 (2008) (praising *Twombly*'s holding and the need for heightened pleading standards in claims brought under § 1 of the Sherman Act); Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After* Iqbal, 14 LEWIS & CLARK L. REV. 279, 303-05 (2010) (suggesting that *Iqbal* is a useful bar to certain constitutional claims, such as supervisory liability). Other commentators argued for applying the heightened pleading standard to personal jurisdiction and the alien tort statute. *See* Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627, 634, 643-44, 651 (2009) (noting that applying *Twombly* will allow courts to more efficiently assess claims of personal jurisdiction and requests for personal jurisdiction discovery); Amanda Sue Nichols, Note, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of* Bell Atlantic v. Twombly*?*, 76 FORDHAM L. REV. 2177, 2221-25 (2008). These articles, which were likely written before *Iqbal*, clarified that *Twombly* governed all civil cases. *See* discussion *supra* note 26.

Another group of commentators have supported *Twombly* but disapproved of *Iqbal*. *See, e.g.*, Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 IOWA L. REV. BULL. 55, 66 (2010) (noting that *Twombly* was correctly decided but that the Court should have limited its discussion to the requirements necessary to plead an antitrust violation); Meier, *supra* note 38, at 738 (arguing that the Court correctly decided *Twombly* but that the *Iqbal* Court misinterpreted *Twombly* "with regard to the sort of defects that should trigger the plausibility analysis"). Professor Epstein argued that the Court reached the right result in *Twombly*—but through a flawed analysis. *See* Epstein, *supra* note 57, at 65-67 (arguing that current litigation hardly resembles what the drafters encountered and noting the massive stakes in antitrust litigation).

70. *See* Kourlis et al., *supra* note 59, at 278-82 ("Pleadings that require the recitation of facts directly bearing on the elements of a claim or affirmative defense will better address current problems of pervasive cost and delay by commencing the issue-narrowing process at the start of the case."); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FACT-BASED PLEADING: A SOLUTION HIDDEN IN PLAIN SIGHT 1-9 (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/IAALS,%20Fact-Based%20Pleading%20-%20A%20Solution%20Hidden%20in%20Plain%20Sight.pdf (same).

unfairly subjected to the burdens of discovery;[71] conserved scarce judicial resources;[72] improved judicial operations;[73] and aligned federal pleading standards with their foreign counterparts.[74] Other commentators argued that *Twombly* and *Iqbal* only slightly changed the pleading standards[75] or did not significantly depart from pre-*Twombly* cases.[76]

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71. *Access to Courts Hearing*, *supra* note 32, at 6-7 (statement of Gregory G. Garre, Partner, Latham & Watkins LLP) (arguing that *Twombly* and *Iqbal* are grounded in the Court's precedent and that the alternative is allowing claims to proceed through discovery fishing expeditions, thereby imposing additional costs on civil defendants and society at large); *see Justice Denied Hearing*, *supra* note 35, at 31-57 (statement of Gregory C. Katsas, Former Assistant Att'y Gen., Civil Division, U.S. Department of Justice) (noting both the high costs of discovery—which disproportionately fall on defendants—and the erroneous predicted sea change of denied claims); Marc Anderson & Max Huffman, Iqbal, Twombly, *and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL'Y 1, 20 (2010) (discussing costs of false positives to society); Andrew Blair-Stanek, Twombly *Is the Logical Extension of the* Mathews v. Eldridge *Test to Discovery*, 62 FLA. L. REV. 1, 17-33 (2010) (arguing that the plausibility standard naturally extends procedural due process jurisprudence); Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 879-80 (2012) (noting that only focusing on pleadings ignores other aspects of litigation and that plausibility pleading properly balances all litigation aspects); Adam McDonell Moline, Comment, *Nineteenth-Century Principles for Twenty-First-Century Pleading*, 60 EMORY L.J. 159, 177 (2010) (arguing that *Twombly* and *Iqbal* "restore[] the traditional fair notice inquiry to its proper place in pleading jurisprudence").

72. *See* Smith, *supra* note 26, at 1082; Darpana M. Sheth, *Legal Memorandum: Overturning* Iqbal *and* Twombly *Would Encourage Frivolous Litigation and Harm National Security*, HERITAGE FOUND., June 4, 2010, at 9-10, http://report.heritage.org/lm0053 (arguing that legislation introduced to overturn *Twombly* and *Iqbal* would result in frivolous litigation and could possibly harm national security).

73. *See* Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063, 1067 (2009) ("*Twombly* thus presents a welcome clarification of modern pleading standards that is likely to increase the efficiency and fairness of civil proceedings."); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 5-6 (Mar. 11, 2009, rev. Apr. 15, 2009), http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf [hereinafter INSTITUTE FINAL REPORT]; *see* Campbell, *Plausible Showing*, *supra* note 16, at 21-25 (supporting *Twombly*'s retirement of the *Conley* language so that the Judiciary can implement a modern interpretation of Rule 8).

74. *See* Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 452-55 (2010) (explaining foreign approaches); *see also* Kourlis et al., *supra* note 59, at 270-73 (listing countries that have adopted fact-based pleading).

75. *See* Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 898 (2009) (discussing that *Twombly*'s plausibility standard is only a minor departure from existing pleading standards and is consistent with Rule 8(a)(2)); Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 102 NW. U. L. REV. COLLOQUY 117, 117 (2007) (arguing that *Twombly* did not change the pleading standard); Daniel R. Karon, *"'Twas Three Years After Twombly and All Through the Bar, Not a Plaintiff Was Troubled from Near or from Far"—The Unremarkable Effect of the U.S. Supreme Court's Re-Expressed Pleading Standard in* Bell Atlantic Corp. v. Twombly, 44 U.S.F. L. REV. 571, 588-89 (2010) (stating that *Twombly* and *Iqbal* did not establish new pleading standards); Daniel W. Robertson, Note, *In Defense of Plausibility:* Ashcroft v. Iqbal *and What the Plausibility Standard Really Means*, 38 PEPP. L. REV. 111, 129-30 (2010) (calling the plausibility standard a "minimal threshold" and "relatively low bar" for plaintiffs); Allan R. Stein, *Confining* Iqbal, 45 TULSA L. REV. 277, 278 (2009) ("*Iqbal* should not be read as the nail in the notice-pleading coffin."); Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal, 94 MINN. L. REV. 505, 539 (2009) (defining plausibility and explaining "why plausibility is not a demanding standard").

76. *See* Steinman, *supra* note 16, at 1334-43 (opining that defining "conclusory" in transactional terms reconciles *Twombly* and *Iqbal* with the pre-*Twombly* cases); *see also* Edward A. Hartnett, *Taming* Twombly,

Additionally, some commentators proposed several suggestions to balance the competing interests that *Twombly* and *Iqbal*'s detractors and advocates have advanced.[77] Suggestions include allowing limited discovery to evaluate the sufficiency of the claim,[78] splitting discovery costs,[79] or tying the pleading requirement to the type of claim,[80] among other proposals.[81]

III. EXISTING EMPIRICAL RESEARCH

Scholars have conducted empirical analyses to determine the impact of *Twombly* and *Iqbal*.[82] The following describes eight studies that each examined the rates at which courts granted 12(b)(6) motions to dismiss.[83]

Even After Iqbal, 158 U. PA. L. REV. 473, 484-86, 495 (2010) (stating that *Twombly*'s insistence that a claim's inference be plausible is equivalent to the traditional insistence that an inference be reasonable).

77. *See infra* notes 78-81.

78. *See* Bone, *supra* note 75, at 932 (proposing special discovery provisions for civil rights suits when the "plaintiff's substantive interest is valued in moral terms"); Campbell, *Getting a Clue*, *supra* note 16, at 1235-45 (proposing pre-suit discovery); Dodson, *supra* note 56, at 72-86 (proposing that a new pleading standard should be accompanied by a new discovery standard to allow plaintiffs to access limited discovery to evaluate the sufficiency of the claims); Dodson, *supra* note 53, at 43 (same); Epstein, *supra* note 57, at 84 (proposing a limitation to discovery because antitrust conspirators know their actions are subject to penalty and "therefore take major steps to conceal them"); Epstein, *supra* note 68, at 200 ("[I]n many cases limited and staged discovery . . . is preferable to dismissing on the pleadings."); Edward A. Hartnett, *Responding to* Twombly *and* Iqbal*: Where Do We Go From Here?*, 95 IOWA L. REV. BULL. 24, 33 (2010) (proposing a new civil procedural rule to allow plaintiffs to have a limited opportunity for discovery to determine whether an allegation has enough support to proceed or otherwise dismiss the claim under a Rule 56 motion for summary judgment); Edward A. Hartnett, *Taming* Twombly*: An Update After* Matrixx, 75 L. & CONTEMP. PROBS. 37, 48-49, 51 (2012) (proposing that discovery continue during a motion to dismiss under Rule 12(b)(6) and proposing a new rule to allow limited discovery to ascertain a claim's allegation); Miller, *supra* note 24, at 105 (proposing a limited form of discovery to overcome information asymmetry); *see also* TEX. R. CIV. P. 202.1(a)-(b) (allowing pre-suit discovery).

79. *See* Fitzsimons, *supra* note 46, at 226-27 (amending Rule 8(a) to include a provision that would require the plaintiff to split the defendant's discovery costs in an antitrust action if the defendant prevails on a Rule 56(b) motion); *see also* Campbell, *Getting a Clue*, *supra* note 16, at 1234 (proposing that a plaintiff post a bond before discovery).

80. *See* Campbell, *Getting a Clue*, *supra* note 16, at 1232-34 (proposing different pleading standards depending on different claims); Schwartz & Appel, *supra* note 16, at 1128-39 (arguing that the pleading specificity needed to establish plausibility should be based on a case's complexity); Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 WM. & MARY L. REV. 987, 1037 (2012) (proposing that courts apply the same heightened pleading standard to affirmative defenses raised in sexual harassment cases to ensure symmetry between the plaintiff and defendant); Stancil, *supra* note 36, at 146-47 (proposing the institution of two pleading standards, divided by costs, in which garden-variety civil claims would be pled under notice pleading but high-risk claims would be pled under a stricter pleading standard); *see also* Edward H. Cooper, *King Arthur Confronts* Twiqy *Pleading*, 90 OR. L. REV. 955, 980-83 (2012) (proposing a variety of pleading standards).

81. *See* Maxeiner, *supra* note 16, at 1280-88 (suggesting that the American civil procedural system borrow elements from the German procedural system to allow all plaintiffs to have their day in court).

82. *See infra* Part III.A-H. Commentary about *Twombly*'s and *Iqbal*'s impact ranges from no impact to a heightened scrutiny of civil rights claims, resulting in fewer filings of civil rights and employment discrimination cases in federal courts. *See* Huston, *supra* note 32, at 427 (arguing that *Twombly* and *Iqbal* have not dramatically increased the number of cases dismissed for failing to state a claim); Schneider, *supra* note 36, at 519; Spencer, *supra* note 33, at 145 (noting that many district courts treat *Twombly* as permitting the heightened scrutiny of civil rights claims).

83. *See infra* Part III.A-H. In addition to the studies discussed, there are other examinations of

These studies are presented chronologically and are followed by a separate discussion of their limitations.[84]

It is difficult to directly measure the impact of *Twombly* and *Iqbal* because courts rarely describe how or if the new pleading standards are affecting the court's decision.[85] As such, it is impossible to know whether a motion granting a 12(b)(6) dismissal would have been decided any differently if *Twombly* or *Iqbal* never existed.[86] *Williams v. Southern Illinois Riverboat/Casino Cruises, Inc.* is the rare case in which the court explicitly stated that *Twombly* was the court's determinative factor in dismissing a complaint alleging a violation of the Civil Rights Act of 1964, noting that the complaint was sufficient for *Conley* but not for *Twombly*.[87]

A. Hannon's 2008 Study of 12(b)(6) Motions

Hannon examined 12(b)(6) dismissal rates to determine the impact of *Twombly*.[88] Using Westlaw searches, Hannon coded 2,212 pre-*Twombly* cases,

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Twombly's and *Iqbal*'s impact. *See* Memorandum from Andrea Kuperman to the Civil Rules Comm. & Standing Rules Comm. on Review of Case Law Applying *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, at 2 (July 26, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_072610.pdf ("[T]he case law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency."); STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, MOTIONS TO DISMISS INFORMATION ON COLLECTION OF DATA (2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions%20to%20Dismiss_042710. pdf (showing an initial jump in the number of motions to dismiss filed after *Iqbal*, which subsequently leveled off); SHEARMAN & STERLING LLP, ANTITRUST DIGEST: EMERGING TRENDS AND PATTERNS IN FEDERAL ANTITRUST CASES AFTER *BELL ATLANTIC CORP. V. TWOMBLY* 3, 4-6 (2009), *available at* http://www.shearman.com/files/upload/AT-030609-Antitrust%20Digest.pdf (noting that motions to dismiss were granted 66.3% of the time in antitrust litigation).

Moreover, 94.2% of plaintiffs' employment discrimination attorneys indicated that they included more factual allegations in their complaints since *Twombly* and *Iqbal*. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 14 (2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf. *But see* EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 25 (2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf (noting that most interviewees did not see any impact of *Twombly* or *Iqbal*).

Finally, there are two recent studies addressing motions to dismiss in light of *Twombly* and *Iqbal*. *See* Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2337-38 (2012) (finding an increase in motions to dismiss using the FJC's data and reinforcing the limits of empirical evidence because many judgments about filing cases or accessing discovery are fundamentally normative); Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of* Iqbal*'s Effect on Claims of Race Discrimination* 17 MICH. J. RACE & L. 1, 3, 36-40 & n.240 (2011) (finding that dismissal is 2.66 times more likely for black plaintiffs' claims of race discrimination in the workplace, increasing from 20.5% pre-*Twombly* to 54.6% post-*Iqbal*).

84. *See infra* Part III.A-H.

85. *See* Spencer, *supra* note 33, at 158.

86. *See id.*

87. *See* Williams v. S. Ill. Riverboat/Casino Cruises, Inc., No. 06-cv-664-JPG, 2007 WL 3253239, at *1, *3 (S.D. Ill. Nov. 5, 2007).

88. Kendall W. Hannon, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic v.

which were divided into four time periods from 2006 and 2007, and 1,075 post-*Twombly* cases, which were divided into two time periods from 2007.[89] Of the 2,212 pre-*Twombly* cases, motions to dismiss were granted in 36.8%, with a range between 35.8% and 37.9%.[90] Of the 1,075 post-*Twombly* cases, motions to dismiss were granted in 39.4%, with a breakdown of 38.1% for the winter 2007 period and 40.6% for the summer 2007 period.[91]

Hannon subsequently compared the rates in which 12(b)(6) motions to dismiss were granted in civil rights cases and found that while motions were granted in 41.7% of the 686 pre-*Twombly* cases, that percentage increased to 52.9% of the 278 post-*Twombly* cases.[92] In contrast, Hannon found that in non-civil rights claims the percentage of decisions granting motions to dismiss increased from 36.8% of 1,787 pre-*Twombly* cases to 37.4% of 906 post-*Twombly* cases.[93] The difference in the percentage of decisions granting motions to dismiss between pre-*Twombly* civil rights cases and post-*Twombly* civil rights cases is statistically significant at the 0.05 level.[94] Hannon, however, did not distinguish between motions granted with leave to amend the complaint and those granted without leave to amend the complaint.[95]

B. Professor Seiner's 2009 Study of Employment Discrimination Claims

Professor Seiner measured *Twombly*'s impact on employment discrimination claims brought under Title VII of the Civil Rights Act of 1964.[96] He examined district courts' decisions on motions to dismiss for failure to state a claim in the year prior to the May 21, 2007 *Twombly* decision (pre-*Twombly* decisions) and the year after that decision (post-*Twombly* decisions).[97] His study consisted of 191 pre-*Twombly* decisions and 205 post-*Twombly* decisions.[98] A little over 54.5% of the pre-*Twombly* decisions granted motions to dismiss and 57.1% of post-*Twombly* decisions granted motions to dismiss.[99] This increase in courts' grantings of motions to dismiss is not statistically

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Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1814, 1829 (2008).

89. *Id.* at 1833-36. Hannon refers to the pre-*Twombly* cases as *Conley* cases. *See id.* at 1835.

90. *Id.*

91. *Id.* at 1836.

92. *Id.* at 1837.

93. *Id.*

94. *Id.* at 1838.

95. *See id.* (discussing the impact of *Twombly* on 12(b)(6) motions but never specifying between the motions granted with and without leave to amend the complaint).

96. Seiner, *supra* note 24, at 1013-15.

97. *Id.* at 1027-28.

98. *Id.* at 1029. Initially, Westlaw searches yielded 264 pre-*Twombly* decisions and 268 post-*Twombly* decisions; some cases were then disqualified to reflect only those brought under Title VII. *Id.* at 1028-29.

99. *Id.* at 1029-30.

significant.[100] Nevertheless, a case-by-case examination led Professor Seiner to conclude that the change in pleading standards is having an impact.[101]

C. Professor Seiner's 2010 Study of Title I of the ADA Claims

In 2010 Professor Seiner measured the pre- and post-*Twombly* removal rates for claims brought under Title I of the Americans with Disabilities Act (ADA).[102] Similar to his 2009 study, he examined district courts' decisions on motions to dismiss for failure to state a claim in pre- and post-*Twombly* decisions.[103] His study consisted of fifty-nine pre-*Twombly* decisions and sixty-three post-*Twombly* decisions.[104] He found a higher percentage of district court opinions granting motions to dismiss following *Twombly* compared to the year prior.[105] Specifically, 54.2% of the pre-*Twombly* decisions granted motions to dismiss, and 64.4% of post-*Twombly* decisions granted motions to dismiss.[106] This rate, however, is not statistically significant.[107] Professor Seiner concluded that "confusion and uncertainty" exist as to how the plausibility standard should apply to claims brought under Title I of the ADA.[108]

D. Professor Hatamyar's 2010 Study of 12(b)(6) Motions

Professor Hatamyar measured district court opinions in the two years before and after *Twombly*, randomly selecting 500 pre-*Twombly* cases and 500 post-*Twombly* cases, and, following the *Iqbal* decision, adding 200 post-*Iqbal* cases.[109] These cases were subsequently narrowed to 1,039 cases for analysis.[110]

The percentage of rulings granting motions to dismiss without leave to amend composed 39% of all rulings, and their frequency decreased from pre-

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100. *Id.* at 1030, 1032.

101. *Id.* at 1036. *But see* David L. Noll, *The Indeterminacy of* Iqbal, 99 GEO. L.J. 117, 146 (2010) (noting that it is too soon to determine *Iqbal*'s overall effect on employment discrimination claims).

102. Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 95-99 (2010). Title I of the ADA prohibits an employer with fifteen or more employees from discriminating against a qualified individual on the basis of disability. 42 U.S.C. §§ 12111-12117 (2006).

103. Seiner, *supra* note 102, at 116-17.

104. *Id.* Initially, Westlaw searches yielded 233 pre-*Twombly* decisions and 245 post-*Twombly* decisions; some cases were then disqualified to reflect only those brought under Title I. *Id.*

105. *Id.* at 118.

106. *Id.*

107. *Id.* at 118-19.

108. *Id.* at 122, 126. Professor Seiner then proposed a unified pleading standard for alleging claims under Title I of the ADA. *Id.* at 129-49. Professor Seiner similarly proposed a pleading model for alleging a violation of Title VII of the Civil Rights Act of 1964. Joseph A. Seiner, *After* Iqbal, 45 WAKE FOREST L. REV. 179, 210-21 (2010).

109. Hatamyar, *supra* note 26, at 584-85.

110. *Id.* Cases were excluded if they were sua sponte reviews of prisoners' complaints under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(c)(1) (2006); cases not decided on a 12(b)(6) motion; and cases decided under an explicit heightened pleading standard such as fraud. *Id.* at 585-87; *see* FED. R. CIV. P. 9(b).

Twombly (40%), to post-*Twombly* (39%), to post-*Iqbal* (37%).[111] In contrast, rulings granting motions to dismiss with leave to amend composed 9% of all rulings, and their frequency increased from pre-*Twombly* (6%), to post-*Twombly* (9%), to post-*Iqbal* (19%).[112] Mixed orders composed 28% of all rulings and fluctuated from pre-*Twombly* (28%), to post-*Twombly* (30%), to post-*Iqbal* (25%).[113] Finally, orders denying motions to dismiss, which composed 23% of all rulings, decreased from pre-*Twombly* (26%), to post-*Twombly* (23%), to post-*Iqbal* (18%).[114] These results are statistically significant using a chi-squared test.[115] If the post-*Iqbal* orders are excluded, however, the differences between pre-*Twombly* and post-*Twombly* orders are not statistically significant.[116]

More trends emerge when cases are examined by their type of suit. Of the 1,039 cases analyzed, 44% were civil rights cases.[117] Professor Hatamyar's research showed 12(b)(6) motions were more frequently filed in civil rights cases than in any other type of case.[118] Moreover, there was an upward trend in granting 12(b)(6) motions in civil rights cases, increasing from pre-*Twombly* (50%), to post-*Twombly* (53%), to post-*Iqbal* (58%).[119] Professor Hatamyar suggested that one such reason for this finding is that half of the plaintiffs in civil rights cases were pro se and that courts are more likely to grant a motion to dismiss against a pro se complaint than a complaint filed by a lawyer.[120] As a result of her research, Professor Hatamyar concluded that notice pleading has a "grave" prognosis.[121]

E. Professor Reinert's 2010 Study of Pleading's Success

Professor Reinert tested *Twombly*'s and *Iqbal*'s underlying assumption: heightened pleading standards are more efficient filters than *Conley*'s notice pleading standard.[122] Reinert first identified appellate cases from 1990 to 1999

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111. Hatamyar, *supra* note 26, at 598.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 599.
116. *Id.* at 600.
117. *Id.* at 626. Specifically, 32% of all cases were constitutional civil rights cases, 6% were Title VII cases, 4% were ADA or Age Discrimination in Employment Act (ADEA) cases, and 2% were other civil rights cases. *Id.* Aside from the 44% of orders that were civil rights, the remaining type of orders in descending percentage were other statutory (21%), torts (14%), contracts (12%), labor (6%), and intellectual property (3%). *Id.*
118. *Id.* at 604.
119. *Id.* at 607.
120. *Id.* at 613. The likelihood of a 12(b)(6) motion dismissing a pro se plaintiff's complaint without leave to amend is over five times greater than for a plaintiff who has counsel. *Id.* at 621. This finding comes in spite of the liberal standards for construing pro se pleadings. *See* Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam); Hughes v. Rowe, 449 U.S. 5, 9-10 (1980) (per curiam).
121. Hatamyar, *supra* note 26, at 624; *see* Spencer, *supra* note 26, at 431 ("Notice pleading is dead.").
122. Reinert, *supra* note 42, at 125.

whose pleadings would likely be subject to dismissal under *Twombly* or *Iqbal* but that were considered sufficient under *Conley*.[123] Second, Reinert followed the cases after their remand to district courts to determine their ultimate resolution to estimate the success of thinly pleaded cases.[124] Third, Reinert compared the rate of success in thinly pleaded cases with the success of all cases litigated in the same period.[125] Reinert concluded that applying a heightened pleading standard "will have a larger-than-considered effect on meritorious cases," and he "question[ed] the wisdom" of adopting heightened pleading.[126] The strength of this analysis, however, assumes that cases with motions reversed on appeal are comparable to all civil cases, including those in which a motion to dismiss was never filed.

F. Professor Janssen's 2011 Study of Iqbal*'s Impact in Pharmaceutical Litigation*

Recognizing that statistics alone do not indicate the impact of *Iqbal*, Professor Janssen examined 264 federal decisions that resolved a post-*Iqbal* pleading regarding the pharmaceutical or medical device industries.[127] Professor Janssen categorized each case to determine whether *Iqbal* made a decisional difference.[128] Professor Janssen concluded that almost 79% of the time *Iqbal* "did not affect dispositive pleading motions" in these cases.[129] As to the remaining 21% of cases, Professor Janssen described *Iqbal* as "possibly impactful to all or part of the court's disposition of a pending motion to dismiss" based on the language used in the courts' opinions.[130]

G. Federal Judicial Center 2011 Studies

In March 2011, the FJC, the research and education arm of the federal judiciary, responded to a request from the Judicial Conference Advisory Committees on Civil Rules to evaluate changes in the filings and resolutions of motions to dismiss under 12(b)(6).[131] The FJC examined motion activity in

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123. *Id.* at 134-35.

124. *Id.* at 134, 137 (describing the steps used to determine the ultimate outcome of cases, including consulting PACER and contacting the case's attorneys). Reinert defined success as judgments for the plaintiff, settlements, or stipulated dismissals. *Id.* at 138.

125. *Id.* at 134. The control group stems from the Administrative Office's database of all civil cases terminated between 1990 and 2000. *See id.* at 140, 149-50 (describing control group characteristics).

126. *Id.* at 154, 161.

127. William M. Janssen, Iqbal *"Plausibility" in Pharmaceutical and Medical Device Litigation*, 71 LA. L. REV. 541, 571, 584 (2011).

128. *Id.* at 588.

129. *Id.* at 598.

130. *Id.* Specifically, courts wrote about *Iqbal* but failed to address whether the outcome would have been any different before *Iqbal* was decided. *Id.* at 631. Moreover, Professor Janssen noted that potential information asymmetry, discussed in Part II.B, appeared in only 8.3% of the cases in his cohort. *Id.* at 625.

131. *See* 28 U.S.C. §§ 620-629 (2006); CECIL ET AL., MOTIONS, *supra* note 1, at 1.

twenty-four district courts during the same periods in 2006 and 2010.[132] Using 4,725 cases collected through courts' Case Management/Electronic Case Files (CM/ECF) databases, the FJC found an increase in motions to dismiss for failure to state a claim.[133] Specifically, after *Iqbal* a plaintiff was twice as likely to face a motion to dismiss.[134] The FJC also found the increase extends only to motions granted with leave to amend; there was no increase found in motions granted without leave to amend.[135] In sum, although there was a general increase in the rate at which motions to dismiss for failure to state a claim were filed in the first ninety days of the case, the greatest increase was in financial instruments cases.[136] There was no increase in filing rates in civil rights cases and no increase in the rate at which motions to dismiss for failure to state a claim without leave to amend were filed.[137]

In November 2011, the FJC updated its study.[138] The FJC followed 543 cases from its earlier study to determine the outcome of motions granted in whole or in part with leave to amend the complaint.[139] The FJC found similar results to its earlier study.[140] After excluding financial instruments cases, the FJC found no statistically significant difference between the 2006 and 2010 rates at which movants prevailed in 12(b)(6) motions.[141]

H. Professor Brescia's 2011-2012 Study of Pleading and Housing Discrimination

Professor Brescia examined 632 employment and housing discrimination cases, which he identified through searching the LexisNexis database.[142] Professor Brescia divided his cases into three time frames: the forty-one months prior to *Twombly*, the twenty-four months between *Twombly* and *Iqbal*, and the nineteen months after *Iqbal*.[143] The pre-*Twombly* cases had an overall dismissal rate of 61%; the post-*Twombly*/pre-*Iqbal* cases had an overall dismissal rate of 57%; and the post-*Iqbal* cases had an overall dismissal rate of

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132. CECIL ET AL., MOTIONS, *supra* note 1, at 5. The FJC excluded prisoner cases and cases with pro se parties. *See id.* at 6.

133. *Id.* at 36.

134. *Id.* at 8-12, 36.

135. *Id.* at 12-15.

136. *Id.* at 21.

137. *Id.*

138. CECIL ET AL., UPDATE, *supra* note 1, at 1.

139. *Id.* at 3.

140. *Id.* at 4.

141. *Id.* (noting a statistical significance of $p = 0.331$). Financial instruments cases include cases for negotiable instruments, consumer credit, truth in lending, and foreclosure—of which the great majority are claims by homeowners suing lenders, loan servicing companies, or both over the terms of an initial residential mortgage or refinancing. *Id.* at 4 n.8.

142. Brescia, *supra* note 49, at 262-64.

143. *Id.* at 262. Professor Brescia excluded decisions from appellate courts, decisions on motions for summary judgment, and motions to dismiss not involving the specificity of the allegations. *Id.* at 264-65.

72%.[144] All changes are statistically significant differences.[145] Professor Brescia attributed the dip in the dismissal rate of post-*Twombly*/pre-*Iqbal* cases to the 2008 financial crisis.[146]

I. Professor Hatamyar's 2012 Study

In 2012, Professor Hatamyar updated her previous study, discussed in Part III.D.[147] Using the same procedures as before, through Westlaw searches, Professor Hatamyar coded 1,326 cases decided under *Conley*, *Twombly*, and *Iqbal*[148] and found that the "percentage of 12(b)(6) motions granted in full with leave to amend increased from 6% under *Conley* to 9% under *Twombly* to 21% under *Iqbal*."[149] The percentage of motions granted in full increased from *Conley* to *Iqbal* for all types of cases, although not all rates were statistically significant.[150] This led Professor Hatamyar to conclude that *Iqbal* has become statistically significant, as the "relative risk that a court would grant a 12(b)(6) motion without leave to amend, rather than deny, increased by a factor of 1.75 over *Conley*, holding all other variables constant."[151]

J. Studies' Limitations

While the studies discussed above have contributed substantially to our understanding of the impact of *Twombly* and *Iqbal*, these studies are not without some limitations, many of which are recognized by their respective authors.[152] Our study certainly has its own limitations, but we aim to improve upon at least some of the weaknesses of the above studies. First, some of the studies examined cases found by searching electronic databases, which exclude claims and overrepresent orders granting motions to dismiss when compared with orders appearing on docket sheets.[153] Rather than using cases identified

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144. *Id.* at 268-69.

145. *Id.* at 291. The p-value is 0.003. *Id.*

146. *Id.* at 277. Professor Brescia then examined how the cases applied the plausibility standard and found that "few lower court judges appeared to follow the Supreme Court's use of the plausibility standard to weigh the relative likelihood that conduct complained of was illegal or legal." *Id.* at 278-80.

147. Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 604 (2012).

148. *Id.* at 609-11.

149. *Id.* at 614.

150. *Id.* at 618.

151. *Id.* at 621; *cf.* Part III.D (finding that *Iqbal* did not cause a statistically significant impact in rates granting 12(b)(6) motions).

152. Hatamyar, *supra* note 26, at 593; Seiner, *supra* note 24, at 1031-32. For a response to Professors Hoffman's and Moore's critiques of the FJC studies, see JOE S. CECIL, OF WAVES AND WATER: A RESPONSE TO COMMENTS ON THE FJC STUDY *MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER* IQBAL (Mar. 19, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=2026103.

153. Brescia, *supra* note 49, at 262-63; Hannon, *supra* note 88, at 1833; Hatamyar, *supra* note 26, at 584-85 n. 198, 200; Janssen, *supra* note 127, at 584; Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107, 130 (reporting

through electronic databases, we used the FJC's Integrated Database (IDB), which contains all federal cases and, thus, does not risk arbitrarily excluding cases.[154] Second, Professor Hatamyar critiqued the FJC study for limiting the time period of cases examined and for excluding cases that were brought by pro se plaintiffs and cases in which the 12(b)(6) motion was granted on the basis of sovereign or qualified immunity.[155] Again, we use the IDB and include all cases in the database in our analysis. Third, studies examining dismissed cases are unable to determine if the dismissals were false negatives—the cases were meritorious but were dismissed.[156] Our study does not look at dismissed cases, but rather case removal, to assess the impact of *Twombly* and *Iqbal*, which avoids this potential problem as will be discussed below. Fourth, some studies only examined one type of claim, thereby preventing their results from being generalized to all claims, whereas our study includes all claim types for the main analyses.[157] Fifth, there are limitations to relying on settlement as an indicator of a case's merit.[158] Our study does not include settlement in its examination of the impact of *Twombly* and *Iqbal*.

IV. OUR REMOVAL STUDY

To examine the impact of the *Twombly* and *Iqbal* decisions, we analyze removal rates as an indirect measure of the extent to which cases were being

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differences between published and unpublished orders granting summary judgment motions); Reinert, *supra* note 42, at 134, 135 n.77 (noting selection bias by using published opinions); Seiner, *supra* note 24, at 1031; Seiner, *supra* note 102, at 119; *see infra* note 155. Additionally, some of the initial studies were conducted before the *Iqbal* decision, when there was confusion as to whether *Twombly*'s pleading standard applied only to antitrust cases or in all civil cases. *See infra* note 296 and accompanying text.

154. *See* FEDERAL COURT CASES: INTEGRATED DATABASE SERIES 2011, *available at* http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/72.

155. Hatamyar, *supra* note 147, at 634-41. Additionally, Professor Hoffman found numerous problems with the FJC study. *See* Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 30-32 (2011). Specifically, Professor Hoffman critiqued the FJC's sample size and its failure to do the following: clarify its finding of no statistical significance; clarify that its statistical test measured only the likelihood of a false-positive error; clarify the limits of its results by excluding reasons why the observed differences "might not have reached the predetermined level of statistical significance"; and disclose that the results of a different test would have been statistically significant. *See id.* at 19, 21-27. Professor Hoffman additionally noted that the FJC study cannot assess deterrent effects, rhetorically asking, "[H]ow many prospective claimants were deterred from seeking legal relief because of the Court's more exacting pleading standard"? *Id.* at 28. Moreover, Professor Hoffman argued that the FJC used incomplete data. *Id.* at 31-36.

156. *See* Reinert, *supra* note 42, at 133 n.72 (describing a false negative when the court incorrectly assessed the merit of a complaint).

157. *See* Brescia, *supra* note 49, at 264 (examining employment and housing discrimination cases); Seiner, *supra* note 102, at 95; Seiner, *supra* note 24, at 1015 (examining cases brought under Title VII of the Civil Rights Act of 1964). Title VII provides redress to those who face discrimination in their workplace because of their race, sex, national origin, or religion. *See* 42 U.S.C. § 2000e-2 (2006). Seventy percent of employment discrimination claims are brought under Title VII. *See* Clermont & Schwab, *supra* note 59, at 117; Janssen, *supra* note 127, at 582 (noting the limitations of studying pharmaceutical and medical device cases).

158. *See* Reinert, *supra* note 42, at 162.

diverted to federal courts.[159] We cannot directly assess whether cases filed in state courts could have been filed in federal courts, but we assume that if such cases have been diverted from the federal courts to state courts, then defendants would be more likely to remove such cases back to federal courts.[160] This trend of removal would result in an increased rate at which such cases appear in federal courts as removed cases rather than cases originally filed in federal court.[161] In other words, an increase in the rate of removal following *Iqbal* from states with notice-pleading standards will offer an indication that cases were diverted from federal to state courts, much like observing an echo of the original effect of diversion to state court.[162] Specifically, if a plaintiff files in state court, the defendant has the option of removing the case to federal court if the plaintiff could have filed the case in the federal district court where the state is located.[163] Following removal, the federal court will apply the substantive state law while using federal procedural law.[164] As such, if the underlying substantive law remains constant, then the primary advantage of removing to litigate in federal court is procedural.[165]

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159. *See infra* Part IV.B.

160. *See* Dodson, *supra* note 53, at 56-57 (predicting that defendants will favor federal courts if the federal courts apply a stricter pleading standard than the state court in the state in which the case is filed); Shannon, *supra* note 67, at 491 (noting that a complaint might be deficient in federal court under a motion to dismiss yet survive the same motion under state procedural rules); Z.W. Julius Chen, Note, *Following the Leader:* Twombly, *Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1451 (2008) (predicting that "most federal claims will be removed and adjudicated under the plausibility standard . . . because defendants will prefer a more stringent pleading standard"). Chen noted that applying *Twombly* in a federal diversity case will allow the litigant to forum shop. *See* Chen, *supra*, at 1444 n.89.

161. *See* Moffitt, *supra* note 49, at 56 (recognizing that *Iqbal* can affect the number of cases filed because some plaintiffs may decide to not file in anticipation of the difficulty of surviving a 12(b)(6) motion). Professor Moffitt elaborated that there is a "grey area" that will be affected: those cases that would have been filed pre-*Iqbal* but are unlikely to be filed post-*Iqbal*. *Id.*; *see* Schneider, *supra* note 36, at 519 (predicting fewer filings of civil rights and employment discrimination cases in federal courts).

Case analysis or removal rates cannot account for a nonevent: the claims that are not filed because the lawyer believes the claim will not survive *Iqbal*'s pleading standard. *See* Edward K. Cheng & Albert H. Yoon, *Does* Frye *or* Daubert *Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 480, 482 (2005) (explaining that case analysis and removal rates require examining published opinions and filed cases respectively).

162. *See infra* notes 195-96 and accompanying text.

163. 28 U.S.C. § 1441(a) (2006). Professor Hoffman examined the similarities between pleading standards and removal standards and observed that the notice of removal, which must contain "a short and plain statement of the grounds for removal," intentionally mirrors the language of Rule 8. Hoffman, *supra* note 56, at 1245 (quoting 28 U.S.C. § 1446(a)). Professor Hoffman additionally suggested a "movement in opposite directions" as courts use a permissive attitude to defendants' removal, while *Twombly* suggests a less permissive examination of plaintiff's complaints. *Id.* at 1252.

164. Hanna v. Plumer, 380 U.S. 460, 465 (1965); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). *But see* Steinman, *supra* note 56, at 252 (arguing that *Erie* "requires federal courts to follow state law practices on important aspects of civil procedure").

165. Cheng & Yoon, *supra* note 161, at 483; *see also* Clermont, *supra* note 47, at 1921-22 (noting that "*all* cases entail forum selection. The plaintiff's opening moves include shopping for the most favorable forum . . . ."); *see* Redish, *supra* note 71, at 855 ("[A] procedural system's chosen pleading standard can have a significant impact on the implementation of underlying substantive law."); *cf.* Steinman, *supra* note 56, at 297-98 (arguing that federal courts should follow state laws on pleading standards and that using different pleading standards leads to the kind of forum shopping that *Erie* is supposed to forbid).

A. Removal Metric Overview

There are several advantages to using removal as a tool to evaluate the effect of different pleading standards.[166] First, the removal metric observes cases at an early stage of the litigation process, thus capturing a larger sample of cases.[167] Second, the removal metric reflects what actually happens in litigation.[168] Additionally, the removal metric avoids reliance on surveying lawyers.[169] In contrast, case analysis is subject to decision availability,[170] can be imprecise and subjective, and is dependent on the underlying strength of the complaint as well.[171]

Scholars are aware of two studies that use removal rates as measures.[172] In 2002, the FJC measured the effects of the *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.* decisions on class action filing rates.[173] As part of this study, the FJC examined removal rates, reasoning that removal rates could indirectly indicate "changes in plaintiffs' preferences for filing class actions in state courts."[174] The second removal study examined the impact of the standard for admitting scientific evidence by comparing the removal rates

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166. Cheng & Yoon, *supra* note 161, at 482, 484.

167. *Id.* at 484.

168. *Id.* In contrast, case analyses do not account for situations in which the parties settle early in the litigation process. *Id.* at 480. This can impact studies because the majority of cases never go to trial, thus precluding the number of opinions that might be written. *See id.*; Hoffman, *supra* note 41, at 306-12 (acknowledging that the results of examining opinions can be skewed because such research does not account for cases that are settled or in which the judge chooses not to publish an opinion).

169. Cheng & Yoon, *supra* note 161, at 481. Surveys do not always precisely capture information because surveys rely on the respondents' ability to accurately recall and convey concepts. *Id.*

170. *See* Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1558-60, 1563 (2008) (noting the dangers of relying on published opinions to get a complete picture of what the courts are doing); Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 125 (2002) [hereinafter Clermont & Eisenberg, *Litigation Realities*] (noting that "judicial decisions represent only the very tip of the mass of grievances"); Lizotte, *supra* note 153, at 131-33 (describing the differences in case availability between Westlaw, LexisNexis, and courts' docket databases); Miller, *supra* note 24, at 20 n.67 (noting that the research techniques employed have been limited to what is reported in Westlaw and LexisNexis, which are more likely to report denials than grants of 12(b)(6) motions); Reeves, *supra* note 42, at 492 (noting that "80 to 90 percent of employment discrimination cases filed in federal court do not produce a published opinion" (quoting Peter Siegelman & John J. Donohue, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1133 (1990)) (internal quotation marks omitted)).

171. Cheng & Yoon, *supra* note 161, at 480-81 (explaining that decisions might not always provide accurate representations of the judicial decision-making process and may require the researcher to make interpretations when reviewing and coding opinions).

172. *Id.* at 482; BOB NIEMIC & TOM WILLGING, FED. JUDICIAL CTR., EFFECTS OF *AMCHEM*/*ORTIZ* ON THE FILING OF FEDERAL CLASS ACTIONS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 1-2 (2002), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/amchem.pdf/$file/amchem.pdf.

173. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); NIEMIC & WILLGING, *supra* note 172, at 1-2.

174. NIEMIC & WILLGING, *supra* note 172, at 12-13. The FJC found a fourfold increase in removal rates, yet the removal frequency was very small. *Id.* This study only examined the number of removals, not the removal rate. *Id.*

between states with the *Frye* standard against those with the *Daubert* standard.[175]

Nevertheless, the removal metric, like other measurements, has its flaws. The removal metric is subject to the defendants' ability to remove the case.[176] As such, the parties must either present a federal question or satisfy both the diversity requirement and the amount-in-controversy requirement.[177] Moreover, some cases—such as state court actions against railroads, common carriers, or workers' compensation laws—cannot be removed.[178] Removal is also prohibited if one of the defendants is a citizen of the state in which the original action is commenced.[179] In some instances, state courts will apply federal procedural law, reducing a defendant's incentive to remove a case for a procedural advantage.[180] Furthermore, there are some cases that can only be filed in federal courts and would, thus, not be accounted for in the removal metric.[181]

Additionally, there are several factors that influence the defendant's decision to remove a case.[182] Accordingly, the defendant's choice of removal could indicate a preference for the federal pleading standard or a preference for other factors.[183] Traditionally, corporate and business interests favored federal courts, so their removal could be routine and not a preference of pleading standards.[184] Finally, the measure could capture a removed case that was improperly removed.[185]

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175. Cheng & Yoon, *supra* note 161, at 482.

176. 28 U.S.C. § 1441 (2006).

177. *Id.* §§ 1331, 1332(a)(1)-(4).

178. *Id.* § 1445.

179. § 1441(b).

180. Kevin M. Clermont, *Reverse*-Erie, 82 NOTRE DAME L. REV. 1, 23-26, 38-39 (2006) (arguing that the classic judicial choice of law might be minimized, as lawyers would no longer weigh removing a case solely to use federal procedural rules because the state court would be applying federal procedural rules); Dodson, *supra* note 53, at 56 (predicting that state courts hearing a federal cause of action would be more inclined to apply a liberal state pleading standard than the federal standard); Chen, *supra* note 160, at 1445-46.

181. *See* Janssen, *supra* note 127, at 582, 623 n.300 (noting that federal preemption often extends to cases involving pharmaceuticals and medical devices).

182. Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591 (2006); THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION 20-22 (2005), *available at* http://www.fjc.gov/public/pdf.nsf lookup/ClAct05.pdf/$file/ClAct05.pdf.

183. Kenneth A. Manning & Kevin M. Hogan, *State or Federal Court?: The Commencement or Removal of Civil Cases in New York*, 1999 FED. CTS. L. REV. 5, [2] ("[F]orum selection may have more to do with an attorney's . . . personal preference or comfort level in a particular court, rather than a thorough consideration of tactical advantages or client needs."), *available at* http://www.fclr.org/fclr/articles/html/1999/fedctslrev5.pdf.

184. *See* Steinman, *supra* note 56, at 297 ("[C]orporate and business interests tend to favor federal court, while their political and litigation adversaries tend to favor state court."). Defendants' interest in removal is supported. *See* Hoffman, *supra* note 56, at 1266 n.277. Empirical evidence suggests that successfully removing a case can decrease a plaintiff's win rate, across all cases, from 58% to 36%. *See id.* Additionally, the win rate in original diversity cases is 71%, but for removed diversity cases, it is only 34%. Clermont, *supra* note 47, at 1927; Clermont & Eisenberg, *Litigation Realities*, *supra* note 170, at 121-25 (noting how

B. Removal Study Design

1. Hypothesis

Given that plaintiffs choose the initial forum, we predict that heightened pleading standards following *Twombly* and *Iqbal* will result both in more plaintiffs choosing to file cases otherwise suitable for federal court in state courts with lower pleading standards and in an increase in the rate at which defendants then remove such cases to federal court.[186] More specifically, we expect that a defendant who is a party to a case filed in a state court that uses notice pleading will remove the case to federal court whenever possible.[187] After removing a case from state court to federal court, defendants force plaintiffs' claims to be evaluated under the more demanding standards of *Twombly* and *Iqbal*, thereby increasing the likelihood that the federal court will grant a motion to dismiss for failure to state a claim.[188]

In addition, we expect that certain case types will show the hypothesized effect, while others will not.[189] We expect that the following types of cases will likely show an effect of *Twombly* and *Iqbal*: antitrust, Racketeer Influenced and Corrupt Organizations Act (RICO), patent infringement, employment discrimination, immunity, civil rights, toxic tort, and products liability.[190] We expect that the following types of cases will be unlikely to show an effect of *Twombly* and *Iqbal*: automobile tort, contract, insurance, trademark, copyright, Federal Employers' Liability Act (FELA), and negotiable instrument.[191] These expectations were based on the types of suits that are more likely to satisfy the removal requirements and the types of suits that would warrant defendants to expend the resources for removing.[192]

2. Measurements

We define the removal rate as the number of cases removed to federal court in a given month (or quarter) in a state or set of states over the total

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removal improves defendants' likelihood of obtaining a favorable outcome); Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL LEGAL STUD. 551, 552 (2005) ("[W]hen a defendant removes a state case to federal court, it obtains an advantage.").

185. Eisenberg & Morrison, *supra* note 184, at 562-68, 576 (discussing erroneous removal and concluding that it is "a significant and growing phenomenon").

186. *See* Main, *supra* note 41, at 327 ("The distinction between code pleading and notice pleading is significant.").

187. *See id.*

188. *See id.* at 349.

189. *See infra* notes 195-96 and accompanying text.

190. *See* Hatamyar, *supra* note 26, at 568-69, 593.

191. *See id.* at 590, 606 (finding that 12(b)(6) motions rarely, if ever, occur in cases involving real property, forfeiture/penalty, immigration, bankruptcy, social security, or federal tax and describing which types of claims were likely to have 12(b)(6) motions granted).

192. *See supra* notes 165-71 and accompanying text.

number of cases originally filed in federal court in that same state or set of states, as shown in Figure 1.

Figure 1. The Rate of Removal Metric

$$\text{Removal Rate (\%)} = \frac{\text{Number of cases removed}}{\text{Total number of cases originally filed in federal court}} * 100$$

The ideal measure of removal rate would be the number of cases removed to federal court in a given month (or quarter) in a state or set of states over the total number of cases filed in state court that could be removed to federal court.[193] The number of cases, however, filed in state court that are removable is not easily known, as discussed above.[194] Thus, the denominator we use instead is the number of cases originally filed in federal court for the time period of interest. The denominator helps us account for relative changes in cases filed from state to state to give us a base point of comparison for each state.

We implicitly assume that some portion of the cases that are diverted to state courts will be removed back to federal courts.[195] To repeat the analogy from above, an increase in the rate of removal following *Iqbal* from states with notice-pleading standards will offer an indication that cases were diverted from federal to state courts, much like observing an echo of the original effect of diversion to state court. The data used to calculate the removal rate comes from the FJC's IDB.[196] The IDB is a database of all federal cases drawn from the federal case statistics that the Administrative Office compiles, which the FJC then corrects and refines.[197]

V. STATE CLASSIFICATIONS

To compare the removal rates between notice-pleading states and fact-pleading states, we first separated states into their appropriate categories. Our list below characterizes thirty-nine states (76%) as notice-pleading states and twelve states (24%) as fact-pleading states.[198] In addition to our list, we

193. *See supra* notes 166-85 and accompanying text.

194. *See infra* notes 203-05 and accompanying text.

195. *See* Clermont, *supra* note 47, at 1926. Historically, ten percent of all cases removed are remanded. *See id.*

196. NIEMIC & WILLGING, *supra* note 172, at 25-26.

197. *Id.* There are limitations, however, to using this dataset, including problems with updating docket sheets. *See* Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1467-69 (2003) (describing flaws in the Administrative Office's data).

198. *See infra* note 202 and accompanying text.

included a list from Justice Souter's dissenting opinion in *Twombly* and a list prepared by Professor Oakley in a 2003 study as points of comparison.[199]

A. Our Classification

We created our list by examining each state's pleading standards. We characterized pleading statements of a general nature (epitomized by the federal requirement of "a short and plain statement of the claim showing that the pleader is entitled to relief") as notice pleadings.[200] In contrast, we characterized any pleading standards that referenced specificity—by using words like facts or specific incidents—as fact-pleading standards.[201] Our list appears below in Table 1 and characterizes thirty-nine states (76%) as notice-pleading states and twelve states (24%) as fact-pleading states.[202]

Categorizing the states solely on their pleading standards is somewhat wanting. Examining only the wording of the pleading ignores how the pleading is applied in court.[203] To illustrate, the wording of the federal pleading standard remains constant, and both the *Twombly* and *Iqbal* courts quote the exact same language.[204] Nevertheless, the *application* of the pleading standard has changed.[205]

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199. Main, *supra* note 41, at 328. There are additional lists classifying states by notice pleading or fact pleading. *Id.* Professor Main classifies three states as fact-pleading states: Illinois, Nebraska, and Pennsylvania. *Id.* In 2003, Nebraska switched to a notice-pleading standard. *See infra* note 245. The Institute for the Advancement of the American Legal System (the Institute) discusses seven states—Connecticut, Florida, Maryland, Missouri, New Jersey, Oregon, and Pennsylvania—as fact-pleading states in its article. Kourlis et al., *supra* note 59, at 266-70, 274-78. In a different document, however, the Institute characterizes eleven states as fact-pleading states: California, Connecticut, Florida, Illinois, Louisiana, Missouri, New Jersey, New York, Pennsylvania, Texas, and Virginia. INSTITUTE FINAL REPORT, *supra* note 73. Also, Christine Childers classified twenty-eight states as notice-pleading states. Christine L. Childers, Note, *Keep on Pleading: The Co-Existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26(b)(1)*, 36 VAL. U. L. REV. 677, 702 n.146 (2002) (listing Alabama, Alaska, Arizona, Colorado, Delaware, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Mexico, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming as notice-pleading states). Childers does not classify the remaining twenty-three states. *See id.*

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

201. *See id.*

202. *See infra* Table 1.

203. *See* Main, *supra* note 41, at 329. Professor Main shows that neither notice pleading nor fact pleading establishes a clear mandate for the specificity required in a civil complaint. *Id.* Professor Main found that Illinois, Nebraska, and Pennsylvania alternated between notice pleading and fact pleading in civil rights cases, despite the fact-pleading language of each state's procedural rules. *Id.* at 339-44, 349-53, 357-59. This led Professor Main to suggest that the local legal culture affects how pleading standards operate. *Id.* at 370-75. (Professor Main's research was before Nebraska's 2003 switch to a notice-pleading state. *See infra* note 245.)

204. *See* FED. R. CIV. P (8)(a)(2); Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

205. *See* Michalski, *supra* note 62, at 110-11 (discussing a possible split of pleading standards, including some states' courts that have addressed how *Iqbal* affected their states' pleading standards).

In our classification, there are several states for which the wording of the pleading conflicts with how it is applied. Delaware is one such state.[206] Delaware's pleading standards are identical to the federal pleading standard.[207] Yet the Delaware courts are clear that merely adopting identical language of the federal procedure rules does not characterize Delaware as a notice-pleading state.[208] Moreover, the Delaware Chancery Court described the *Twombly* decision as raising the federal pleading requirement to the heightened standard that currently exists in Delaware.[209] As a result, we classified Delaware as a fact-pleading state.[210]

The opposite situation occurs for six other states: Michigan, New Jersey, New York, North Carolina, Virginia, and Wisconsin.[211] The pleading standards of these six states use wording characteristic of fact-pleading states.[212] The courts of these six states, however, each characterize their pleading standards as notice pleadings.[213] As such, we classified these states as notice-pleading states but ran a second set of statistics in which these states were classified as fact-pleading states, and the results were unchanged.[214]

Table 1. States by Pleading Standard		
#	Notice-Pleading States (39 states, 76%)	Fact-Pleading States (12 states, 24%)
1	Alabama[215]	Arkansas[216]

206. *See* DEL. CH. CT. R. 8(a)(1).

207. *Id.* ("A pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."); DEL. SUPER. CT. R. 8(a)(1) (same); DEL. CT. COM. PL. R. 8(a)(1) (same).

208. *See* Am. Ins. Co. v. Material Transit, Inc., 446 A.2d 1101, 1104 (Del. Super. Ct. 1982) ("To show entitlement of relief as required in Rule 8(a), the complaint must aver either the necessary elements of a cause of action or facts which would entitle the plaintiff to relief under the theory alleged.").

209. Desimone v. Barrows, 924 A.2d 908, 929 (Del. Ch. 2007) (noting that the U.S. Supreme Court has now "embraced the pleading principle that Delaware courts have long applied").

210. *See* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 357 (2003) [hereinafter Oakley, *Fresh Look*] (describing Delaware as a fact-pleading state); John B. Oakley & Arthur Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1378 (1986) [hereinafter Oakley & Coon, *Survey*] (same). *But see* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 578 (2007) (Stevens, J., dissenting) (describing Delaware as a state that took its cue from the federal court by utilizing a dismissal standard of "whether it appears 'beyond doubt' that 'no set of facts' in support of the claim would entitle the plaintiff to relief").

211. *See* MICH. CT. R. 2.111(B)(1); N.J. CT. R. 4:5-2; N.Y. C.P.L.R. 3013; N.C. GEN. STAT. § 1A-1, Rule 8(a) (2011); VA. SUP. CT. R. 1:4(d); WIS. STAT. § 802.02 (2012).

212. *See* MICH. CT. R. 2.111(B)(1); N.J. CT. R. 4:5-2; N.Y. C.P.L.R. 3013; N.C. GEN. STAT. § 1A-1, Rule 8(a); VA. SUP. CT. R. 1:4(d); WIS. STAT. § 802.02.

213. *See infra* notes 241, 248, 250-51, 261, 263.

214. *See infra* notes 241, 248, 250-51, 261, 263.

215. ALA. R. CIV. P. (8)(a)(1); *Ex parte* Burr & Forman, LLP, 5 So. 3d 557, 564 n.1 (Ala. 2008) ("Rule 8 of the Alabama Rules of Civil Procedure implemented modern rules of notice pleadings, and the comments to the rule recognize that there is no technical pleading requirement other than describing in general the events that transpired, coupled with a demand for judgment.").

216. ARK. R. CIV. P. 8(a)(1); Ballinger v. Heritage Log Homes, Inc., No. CA 04-333, 2005 WL 165328, at *9 (Ark. Ct. App. Jan. 26, 2005) ("Arkansas is a 'fact,' rather than a 'notice,' pleading state.").

2	Alaska[217]	California[218]
3	Arizona[219]	Connecticut[220]
4	Colorado[221]	Delaware[222]
5	District of Columbia[223]	Florida[224]
6	Georgia[225]	Illinois[226]

217. ALASKA R. CIV. P. (8)(a)(1); Bigley v. Alaska Psychiatric Inst., 208 P.3d 168, 181 (Alaska 2009); Valdez Fisheries Dev. Ass'n v. Alyeska Pipeline Serv. Co., 45 P.3d 657, 673 (Alaska 2002) ("In applying these principles to a given case, we must also bear in mind Alaska's traditionally lenient notice-pleading standards.").

218. CAL. CIV. PROC. CODE § 425.10(a) (West 2006) ("A complaint or cross-complaint shall contain . . . A statement of the facts constituting the cause of action, in ordinary and concise language."); Tu v. UCSD Med. Ctr., 201 F. Supp. 2d 1126, 1130 (S.D. Cal. 2002) (noting, as a pre-*Twombly* decision, that "California's heightened pleading standard irreconcilably conflicts with Rule 8 of the Federal Rules of Civil Procedure").

219. ARIZ. R. CIV. P. (8)(a)(2); Best v. Edwards, 176 P.3d 695, 702 (Ariz. Ct. App. 2008) ("While we agree that Arizona allows notice pleading . . . .").

220. CONN. GEN. STAT. ANN. § 52-91 (West 2009); CONN. SUPER. CT. R. § 10-1 to -2; West v. New Haven Hous. Auth., No. CV044002185S, 2006 WL 1680067, at *5 (Conn. Super. Ct. May 23, 2006) ("[T]he adequacy of the plaintiffs' allegations are measured by the fact pleading requirements of the Connecticut rules of practice, and not by the Federal Rules of Civil Procedure, which permit notice pleading.").

221. COLO. R. CIV. P. (8)(a)(2); Command Commc'ns, Inc. v. Fritz Cos., 36 P.3d 182, 186-87 (Colo. App. 2001) ("Colorado has a liberal notice-pleading requirement.").

222. Desimone v. Barrows, 924 A.2d 908, 929 (Del. Ch. 2007) (noting that the United States Supreme Court has now "embraced the pleading principle that Delaware courts have long applied"). *But see* DEL. CH. CT. R. 8(a)(1) ("A pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."); DEL. SUPER. CT. R. 8(a)(1) (same); DEL. CT. R. 8(a)(1) (same); Am. Tower Corp. v. Unity Commc'ns, Inc., No. 09C-03-122 PLA, 2010 WL 1077850, at *1 (Del. Super. Ct. Mar. 8, 2010) ("Since notice pleading is sufficient under the Delaware Rules of Civil Procedure . . . ."); Beck & Panico Builders, Inc. v. Straitman, No. 08A-08-014 PLA, 2009 WL 5177160, at *5 (Del. Super. Ct. Nov. 23, 2009) ("The rules of civil procedure for the Delaware courts have followed the federal model in adopting a liberal notice-pleading standard. Unless specificity is required by the rules, a plaintiff need merely offer general allegations to state a claim." (footnotes omitted)).

223. D.C. R. CIV. P. (8)(a)(2); Taylor v. D.C. Water & Sewer Auth., 957 A.2d 45, 50 (D.C. 2008) ("Since this is a notice pleading jurisdiction, we only require that plaintiff's statement of a claim 'give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests.' 'This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.'" (footnotes omitted) (quoting Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002)) (internal quotation marks omitted)); Bolton v. Bernabei & Katz, PLLC, 954 A.2d 953, 963 (D.C. 2008).

224. FLA. R. CIV. P. 1.110; Louie's Oyster, Inc. v. Villaggio Di Las Olas, Inc., 915 So. 2d 220, 221-22 (Fla. Dist. Ct. App. 2005) ("Unlike the pleading requirements in the federal courts where notice pleading is the prevailing standard, the Florida Rules of Civil Procedure require fact pleading." (quoting Ranger Constr. Indus., Inc. v. Martin Cos. of Daytona, 881 So. 2d 667, 680 (Fla. Dist. Ct. App. 2004)) (internal quotation marks omitted)); Continental Baking Co. v. Vincent, 634 So. 2d 242, 244 (Fla. Dist. Ct. App. 1994) (same).

225. GA. CODE ANN. § 9-11-8(a)(2)(A) (2012); Patrick v. Verizon Directories Corp., 643 S.E.2d 251, 252 (Ga. Ct. App. 2007) ("Under notice pleading procedure of the Civil Practice Act, only a short and plain statement of the claim is required; nevertheless, a complaint must give a defendant notice of the claim in terms sufficiently clear to enable him to frame a responsive pleading thereto." (quoting Allen v. Bergman, 412 S.E.2d 549, 552 (Ga. Ct. App. 1991)) (internal quotation marks omitted)).

226. 735 ILL. COMP. STAT. 5/2-603 (2012); Porter v. Decatur Mem'l Hosp., 882 N.E.2d 583, 593 n.1 (Ill. 2008) ("[W]e acknowledge that Illinois is a fact-pleading jurisdiction, while federal courts represent a notice-pleading jurisdiction."); Johnson v. Matrix Fin. Servs. Corp., 820 N.E.2d 1094, 1105 (Ill. App. Ct. 2004) ("Illinois, of course, is a fact-pleading jurisdiction.").

7	Hawaii[227]	Louisiana[228]
8	Idaho[229]	Maryland[230]
9	Indiana[231]	Missouri[232]
10	Iowa[233]	Oregon[234]
11	Kansas[235]	Pennsylvania[236]

227. HAW. R. CIV. P. (8)(a)(1); Tokuhisa v. Cutter Mgmt. Co., 223 P.3d 246, 257 (Haw. Ct. App. 2009) ("Under Hawai'i's 'notice pleading' approach, it is 'no longer necessary to plead legal theories with . . . precision.' 'Hawaii's rules of notice pleading require that a complaint set forth a short and plain statement of the claim that provides defendant with fair notice of what the plaintiff's claim is and the grounds upon which the claim rests. Pleadings must be construed liberally.'" (alteration in original) (citation omitted) (second quote quoting Leslie v. Estate of Tavares, 994 P.2d 1047, 1050 (Haw. 2000)) (third quote quoting Meindl v. Genesys Pac. Techs., Inc. (*In re* Genesys Pac. Techs., Inc.), 18 P.3d 895, 903 (Haw. 2001))).

228. LA. CODE CIV. PROC. ANN. art 854 (2012); Trust for Schwegmann v. Schwegmann Family Trust, 905 So. 2d 1143, 1147 (La. Ct. App. 2005) ("Our legal system provides for fact-pleading rather than notice-pleading . . . .").

229. IDAHO R. CIV. P. (8)(a); Brown v. City of Pocatello, 229 P.3d 1164, 1169 (Idaho 2010); Villa Highlands, LLC v. W. Cmty. Ins. Co., 226 P.3d 540, 543 (Idaho 2010) ("To reach a just result, '[o]ur Rules of Civil Procedure establish a system of notice pleading.'" (alteration in original) (quoting Youngblood v. Higbee, 182 P.2d 1199, 1202 (Idaho 2007))).

230. MD. R. CIV. P. CIRCUIT CT. 2-303, 2-305; Manikhi v. Mass Transit Admin., 758 A.2d 95, 100 (Md. 2000) ("In Maryland, contrary to federal practice, dismissals for failure to state a claim are not limited to those cases in which 'it appears beyond doubt that the plaintiff can prove no state of facts in support of his claim which would entitle him to relief.'" (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007))).

231. IND. R. TRIAL P. 8(a)(1); Buchanan *ex rel.* Buchanan v. Vowell, 926 N.E.2d 515, 519 (Ind. Ct. App. 2010) ("Under notice pleading, a plaintiff need only plead the operative facts involved in the litigation . . . . We will not affirm a dismissal under T.R. 12(B)(6) unless it is apparent that the facts alleged in the challenged pleading 'are incapable of supporting relief under any set of circumstances.'" (citations omitted) (quoting McQueen v. Fayette Cnty. Sch. Corp., 711 N.E.2d 62, 65 (Ind. Ct. App. 1999))); Smith v. Donahue, 907 N.E.2d 553, 555 (Ind. Ct. App. 2009) ("Indiana uses notice pleading . . . .").

232. MO. ANN. STAT. § 509.050 1(1) (West 2012); MO. R. CIV. P. 55.05; Agnello v. Walker, 306 S.W.3d 666, 678 (Mo. Ct. App. 2010) ("Missouri employs a pleading requirement commonly referred to as fact pleading . . . ."); Charron v. Holden, 111 S.W.3d 553, 555 (Mo. Ct. App. 2003) ("Unlike the 'notice pleading' requirements of the federal courts, Missouri courts apply a 'fact pleading' standard.").

233. IOWA R. CIV. P. 1.402(2)(a); U.S. Bank v. Barbour, 770 N.W.2d 350, 353-54 (Iowa 2009) ("Our rules of civil procedure do not require technical forms of pleadings."); Nelson v. Case, No. 09-0404, 2010 WL 1875702, at *2 (Iowa Ct. App. May 12, 2010) ("Nearly every case will survive a motion to dismiss under notice pleading. A petition need not allege ultimate facts that support each element of the cause of action. Rather, it must contain factual allegations that give the defendant 'fair notice' of the claim asserted so the defendant may adequately respond to the petition. The 'fair notice' requirement is met if a petition informs the defendant of the incident giving rise to the claim and of the claim's general nature." (citations omitted)).

234. OR. R. CIV. P. 18A; Weihl v. Asbestos Corp., Ltd, 129 P.3d 748, 755 (Or. Ct. App. 2006) (noting "Oregon's fact pleading requirements").

235. KAN. CIV. PROC. CODE ANN. § 60-208(a)(1) (2012); Unruh v. Purina Mills, LLC, 221 P.3d 1130, 1137 (Kan. 2009) ("Under notice pleading, the petition is not intended to govern the entire course of the case. Rather, the pretrial order is the ultimate determinant as to the legal issues and theories on which the case will be decided."); Halley v. Barnabe, 24 P.3d 140, 143 (Kan. 2001) ("We long ago abandoned the theory of fact pleading in favor of our present 'notice' type pleading.").

236. 231 PA. CONS. STAT. § 1019 (2012); PA. R. CIV. P. 1019(a); Unified Sportsmen of Pa. v. Pa. Game Comm'n, 950 A.2d 1120, 1134 (Pa. Commw. Ct. 2008) ("Pennsylvania is a fact pleading jurisdiction."); Signora v. Liberty Travel, Inc., 886 A.2d 284, 302 n.25 (Pa. Super. Ct. 2005) ("The federal courts rely on notice pleading, as distinguished from Pennsylvania's fact pleading.").

12	Kentucky[237]	South Carolina[238]
13	Maine[239]	
14	Massachusetts[240]	
15	Michigan[241]	
16	Minnesota[242]	
17	Mississippi[243]	
18	Montana[244]	
19	Nebraska[245]	

237. KY. R. CIV. P. 8.01(1)(a); McDonald's Corp. v. Ogborn, 309 S.W.3d 274, 293 (Ky. Ct. App. 2009) ("Kentucky has always followed the notice pleading theory . . . ." (quoting J.N.R. v. O'Reilly, 264 S.W.3d 587, 608 (Ky. 2008) (Noble, J., dissenting), *overruled on other grounds by* J.A.S. v. Bushelman, 342 S.W.3d 850 (Ky. 2011)) (internal quotation marks omitted)); Louisville-Jefferson Cnty. Metro Gov't v. Martin, Nos. 2007-CA-001629-MR, 2007-CA-001803-MR, 2009 WL 1636270, at *5 (Ky. Ct. App. June 12, 2009) ("[I]nasmuch as notice pleadings prevail in Kentucky practice, we see no necessity for anything more. The emphasis is on substance over form and discovery over pleading . . . ." (second alteration in original) (quoting United States v. Commonwealth, 706 S.W.2d 420, 425 (Ky. Ct. App. 1986)) (internal quotation marks omitted)).

238. S.C. R. CIV. P. 8(a)(2); Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc., 559 S.E.2d 362, 365 (S.C. Ct. App. 2001) (finding that the South Carolina Rules of Civil Procedure "retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules" (quoting Gaskins v. S. Farm Bureau Cas. Ins. Co., 541 S.E.2d 269, 271 (S.C. Ct. App. 2000)) (internal quotation marks omitted)).

239. ME. R. CIV. P. 8(a)(1); Johnston v. Me. Energy Recovery Co., 997 A.2d 741, 746 (Me. 2010) ("Maine is a notice pleading state . . . .").

240. MASS. R. CIV. P. 8(a)(1); Univ. of Pa. v. Halpern, No. 09-ADMS-40006, 2009 WL 3004576, at *4 (Mass. App. Div. Sept. 15, 2009) ("Under the Massachusetts practice of notice pleading, 'there is no requirement that a complaint state the correct substantive theory of the case.' A complaint must, however, contain 'a short and plain statement of the claim.'" (quoting Colorio v. Marx, 892 N.E.2d. 356, 360 (Mass. App. Ct. 2008))).

241. MICH. CT. R. 2.111(B)(1); Dalley v. Dykema Gossett P.L.L.C., 788 N.W.2d 679, 686 (Mich. Ct. App. 2010) ("[T]he primary function of a pleading in Michigan is to give *notice* of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." (alteration in original) (emphasis added) (quoting Stanke v. State Farm Mut. Auto. Ins. Co., 503 N.W.2d 758, 762 (Mich. Ct. App. 1993))); Paige v. Paige, No. 283811, 2009 WL 2426261, at *11 (Mich. Ct. App. Aug. 6, 2009) ("Michigan is a notice pleading state . . . .").

242. MINN. R. CIV. P 8.01; Donnelly Bros. Constr. Co. v. State Auto Prop. & Cas. Ins., 759 N.W.2d 651, 660 (Minn. Ct. App. 2009) ("Minnesota is a notice-pleading state that does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it.").

243. MISS. R. CIV. P. 8(a)(1); Upchurch Plumbing, Inc. v. Greenwood Utils. Comm'n, 964 So. 2d 1100, 1117 (Miss. 2007) (stating that, as of January 1, 1982, "Mississippi became a 'notice pleadings' state").

244. MONT. R. CIV. P. 8(a)(1); Griffin v. Moseley, 234 P.3d 869, 877 (Mont. 2010) ("[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." (alteration in original) (quoting Spaberg v. Johnson, 392 P.2d 78, 80 (Mont. 1964)) (internal quotation marks omitted)).

245. NEB. CT. R. § 6-1108(a)(2); Mahmood v. Mahmud, 778 N.W.2d 426, 431 (Neb. 2010) ("Under the rules of notice pleading in effect since 2003, Nebraska's pleading practices have now been liberalized. A party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief." (footnote omitted)); Bailey v. First Nat'l Bank of Chadron, 741 N.W.2d 184, 193 (Neb. Ct. App. 2007) (noting that Nebraska's notice pleading was modeled after the Federal Rules of Civil Procedure); Legis.

20	Nevada[246]	
21	New Hampshire[247]	
22	New Jersey[248]	
23	New Mexico[249]	
24	New York[250]	
25	North Carolina[251]	
26	North Dakota[252]	
27	Ohio[253]	
28	Oklahoma[254]	

B. 876, 97th Leg., 2d Sess. (Neb. 2002) (replacing Nebraska's fact pleading standard with the notice pleading standard).

246. NEV. R. CIV. P. 8(a)(1); Cohen v. Mirage Resorts, Inc., 62 P.3d 720, 724 (Nev. 2003) ("Nevada is a notice pleading state . . . .").

247. Porter v. City of Manchester, 849 A.2d 103, 117 (N.H. 2004) ("[W]e take a liberal approach to the technical requirements of pleadings." (quoting Pike Indus., Inc. v. Hiltz Constr., Inc., 718 A.2d 236, 237 (N.H. 1998)) (internal quotation marks omitted)); *Pike Indus*., 718 A.2d at 237 ("New Hampshire maintains a system of notice pleadings.").

248. N.J. R. CT. 4:5-2. *But see* Evesham Twp. Bd. of Educ. v. Vitetta Grp., No. 10565-05, 2008 WL 4735883, at *8-9 (N.J. Super. Ct. App. Div. Oct. 30, 2008) ("New Jersey is a notice-pleading state, which means that only a short, concise statement of the claim need be given in the complaint, without requiring any technical forms of pleading."); Azizi v. Phillips, No. DC-11850-05, 2006 WL 3511440, at *1 (N.J. Super. Ct. App. Div. Dec. 7, 2006) ("New Jersey is a notice-pleading state, which means that only a short, concise statement of the claim need be given in the complaint.").

249. N.M. R. CIV. P. 1-008(A)(2); State *ex rel.* Children, Youth & Families Dep't v. Cosme V., 215 P.3d 747, 751 (N.M. Ct. App. 2009) (using the phrase "[u]nder our rules of notice pleading" (quoting Petty v. Bank of N.M. Holding Co., 787 P.2d 443, 445-46 (N.M. 1990)) (internal quotation marks omitted)).

250. N.Y. C.P.L.R. 3013; E. Hampton Union Free Sch. Dist. v. Sandpebble Builders, Inc., 884 N.Y.S.2d 94, 101-02 (N.Y. App. Div. 2009) ("Complaints . . . are subject to the 'notice pleading' requirements of CPLR 3013, which are to be liberally construed." (citations omitted)); Holme v. Global Minerals & Metals Corp., No. 600232/08, 2009 WL 387034, at *3 (N.Y. App. Div. Jan. 12, 2009) ("Under the prevalent policy of 'notice pleading' embodied in CPLR Article 30, a pleading need only "give notice" of the event out of which the grievance arises.'" (second quote quoting DAVID D. SIEGEL, NEW YORK PRACTICE § 208, at 301 (4th ed. 2005))); Manning & Hogan, *supra* note 183, at 467 (noting that New York does not have a similar requirement to the federal pleading standard).

251. N.C. R. CIV. P. 8(a); Metcalf v. Black Dog Realty, LLC, 684 S.E.2d 709, 714 (N.C. Ct. App. 2009) ("North Carolina is a notice pleading jurisdiction . . . ." (quoting Mangum v. Raleigh Bd. of Adjustment, 669 S.E.2d 279, 283 (N.C. 2008)) (internal quotation marks omitted)); L'Heureux Enters., Inc. v. Port City Java, Inc., No. 06 CVS 3367, 2009 WL 4644629, at *4 (N.C. Super. Ct. Sept. 4, 2009) (noting the "requirements of notice pleading envisioned by Rule 8"); Murdock v. Chatham Cnty., 679 S.E.2d 850, 855 (N.C. Ct. App. 2009) ("The general standard for civil pleadings in North Carolina is 'notice pleading.'").

252. N.D. R. CIV. P. 8(a); Farmers Union Mut. Ins. Co. v. Decker, 704 N.W.2d 857, 868 (N.D. 2005) ("In addition, North Dakota has notice pleading under which a complaint need contain only a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" (quoting N.D. R. CIV. P. 8(a))).

253. OHIO R. CIV. P. 8(a); Gonzalez v. Posner, No. F-09-017, 2010-Ohio-2117, 2010 WL 1932040, at *2 (Ohio Ct. App. May 14, 2010) (using the phrase "[u]nder the notice pleading requirements of [civil procedural rule] 8(A)(1)"); Vagas v. City of Hudson, No. 24713, 2009-Ohio-6794, 2009 WL 4981219, at *3 (Ohio Ct. App. Dec. 23, 2009) (reiterating that Ohio Rule 8(a) requires the "complaint to contain a 'short and plain statement' of operative facts demonstrating 'that the party is entitled to relief'" and applying *Twombly* to clarify that the focus must be on the facts alleged in the appellant's complaint).

29	Rhode Island[255]	
30	South Dakota[256]	
31	Tennessee[257]	
32	Texas[258]	
33	Utah[259]	
34	Vermont[260]	

254. OKLA. STAT. ANN. tit. 12, § 2008(a)(1); State v. Powell, 2010 OK 40, 237 P.3d 779, 782 n.2 (Okla. 2010) (Opala, J., dissenting) ("The present Oklahoma Pleading Code enacted in 1984, is patterned on the notice-pleading regime of the Federal Rules of Civil Procedure." (citation omitted)).

255. R.I. R. CIV. P. 8(a); Conservation Law Found. v. Gray, No. PC 05-1958, 2006 WL 216053, at *4 (R.I. Super. Ct. Jan. 27, 2006) ("[T]he Rhode Island Supreme Court has recognized that Rhode Island is a 'notice pleading' state, and pursuant to such standard, a claimant need not provide an exhaustive complaint in order to proceed. . . . 'Pursuant to Rule 8(a)(1) of the Superior Court Rules of Civil Procedure, a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief.'" (citations omitted) (quoting Konar v. PFL Life Ins. Co., 840 A.2d 1115, 1118 (R.I. 2004)) (internal quotation marks omitted)).

256. S.D. CODIFIED LAWS § 15-6-8(a)(1) (2006); Gruhlke v. Sioux Empire Fed. Credit Union, Inc., 756 N.W.2d 399, 409 (S.D. 2008) ("South Dakota still adheres to the rules of notice pleading, and therefore, a complaint need only contain '[a] short and plain statement of the claim showing that the pleader is entitled to relief[.]'" (alterations in original) (quoting S.D. CODIFIED LAWS §15-6-8 (2012))).

257. TENN. R. CIV. P. 8.01; Wicks v. Vanderbilt Univ., No. M2006-00613-COA-R3-CV, 2007 WL 858780, at *13 (Tenn. Ct. App. Mar. 21, 2007) ("Tennessee's notice pleading requires a complaint to contain only minimum general facts that would support a potential cause of action under Tennessee substantive law."); Ind. State Dist. Council of Laborers v. Brukardt, No. M2007-02271-COA-R3-CV 2009 WL 426237, at *7 (Tenn. Ct. App. Feb. 19, 2009) ("While there are valid arguments in favor of [the heightened pleading] standard, it has not been adopted in Tennessee, and this Court is not in a position to adopt the stricter *Twombly* standard."); *see* Edwards v. Allen, 216 S.W.3d 278, 284 (Tenn. 2007) ("A Rule 12.02(6) motion to dismiss seeks only to determine whether the pleadings state a claim upon which relief can be granted. Such a motion challenges the legal sufficiency of the complaint, not the strength of the Plaintiffs' proof."). *But see* Hermosa Holdings, Inc. v. Mid Tenn. Bone & Joint Clinic, P.C., No. M2008-00597-COA-R3-CV, 2009 WL 711125, at *3 (Tenn. Ct. App. Mar. 16, 2009), *abrogated by* Nebb v. Nashville Area Habitat for Humanity, 346 S.W.3d 422, 432 (Tenn. 2011) ("[T]he United States Supreme Court [in *Twombly*] elucidated the appropriate standard of pleading for a complaint attacked by a federal Rule 12(b)(6) motion to dismiss. Although the Tennessee Supreme Court has not adopted the standard announced in *Twombly*, we find it consistent with Tennessee law and therefore recognize its applicability."); Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson County, No. M2008-01393-COA-R3-CV, 2009 WL 3270195, at *5 (Tenn. Ct. App. Oct. 12, 2009) (adopting and applying the *Twombly* standard).

258. TEX. R. CIV. P. 47(a); Crown Asset Mgmt., L.L.C. v. Loring, 294 S.W.3d 841, 846 (Tex. App.—Dallas 2009, pet. denied) ("Under our system of notice pleading, the purpose of a pleading is 'to provide the opposing party with sufficient information to enable him to prepare a defense.'" (quoting Paramount Pipe & Supply Co. v. Muhr, 749 S.W.2d 491, 493 (Tex. 1988))); Moore v. Pulmosan Safety Equipment Corp., 278 S.W.3d 27, 34 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) ("We acknowledge that Texas is a fair notice pleading state . . . .").

259. UTAH R. CIV. P. 8(a); City of Grantsville v. Redevelopment Agency of Tooele City, 233 P.3d 461, 471 (Utah 2010) ("Under our liberal notice pleading standard, all that is required is a 'short and plain statement . . . showing that the pleader is entitled to relief.'" (alteration in original) (quoting UTAH R. CIV. P. 8(a))).

260. VT. R. CIV. P. 8(a); Girouard v. Hofmann, 981 A.2d 419, 420 (Vt. 2009) (noting "our notice pleading requirements"); Colby v. Umbrella, Inc., 955 A.2d 1082, 1086-87 (Vt. 2008) (rejecting the dissent's suggestion to adopt *Twombly*'s standards by noting that the Court "recently reaffirmed our minimal notice pleading standard and are unpersuaded by the dissent's argument that we should now abandon it for a

35	Virginia[261]	
36	Washington[262]	
37	Wisconsin[263]	
38	West Virginia[264]	
39	Wyoming[265]	

B. Additional Lists of State Classifications

1. Justice Stevens's Twombly *Classification*

In responding to the majority's claim that *Conley*'s "no set of facts" language has repeatedly been questioned, Justice Stevens listed "26 States and the District of Columbia [that] utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears 'beyond doubt' that 'no set of facts' in support of the claim would entitle the plaintiff to relief."[266] Justice Stevens focused on the standards of dismissal, not the type of pleading, although an overlap exists.[267]

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heightened standard" (citation omitted)).

261. VA. SUP. CT. R. 1:4(d). *But see* Lodal v. Verizon Va., Inc., No. CL-2007-2178, 2007 WL 5984179, at *2 (Va. Cir. Ct. Aug. 22, 2007) ("As Virginia is a notice pleading state, even a flawed complaint will survive demurrer if it is drafted so that the defendant is on notice of the nature and character of the claim."); Carr v. Bus. Sys. Mgmt., Inc., No. CL-2007-1556, 2007 WL 6008777, at *1 (Va. Cir. Ct. July 25, 2007) (using the phrase "[b]ecause Virginia is a notice pleading state").

262. WASH. REV. CODE § 4.36.070 (2012); SUP. CT. CIV. R. 8(a); Champagne v. Thurston Cnty., 178 P.3d 936, 945 (Wash. 2008) ("Washington follows notice pleading rules and simply requires a 'concise statement of the claim and the relief sought.'" (quoting Pac. Nw. Shooting Park Ass'n v. City of Sequim, 144 P.3d 276, 281 (Wash. 2006) (en banc))); McCurry v. Chevy Chase Bank, F.S.B., 193 P.3d 155, 157 (Wash. Ct. App. 2008) (rejecting the defendant's request to adopt the *Twombly* standard).

263. WIS. STAT. § 802.02 (2012); Foley & Lardner, LLP v. Stitgen, No. 2008AP2284, 2009 WL 2461799, at *2 (Wis. Ct. App. Aug. 13, 2009) ("Wisconsin is a 'notice pleading' jurisdiction, and we must liberally construe a complaint so as to do substantial justice."); Bank of N.Y. v. Johnson, No. 2008AP2285, 2009 WL 1606756, at *2 (Wis. Ct. App. June 10, 2009) ("Wisconsin is a notice-pleading state, and resolution of facts which sustain a pleading is left to discovery."); Johnson v. Am. Family Mut. Ins. Co., No. 2008AP1536, 2009 WL 1456955, at *4 (Wis. Ct. App. May 27, 2009) ("Wisconsin, which is a notice pleading state, requires that 'one need only give the opposing party fair notice of what the claim is and the grounds upon which it is based.'" (quoting Wolnak v. Cardiovascular & Thoracic Surgeons of Cent. Wis., 706 N.W.2d 667, 680 (Wis. Ct. App. 2005))).

264. W. VA. R. CIV. P. 8(a); Roth v. DeFeliceCare, Inc., 700 S.E.2d 183, 189 & n.4 (W. Va. 2010) ("Although entitlement to relief must be shown, a plaintiff is not required to set out facts upon which the claim is based. . . . The Court notes that our interpretation of West Virginia Rule of Civil Procedure 8 is more liberal than what is allowed under the federal rules." (emphasis omitted)).

265. WYO. R. CIV. P. 8(a)(2); Excel Const., Inc. v. HKM Eng'g, Inc., 228 P.3d 40, 49 (Wyo. 2010) ("The Wyoming Rules of Civil Procedure permit 'notice pleading,' and pleadings are to be liberally construed to do substantial justice.").

266. Bell Atl. Corp. v. Twombly, 550 U.S. at 544, 555, 578 (2007) (Stevens, J., dissenting).

267. *Id.* at 572-96.

Justice Stevens's list of twenty-seven notice-pleading states (53%) appears below in Table 2.[268] Additionally, Justice Stevens's footnote included a "*see also*" introduction listing nine other states (18%) to further support his argument.[269] For clarification, we added the fifteen states (29%) that Justice Stevens did not mention.[270] Justice Stevens's list of notice-pleading states included two states we characterized as fact-pleading states: Florida and Louisiana; the remaining twenty-five states we characterized as notice-pleading states.[271] His "*see also*" list included three states we characterized as fact-pleading states: Delaware, Illinois, and Missouri; the remaining six states we characterized as notice-pleading states—Indiana, Iowa, Kentucky, Michigan, Utah, and Virginia.[272] Of the fifteen unmentioned states, we characterized seven of those states as fact-pleading states and eight of those states as notice-pleading states.[273] Although Justice Stevens's list is instructive, our state classification list is more appropriate for our study because Justice Stevens examined the language for dismissing a claim and did not characterize every state. In contrast, we examined the language for pleading standards and did categorize every state.

Table 2. Justice Stevens's No Set of Facts Classification (2007)

#	Notice-Pleading States (27 states, 53%)	*See also* List (9 states, 18%)	Unmentioned States (15 states, 29%)
1	Alabama	Delaware	Arkansas
2	Alaska	Indiana	California
3	Arizona	Illinois	Connecticut
4	Colorado	Iowa	Kansas
5	District of Columbia	Kentucky	Maryland
6	Florida	Michigan	Minnesota
7	Georgia	Missouri	New Hampshire
8	Hawaii	Utah	New Mexico
9	Idaho	Virginia	New Jersey
10	Louisiana		New York
11	Maine		Oregon
12	Massachusetts		Pennsylvania
13	Mississippi		South Carolina
14	Montana		Texas
15	Nebraska		Wisconsin
16	Nevada		
17	North Carolina		

268. *Id.* at 578 n.5.
269. *Id.* at 578 n.4.
270. *See id.* at 578 nn.4-5; *infra* Table 2.
271. *See Twombly*, 550 U.S. at 578 n.5; *infra* Table 2.
272. *See Twombly*, 550 U.S. at 578 n.5; *infra* Table 2.
273. *See Twombly*, 550 U.S. at 578 nn.4-5; *infra* Table 2.

18	North Dakota		
19	Ohio		
20	Oklahoma		
21	Rhode Island		
22	South Dakota		
23	Tennessee		
24	Vermont		
25	Washington		
26	West Virginia		
27	Wyoming		

2. 2003 Oakley Study

In 2003, Professor Oakley updated the 1986 study he conducted with Arthur Coon.[274] Both studies compared the procedural systems of each state to the Federal Rules of Civil Procedure.[275] In doing so, Professor Oakley identified thirty states (59%) as notice-pleading states and three states (6%) as fact-pleading states, but he omitted the remaining eighteen states (35%) because they "fell into a variety of nonconforming categories."[276] Professor Oakley's classification of notice-pleading and fact-pleading states is identical to our list, except for his unclassified states, because our categorization classifies all states as either notice-pleading or fact-pleading states.[277]

Table 3. 2003 Professor Oakley Study			
#	Notice-Pleading States (30 states, 59%)	Fact-Pleading States (3 states, 6%)	Unclassified States (18 states, 35%)
1	Alabama	Arkansas	California
2	Alaska	Delaware	Connecticut
3	Arizona	South Carolina	Florida
4	Colorado		Illinois
5	District of Columbia		Iowa

274. Oakley & Coon, *Survey*, *supra* note 210, at 1367.

275. Oakley, *Fresh Look*, *supra* note 210, at 354. Professor Oakley used several characteristics to compare state procedure rules to the federal procedure rules, including whether the state has "a liberal regime of 'notice pleading' that conforms without qualification to that prescribed by the federal rules as interpreted in *Conley v. Gibson*." *Id.* at 355-56.

276. *Id.* at 356-66 (listing all characteristics used to compare state and federal procedural rules); *see infra* Table 3.

277. *See* Oakley, *Fresh Look*, *supra* note 210, at 356-58. For comparison, Oakley and Coon's 1986 classification identified thirty-four states (66.6%) as notice-pleading states and the remaining seventeen states (33.3%) as fact-pleading states. Oakley & Coon, *Survey*, *supra* note 210, at 1373-74. Our classification matches their classification for forty-six states. *Id.* The differing states are Nebraska, New Jersey, New York, Texas, and Virginia, which they classify as fact-pleading states and we classify as notice-pleading states. *Id.* For previous lists describing states' procedural rules, see *id.* at 1370-72 n.21 (list of procedural systems in 1928), n.23 (list of procedural systems in 1947), n. 25 (list of procedural systems in 1960), and n.27 (list of procedural systems in 1977).

6	Georgia		Louisiana
7	Hawaii		Maryland
8	Idaho		Michigan
9	Indiana		Missouri
10	Kansas		Nebraska
11	Kentucky		New Hampshire
12	Maine		New Jersey
13	Massachusetts		New York
14	Minnesota		Oregon
15	Mississippi		Pennsylvania
16	Montana		Texas
17	Nevada		Virginia
18	New Mexico		Wisconsin
19	North Carolina		
20	North Dakota		
21	Ohio		
22	Oklahoma		
23	Rhode Island		
24	South Dakota		
25	Tennessee		
26	Utah		
27	Vermont		
28	Washington		
29	West Virginia		
30	Wyoming		

VI. RESULTS

The following Section provides the results of our comparison of removal rates. This includes the preliminary results for four states and the full results for all fifty-one states.

A. Preliminary Results (Four States)

As a preliminary analysis, we calculated the quarterly removal rate for four states: Alabama, Arizona, Vermont, and Washington.[278] These four states were selected because they are located in geographically diverse regions of the United States. Furthermore, they are all notice-pleading states, which are the states in which we expect to see the largest changes in removal rate after *Twombly* and *Iqbal*.[279] Thus, in the preliminary analysis, we expected to see an

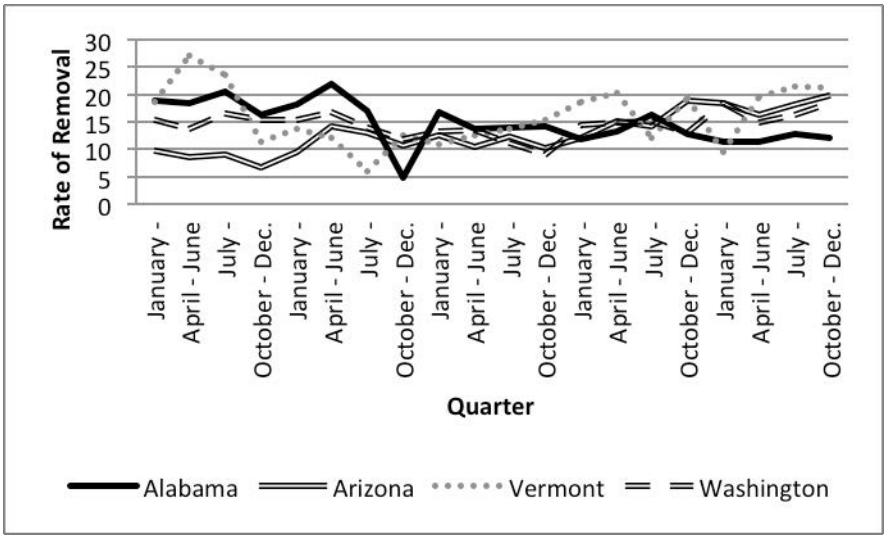
278. *See infra* Table A.1.

279. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 554 (2007); *supra* Part IV.A.

increase in the removal rate for all four states after the adoption of *Twombly* and *Iqbal*. The removal rates from January 2005 through December 2009 were calculated.[280] It is important to remember that Table A.1 includes all case types, so all nature of suit (NOS) codes were included.[281]

Figure 2 illustrates the removal rates in the four states over time.[282] Contrary to our expectations, there is not a clear trend in any of the four states of an increasing removal rate after *Twombly* and *Iqbal*.[283] The figure shows that the rate of removal for each of these states shifts each quarter, but not in a consistently upward direction even after the *Twombly* and *Iqbal* rulings.[284] The data looks similar when the monthly removal rates are calculated.[285] Thus far, the results from the preliminary analysis do not meet our expectations. There does not appear to be a strong, or any, bivariate relationship between the *Twombly* and *Iqbal* rulings and the rate of removal.[286]

Figure 2. Rate of Removal in Four States, 2005-2009



To be sure that the effect of *Twombly* and *Iqbal* was not masked by other variables, we ran a model on the quarterly rate of removal, which is shown in

280. *See infra* Table A.1.
281. *See infra* Table A.1.
282. *See infra* Figure 2.
283. *See infra* Figure 2.
284. *See infra* Figure 2.
285. *See infra* Table A.1. Even when the bivariate analysis was repeated with only civil rights cases (NOS codes 440 through 446), the null results held with no apparent trend in the removal rate across the time period of interest. *See infra* Table 2.
286. *See infra* Figure 2.

Table 4.[287] There are eighty quarters in our sample and four clusters, one for each state: Alabama, Arizona, Vermont, and Washington.[288] The explanatory variables included are pre-*Twombly* and post-*Twombly*, and the comparison group is post-*Iqbal*.[289] These variables are dummy variables denoting the time period. For example, for pre-*Twombly*, the quarters from January to March 2005 through April to June 2007 are coded as "1," and the rest of the quarters are coded as "0." Our expectation is that the removal rates pre-*Twombly* and post-*Twombly* will be lower compared to the removal rate post-*Iqbal*. In other words, the removal rate will be higher after the *Iqbal* ruling—all else equal.

Table 4. Effect of *Twombly* and *Iqbal* on the Quarterly Rate of Removal, 2005-2009

Variable	Coefficient
Pre-*Twombly*	-3.41 (2.84)
Post-*Twombly*	-3.10 (1.34)
Constant	17.62** (1.93)
N	80
Number of clusters	4
F (2,3)	7.06 (p = 0.0734)
R^2	0.0601

Notes: All NOS codes are included. Values in parentheses are robust and clustered standard errors. Post-*Iqbal* serves as the reference group. $p < 0.05$ = * and $p < 0.01$ = **.

While the coefficients for both pre-*Twombly* and post-*Twombly* are in the expected direction, i.e., negative, neither coefficient is statistically significant.[290] The R^2 for the model is 0.06, which means that the model is only explaining 6% of the variation in the quarterly rate of removal.[291] Also, the F

287. *See infra* Table 4. The results are the same even when the monthly rate of removal rather than the quarterly rate is used and also when only civil rights cases are included. *See infra* Table 4. Due to the time-series cross-sectional nature of the data, a fixed effects model was used, which assumes that the unobserved effect for a given state or quarter can be estimated as a given, i.e., fixed effect. *See infra* Table 4. The fixed effects model was run with Arellano-robust standard errors because the initial model showed evidence of heteroskedasticity ($\chi 2 = 41.26$ at p-value = 0.000). *See infra* Table 4.

288. *See infra* Table 4.

289. *See infra* Table 4.

290. *See supra* Table 4.

291. *See supra* Table 4.

statistic is not statistically significant, which means that the entire model does not reach statistical significance and R^2 is not significantly different from zero.[292] This regression does not support our expectation that the rate of removal significantly increased after *Twombly* and after *Iqbal*.

B. Full Sample of States (Fifty-One States)

Despite the lack of results in the preliminary analysis, we expanded the scope of the study to the entire fifty-one state sample.[293] This time we focused on the removal rate for each type of state rather than analyzing the states separately.[294] We calculated the monthly removal rate for each set of states for the period from June 2006 through May 2007 (the pre-*Twombly* and pre-*Iqbal* period) and June 2009 through March 2010 (the post-*Twombly* and post-*Iqbal* period).[295] We excluded the middle period because we were mainly interested in comparing the rate of removal prior to *both* of the rulings with the removal rate after *both* of the rulings, thereby avoiding the initial confusion following *Twombly*'s holding as to whether *Twombly* extended to all cases or only to antitrust cases.[296]

The monthly removal rate was then calculated for the time period of interest for a variety of nature-of-suit codes.[297] Presented here are the figures for civil rights and securities cases.[298] Civil rights cases were selected because we expect to see the greatest change in these cases over time. Securities cases had heightened pleading standards prior to *Twombly*, so we expect that any change in securities cases after *Twombly* and *Iqbal* will not be as dramatic as the change in civil rights cases.[299] Thus, we expect that the removal rates of civil rights cases will be greater than the removal rates of securities cases after *Twombly* and *Iqbal*. Furthermore, we expect to find an increase in the removal rate from notice-pleading states compared to fact-pleading states or states that have adopted stricter pleading standards. Again, we assume that there is less incentive in fact-pleading states for a defendant to remove a case from state to federal court.

The removal rates for civil rights cases are in Table A.2 in the Appendix.[300] The civil rights cases included are nature-of-suit codes 440 through 446.[301] To more readily interpret the results, Figure 3 illustrates the

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292. *See supra* Table 4.

293. *See infra* Table 5.

294. *See supra* Part IV.A.

295. *See infra* Table 5.

296. *See infra* Table 5. Judge McMahon noted that courts "reached every conceivable answer" in applying the Court's mixed signals. McMahon, *supra* note 16, at 858. *Iqbal* clarified that its pleading standards apply to all cases. *See supra* note 28.

297. *See infra* Table A.2-3.

298. *See infra* Table A.2-3.

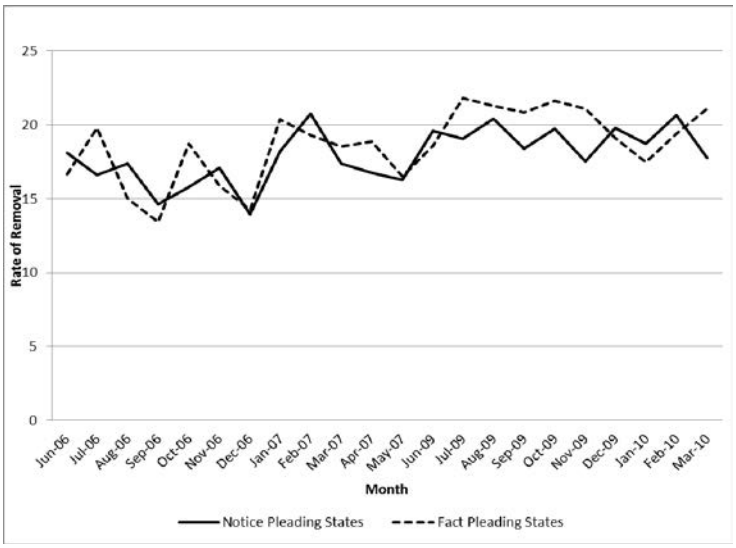
299. Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2) (2006).

300. *See infra* Table A.2.

301. *See infra* Table A.2.

removal rate in civil rights cases for notice-pleading states compared to fact-pleading states.[302] The graph shows that on average, for civil rights cases, notice-pleading states have a very similar rate of removal compared to fact-pleading states.[303] There do not appear to be any significant increases in removal rate over time in notice-pleading states compared to fact-pleading states.[304] While the line fluctuates, the rate of removal mainly varies between 15% and 20% for both sets of states.[305] Thus, even with the full sample of states, the rate of removal for civil rights cases remains relatively steady across the time period of interest and between the two sets of states.[306]

Figure 3. Rate of Removal by State Type in Civil Rights Cases

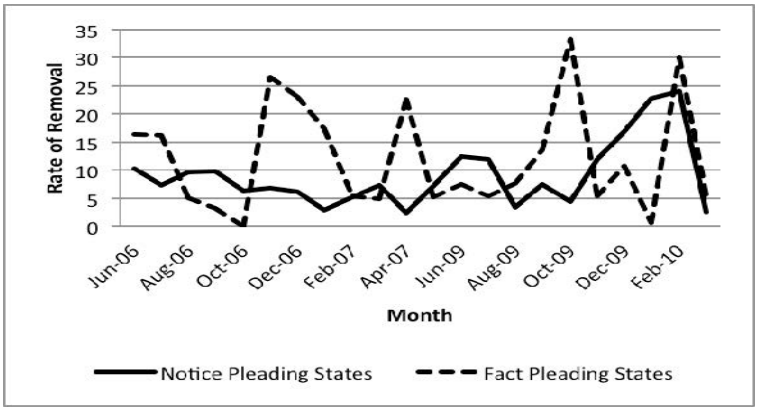


The same calculations were made for the rate of removal in states for securities cases (nature-of-suit code 850).[307] Much like the civil rights cases, there is not a clear trend in the rate of removal between notice-pleading and fact-pleading states.[308] The rate of removal fluctuates greatly in both sets of states.[309] After October 2009, however, the lines seem to diverge somewhat with the rate of removal, on average, slightly increasing for notice-pleading states and decreasing for fact-pleading states.[310] This result is likely driven by

302. *See infra* Figure 3; *see also infra* Table A.2 (providing the actual numbers on which Figure 3 is based).
303. *See infra* Figure 3.
304. *See infra* Figure 3.
305. *See infra* Figure 3.
306. *See infra* Figure 3.
307. *See infra* Table A.3.
308. *See infra* Table A.3 & Figure 4.
309. *See infra* Table A.3 & Figure 4.
310. *See infra* Figure 4.

the large outliers in January and February 2010, and both lines converge at about five percent for the rate of removal in March 2010.[311]

Figure 4. Rate of Removal by State Type in Securities Cases



The results for the entire state sample are not much more encouraging than the four-state sample results. The expected differences between civil rights and securities cases are not present, and the expected changes in the rate of removal in notice-pleading states compared to fact-pleading states are not evident either.

To examine the rate of removal even further, the average rates of removal for the two time periods of interest were calculated for notice-pleading and fact-pleading states.[312] The figures were broken down by case type and include antitrust, civil rights, employment discrimination, RICO, and securities cases.[313]

Table 5. Average Rate of Removal by State Type

	Notice-Pleading States		Fact-Pleading States	
Case Type	June 2006-May 2007	June 2009-March 2010	June 2006-May 2007	June 2009-March 2010
Antitrust	4.15	4.80	4.65	2.56
Civil Rights	16.92	19.17	17.28	20.23
Employment Discrimination	19.69	24.58	25.54	29.91
RICO	11.94	9.11	19.94[a]	16.46
Securities	6.85	11.87	12.11	11.98

Note: This figure excludes the value for June 2006 due to an extreme outlier of 262.50% (63 cases remanded but only 24 cases originally filed in federal court).

311. *See infra* Figure 4.
312. *See infra* Table 5.
313. *See infra* Table 5.

We expect that the change in the average rate of removal from pre-*Twombly* and *Iqbal* to post-*Twombly* and *Iqbal* will be greater in notice-pleading states compared to fact-pleading states, as defendants have more to gain by removing their cases from state court in notice-pleading states. As evidenced by the figures, however, while the rate of removal increased in notice-pleading states—except in RICO cases—it was met by a similar increase in removal in fact-pleading states in employment discrimination and civil rights cases.[314] The only sets of cases in which we observed the expected relationship of an increase in the removal rate in notice-pleading states followed by a decline of the rate of removal in fact-pleading states were the antitrust and securities cases, which, as discussed above, we did not necessarily expect.[315] Furthermore, half of the changes observed in these two sets of cases are less than one percentage point, so they are not substantively significant.[316]

VII. DISCUSSION

We undertook this study expecting that the rate of removal would increase in all states after *Twombly* and *Iqbal*—and that this increase would be more pronounced in notice-pleading states compared to fact-pleading states.[317] The results demonstrate that these expectations were not met.[318] There was no systematic increase in the rate of removal after *Twombly* and *Iqbal*, and the effect was not more pronounced in notice-pleading states compared to fact-pleading states.[319] These null findings apply to both the bivariate and multivariate analyses (the rate of removal graphs and regression analysis, respectively) and to the data no matter how it is parsed—whether it is by nature-of-suit code or by varying time periods.[320]

One potential reason for the null findings could be the rate of removal measure we used.[321] As discussed above, the ideal measure of the removal rate is the number of cases removed over the number of cases that are removable, but this figure is nearly impossible to collect on a large scale.[322] Thus, we had to rely on the cases filed in federal court as a way to account for variation in caseloads across states and time.[323] It is possible that this measure could muddy the removal rate because cases filed in federal court could vary independently of cases removed from state court to federal court. In short, our measure, which

314. *See supra* Table 5.
315. *See supra* note 199 and accompanying text; *supra* Table 5.
316. *See supra* Table 5.
317. *See supra* Part III.B.1.
318. *See supra* Part V.B.
319. *See supra* Part V.B.
320. *See* CECIL ET AL., MOTIONS, *supra* note 1, at 11. Incidentally, although there was no difference in rates of removal to federal courts, motions to dismiss were more likely to be filed in cases removed from state court to federal court, both before and after *Twombly*. *Id.*
321. *See supra* Part III.B.2.
322. *See supra* Part III.B.2.
323. *See supra* Part III.B.2.

by necessity was rather blunt, may not have been sensitive enough to capture the systematic changes we expected in the rate of removal.

Another reason for our null findings may be attributable to defendants' (and defendants' attorneys') behavior. It is possible that, regardless of the *Twombly* and *Iqbal* rulings, attorneys who represent defendants will choose to remove a case to federal court whenever possible.[324] Attorneys who represent defendants typically overwhelmingly prefer federal court to state court, so it is likely that, even before these Supreme Court rulings, attorneys who represent defendants removed cases at much the same rate as they do after the rulings.[325]

VIII. CONCLUSION

In this study, we attempted to examine the impact of the Supreme Court decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* on civil litigation in the United States federal courts.[326] We reviewed those cases and associated commentary, which predicted that the heightened pleading standards following these two decisions would negatively affect plaintiffs by making it harder for plaintiffs—especially plaintiffs alleging a violation of their civil rights—to properly plead a claim.[327] We also reviewed the existing empirical studies measuring the effect of *Twombly* and *Iqbal*, provided an overview of our study and removal rate studies, and provided the classifications between notice-pleading and fact-pleading states.[328]

While this study does not find support for an effect of *Twombly* and *Iqbal* on the rate of removal in notice-pleading states compared to fact-pleading states, this study does not eliminate the possibility either.[329] Further research using a more refined measure of the rate of removal, or one that could account for defendant attorneys' proclivity for federal court, may yield more substantial findings and demonstrate that *Twombly* and *Iqbal* have significantly influenced the litigation process.

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324. *See supra* notes 177-80 and accompanying text.

325. *See supra* notes 177-80 and accompanying text.

326. *See* Ashcroft v. Iqbal, 556 U.S. 662, 687 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 554, 556 (2007); *supra* Part V.

327. *See supra* Part II.A-B.

328. *See supra* Parts II-IV.

329. *See supra* Parts V-VI.

IX. APPENDIX

Table A.1. Quarterly Rate of Removal in Four States, 2005-2009

	Alabama			Arizona			Vermont			Washington		
Quarter/Year	Filed in Fed. Court	Remove to Fed. Court	Removal Rate	Filed in Fed. Court	Remove to Fed. Court	Removal Rate	Filed in Fed. Court	Remove to Fed. Court	Removal Rate	Filed in Fed. Court	Remove to Fed. Court	Removal Rate
Jan. – Mar. 2005	996	190	19.08	1100	107	9.73	64	12	18.75	834	128	15.35
Apr. – June 2005	1052	195	18.54	1054	91	8.63	88	24	27.27	764	105	13.74
July – Sept. 2005	910	188	20.66	1118	102	9.12	59	14	23.73	661	109	16.49
Oct. – Dec. 2005	909	149	16.39	1301	88	6.76	61	7	11.48	714	110	15.41
Jan. – Mar. 2006	952	175	18.38	994	94	9.46	58	8	13.79	663	102	15.38
Apr. – June 2006	934	207	22.16	777	111	14.29	58	7	12.07	675	113	16.74
July – Sept. 2006	995	170	17.09	738	96	13.01	50	3	6.00	710	100	14.08
Oct. – Dec. 2006	3328	168	5.05	838	89	10.62	63	8	12.70	615	73	11.87
Jan. – Mar. 2007	926	156	16.85	741	93	12.55	72	8	11.11	683	91	13.32
Apr. – June 2007	1065	147	13.80	714	75	10.50	55	7	12.73	704	95	13.49
July – Sept. 2007	889	126	14.17	711	88	12.38	51	7	13.73	801	90	11.24
Oct. – Dec. 2007	895	128	14.30	932	94	10.09	58	9	15.52	789	71	9.00
Jan. – Mar. 2008	837	101	12.07	768	93	12.11	64	12	18.75	730	105	14.38
Apr. – June 2008	963	129	13.40	656	99	15.09	49	10	20.41	718	107	14.90
July – Sept. 2008	957	158	16.51	663	94	14.18	57	7	12.28	644	98	15.22
Oct. – Dec. 2008	905	117	12.93	650	122	18.77	62	12	19.35	638	84	13.17
Jan. – Mar. 2009	975	112	11.49	732	135	18.44	72	7	9.72	630	117	18.57
Apr. – June 2009	1057	121	11.45	795	130	16.35	66	13	19.70	694	104	14.99
July – Sept. 2009	1028	133	12.94	761	138	18.13	51	11	21.57	723	119	16.46
Oct. – Dec. 2009	909	111	12.21	663	132	19.91	61	13	21.31	685	126	18.39

Note: All cases are included in the calculation (i.e., there were no exclusions based on NOS codes).

Table A.2. Monthly Rate of Removal by State Type in Civil Rights Cases, June 2006-May 2007 and June 2009-March 2010

	Notice-Pleading States			Fact-Pleading States		
Month-Year	Filed in Federal Court	Removed to Federal Court	Removal Rate	Filed in Federal Court	Removed to Federal Court	Removal Rate
Jun-06	1374	249	18.12	835	139	16.65
Jul-06	1228	204	16.61	747	148	19.81
Aug-06	1427	248	17.38	959	144	15.02
Sep-06	1354	198	14.62	1013	136	13.43
Oct-06	1366	216	15.81	866	162	18.71
Nov-06	1281	219	17.10	874	139	15.90
Dec-06	1395	195	13.98	842	120	14.25
Jan-07	1243	226	18.18	687	140	20.38
Feb-07	1026	213	20.76	762	147	19.29
Mar-07	1322	230	17.40	804	149	18.53
Apr-07	1182	198	16.75	774	146	18.86
May-07	1371	223	16.27	895	148	16.54
Jun-09	1520	298	19.61	883	164	18.57
Jul-09	1551	296	19.08	962	210	21.83
Aug-09	1292	264	20.43	887	189	21.31
Sep-09	1472	271	18.41	931	194	20.84
Oct-09	1364	269	19.72	893	193	21.61
Nov-09	1297	227	17.50	811	171	21.09
Dec-09	1376	272	19.77	916	175	19.10
Jan-10	1169	219	18.73	738	129	17.48
Feb-10	1273	263	20.66	737	143	19.40
Mar-10	1577	280	17.76	877	185	21.09

Note: Cases included are NOS codes 440 through 446.

Table A.3. Monthly Rate of Removal by State Type in Securities Cases, June 2006-May 2007 and June 2009-March 2010

	Notice-Pleading States			Fact-Pleading States		
Month-Year	Filed in Federal Court	Removed to Federal Court	Removal Rate	Filed in Federal Court	Removed to Federal Court	Removal Rate
Jun-06	58	6	10.34	43	7	16.28
Jul-06	54	4	7.41	31	5	16.13
Aug-06	62	6	9.68	40	2	5.00
Sep-06	51	5	9.80	31	1	3.23
Oct-06	47	3	6.38	39	0	0.00
Nov-06	58	4	6.90	34	9	26.47
Dec-06	48	3	6.25	26	6	23.08
Jan-07	68	2	2.94	23	4	17.39
Feb-07	56	3	5.36	38	2	5.26
Mar-07	54	4	7.41	41	2	4.88
Apr-07	41	1	2.44	40	9	22.50
May-07	55	4	7.27	39	2	5.13
Jun-09	56	7	12.50	40	3	7.50
Jul-09	67	8	11.94	37	2	5.41
Aug-09	57	2	3.51	39	3	7.69
Sep-09	66	5	7.58	37	5	13.51
Oct-09	67	3	4.48	30	10	33.33
Nov-09	50	6	12.00	37	2	5.41
Dec-09	53	9	16.98	28	3	10.71
Jan-10	35	8	22.86	151	1	0.66
Feb-10	33	8	24.24	10	3	30.00
Mar-10	75	2	2.67	36	2	5.56

Note: Cases included are NOS code 850.