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Resolving the Bahr-Hebert-Franklin Paradox: Considerations for Applying Twombly and Its Progeny to Pleading and Rule 12 Motion Practice in Minnesota's State Courts

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RESOLVING THE *BAHR-HEBERT-FRANKLIN* PARADOX: CONSIDERATIONS FOR APPLYING *TWOMBLY* AND ITS PROGENY TO PLEADING AND RULE 12 MOTION PRACTICE IN MINNESOTA'S STATE COURTS

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I. INTRODUCTION

Under both the Federal Rules of Civil Procedure and the Minnesota Rules of Civil Procedure, every claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."[1] The notion behind this rule is that "[t]he complaint should put the defendant on notice of the claims against him."[2] Exactly how much substantive notice does Rule 8 require that a defendant have?[3]

According to a literal reading of the rule of law in *Conley v. Gibson*,[4] and the Minnesota Supreme Court's decision in *Northern States Power Co. v. Franklin*,[5] Rule 8 does not require much substantive notice at all. In *Conley*, the High Court held the following:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule 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 him to relief.[6]

Similarly, in *Franklin*, the Minnesota Supreme Court held: "A claim is sufficient against a motion to dismiss based on Rule [12.02(e)] if it is possible on any evidence which might be *produced*, consistent with the pleader's theory, to grant the relief demanded."[7] This liberal view of notice pleading limits the concept of "notice" to disclosing the theory of recovery,

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1 FED. R. CIV. P. 8(a)(2); MINN. R. CIV. P. 8.01.

2 Mumm v. Mornson, 708 N.W.2d 475, 481 (Minn. 2006) (citing L.K. v. Gregg, 425 N.W.2d 813, 819 (Minn. 1988)).

3 *See infra* Part II (explaining how courts interpret Rule 8).

4 Conley v. Gibson, 355 U.S. 41, 48 (1957).

5 N. States Power Co. v. Franklin, 122 N.W.2d 26, 29 (Minn. 1963).

6 *Conley*, 355 U.S. at 45–46 (emphasis added).

7 *Franklin*, 122 N.W.2d at 29 (emphasis added).

providing enough information to permit application of *res judicata*, and advising whether a jury or bench trial is required.[8]

Functionally, the *Conley* rule and the *Franklin* rule are synonymous.[9] Read literally, both rules describe the minimum standard of adequate pleading to govern a complaint's survival in terms of what the plaintiff can prove.[10] The discovery process, not the quality of a complaint's factual allegations, determines what the plaintiff ultimately might *prove* and what evidence the plaintiff ultimately might *produce*.[11] Therefore, literal application of both rules practically guarantees that a motion to dismiss for failure to state a claim will be denied if it challenges a complaint's factual substance.[12]

Federal pleading and Rule 12 motion jurisprudence changed in 2007 when the Supreme Court of the United States decided *Bell Atlantic Corp. v. Twombly*.[13] *Twombly* overruled *Conley* and redefined Fed. R. Civ. P. 8(a)(2) in a way that requires every claim for relief to contain a minimal level of factual substance in order to survive a motion to dismiss.[14] It held that a complaint must contain "enough facts to state a claim to relief that is plausible on its face."[15] Without defining "plausibility" in any exact terms, the Court said that this plausibility standard requires the complaint to allege "enough fact to raise a reasonable expectation that discovery will reveal" evidence of alleged wrongdoing.[16] Two years later, the High Court extended *Twombly* in *Ashcroft v. Iqbal*,[17] holding that the plausibility standard applies to claims for relief in all federal civil actions.[18] Both decisions hold that a complaint consisting of nothing more than legal conclusions or a formulaic recitation of a claim's elements will not suffice to state an actionable claim for relief.[19] Thus, under Fed. R. Civ. P. 8(a)(2), every claim for relief must provide a minimal level of factual substance showing that the pleader is entitled to the demanded relief.[20]

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[8] *See id.*; Roberge v. Cambridge Coop. Creamery Co., 67 N.W.2d 400, 402 (Minn. 1954) (citing 2 MOORE, MOORE'S FEDERAL PRACTICE ¶ 8.13 (2d ed. 1953); 1 YOUNGQUIST & BLACIK, MINNESOTA RULES PRACTICE 193 (1953)).

[9] *Compare Conley*, 355 U.S. at 45–46 (holding 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 him to relief") *with Franklin*, 122 N.W.2d at 29 (holding that "a claim is sufficient against a motion to dismiss . . . if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded").

[10] *See Conley*, 355 U.S. at 45–46; *Franklin*, 122 N.W.2d at 29.

[11] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

[12] *See Conley*, 355 U.S. at 45–46; *Franklin*, 122 N.W.2d at 29.

[13] *Twombly*, 550 U.S. at 570.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 556.

[17] Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009).

[18] *Id.*

[19] *See id.* at 678; *Twombly*, 550 U.S. at 555.

[20] *See* FED. R. CIV. P. 8(a)(2); *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

Twombly and its progeny represent a profound change in pleading and Rule 12 motion jurisprudence which is impacting pleading and quite possibly Rule 12 motion practice in Minnesota's state courts.[21] Within the past four years, the Minnesota Supreme Court has cited *Twombly* twice for the proposition that legal conclusions do not bind courts charged with deciding whether a complaint states an actionable claim for relief.[22] Yet the Minnesota Supreme Court has yet to explain what effect, if any, *Twombly's* prohibition against pleading by legal conclusion has on the *Franklin* rule which, literally read, determines pleading sufficiency based on what the pleader ultimately might prove.[23] In *Hebert v. City of Fifty Lakes*, the Minnesota Supreme Court relied on *Franklin* to uphold the validity of a complaint alleging a counterclaim for continuing trespass, noting that the complaints in both cases contained factual allegations sufficient to state actionable claims under that theory.[24] In *Bahr v. Capella University*, the Minnesota Supreme Court cited the *Franklin* rule as an accepted pleading standard.[25] In the same paragraph it cited *Hebert* and *Twombly* for the proposition that allegations consisting of mere legal conclusions do not state actionable claims.[26] Yet *Bahr* also does not explain what effect, if any, *Hebert* (and *Twombly*) have on the *Franklin* rule.[27] *Bahr* analyzed the complaint at issue in terms of whether its facts stated a plausible claim without expressly adopting *Twombly's* plausibility standard.[28]

Consequently, these three decisions, *Bahr*, *Hebert*, and *Franklin*, present a paradox that must be resolved.[29] On one hand, *Bahr* and *Hebert* essentially say that actionable claims for relief require factual substance in order to survive a motion to dismiss for failure to state a claim.[30] On the other hand, the *Franklin* rule, literally read, makes the viability of a claim depend on what the plaintiff ultimately might prove, as opposed to the

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[21] *See Twombly*, 550 U.S. at 555; Bahr v. Capella Univ., 788 N.W.2d 76, 80 (Minn. 2010); Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 235 (Minn. 2008); Lorix v. Crompton, Corp., 736 N.W.2d 619, 631 n.3 (Minn. 2007).

[22] *See Bahr*, 788 N.W.2d at 80; *Hebert*, 744 N.W.2d at 235. The Minnesota Supreme Court originally cited *Twombly* in *Lorix v. Crompton, Corp.*, but only to observe that the High Court "recently opined on the minimum factual allegations that must be pleaded to support a claim of restraint of trade under section 1 of the Sherman Act." 736 N.W.2d 619, 631 n.3 (Minn. 2007).

[23] N. States Power Co. v. Franklin, 122 N.W.2d 26, 29 (Minn. 1963).

[24] *See Hebert*, 744 N.W.2d at 235–36.

[25] *See Bahr*, 788 N.W.2d at 80 (citing *Franklin*, 122 N.W.2d at 29).

[26] *See id.* (citing *Twombly*, 550 U.S. at 555; *Hebert*, 744 N.W.2d at 235).

[27] *See Bahr*, 788 N.W.2d at 80.

[28] *See id.* at 82–85. *See also infra* text accompanying notes 294–297.

[29] *See infra* Part IV (explaining the *Bahr-Hebert-Franklin* paradox and its solution).

[30] *See infra* Part IV.B (describing how *Bahr* perpetuated the paradox *Hebert* created).

quality of the facts alleged.[31] This contradiction is the *Bahr-Hebert-Franklin* paradox.[32]

The Minnesota Supreme Court needs to resolve this paradox by formally adopting *Twombly's* plausibility standard.[33] Adopting that standard raises important considerations addressed in this essay.[34] Does the plausibility standard change the concept of notice pleading in unacceptable ways?[35] If claims for relief must allege plausible facts, how should courts apply the plausibility standard?[36] Should the plausibility standard apply to affirmative defenses as well as claims for relief?[37]

As a template for addressing these considerations, it is necessary to examine Fed. R. Civ. P. 8(a)(2), its interpretation under *Conley*, its transformation in *Twombly*, and its development and extension in *Iqbal*.[38] This examination reveals that the plausibility standard is but a larger, thematic trend in the way the United States Supreme Court views the function and purpose of dispositive motions.[39] Against this backdrop we will examine how formally adopting the plausibility standard as the pleading requirement in Minnesota state courts resolves the *Bahr-Hebert-Franklin* paradox while accomplishing the over-arching purposes of the Minnesota Rules of Civil Procedure without diminishing the flexibility that modern pleading practice offers.[40]

II. HOW COURTS DEFINE A "CLAIM" FOR RELIEF DETERMINES THE EXTENT OF A PLEADER'S OBLIGATION UNDER RULE 8 WHEN STATING A CLAIM FOR RELIEF

Both Fed. R. Civ. P. 8(a)(2) and Minn. R. Civ. P. 8.01 require every "claim for relief" to contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."[41] How detailed the factual

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[31] *See infra* text accompanying notes 260–264 (stating the rule set out in *Franklin*).

[32] *See infra* Part IV (explaining the *Bahr-Hebert-Franklin* paradox).

[33] *See infra* Part IV.D (explaining how the plausibility standard solves the *Bahr-Hebert-Franklin* paradox).

[34] *See infra* Part IV.D (explaining how the plausibility standard solves the *Bahr-Hebert-Franklin* paradox).

[35] *See infra* Part IV.D (explaining how the plausibility standard solves the *Bahr-Hebert-Franklin* paradox).

[36] *See infra* Part IV.D (explaining how the plausibility standard solves the *Bahr-Hebert-Franklin* paradox).

[37] *See infra* Part IV.D (explaining how the plausibility standard solves the *Bahr-Hebert-Franklin* paradox).

[38] *See infra* Part II–III (explaining the differing interpretations of Rule 12 in *Conley*, *Twombly*, and *Iqbal*).

[39] *See infra* Part III.D (examining the plausibility standard).

[40] *See infra* Part IV (explaining how the plausibility standard solves the *Bahr-Hebert-Franklin* paradox).

[41] FED. R. CIV. P. 8(a)(2); MINN. R. CIV. P. 8.01.

allegations need to be depends on how one defines the word "claim."[42] Scholars and commentators have long debated what constitutes a "claim" for purposes of pleading.[43] *Twombly* simply reignited that debate.[44]

The Federal Rules of Civil Procedure were supposed to simplify pleading practice.[45] The common law pleader had to state facts according to the particular writ governing the case.[46] Parties alleged facts according to what the writ required as opposed to what the pleader actually believed to have happened.[47] Hence, common law pleading had more to do with keeping the case in court than providing real notice about what the claim involved.[48]

Code pleading developed to remedy this shortcoming by requiring claims for relief to allege the actual facts of a dispute while making pleading short and simple.[49] The Code required pleaders to provide a statement of "facts constituting a cause of action."[50] This requirement was supposed "to apprise the defendants of what the plaintiff relies upon and intends to prove."[51] Code pleading required the pleader "to set forth only the ultimate facts, free from evidentiary facts and conclusions of law."[52] Yet the distinction between ultimate facts, evidentiary facts, and legal conclusions often was unclear, differed only by degree, and rightfully earned criticism from commentators.[53] Justice William Mitchell aptly described the situation by stating the following:

> It is, of course, an elementary rule of pleading that facts, and not mere conclusions of law, are to be pleaded. But this rule does not limit the pleader to the statement of pure matters of

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[42] *See infra* text accompanying notes 64–65 (discussing how courts define the word claim in a broad and narrow sense).

[43] *See* 1848 N.Y. Field Code Laws ch. 379, § 142; JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 248 (2d ed. 1993); Walter W. Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416–19 (1921); Bernard C. Gavit, *Legal Conclusions*, 16 MINN. L. REV. 378 (1932); Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303 (1942); Carl C. Wheaton, *Manner of Stating Cause of Action*, 20 CORNELL L.Q. 185 (1935).

[44] *See* Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 10 (2008).

[45] *Id.*

[46] FRIEDENTHAL ET AL., *supra* note 43, at 248.

[47] *See id.*

[48] *See id.*

[49] *See id.*

[50] 1848 N.Y. Field Code Laws Ch. 379, § 142.

[51] Baker v. Habedank, 277 N.W. 925, 926 (Minn. 1938) (citing Dechter v. Nat'l Council, 153 N.W. 742 (Minn. 1915)).

[52] FRIEDENTHAL ET AL., *supra* note 43, at 249.

[53] *See id.* at 249 (citing CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 38 at 233–36 (2d ed. 1947); Walter W. Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416–19 (1921); Bernard C. Gavit, *Legal Conclusions*, 16 MINN. L. REV. 378 (1932); Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303 (1942); Carl C. Wheaton, *Manner of Stating Cause of Action*, 20 CORNELL L.Q. 185 (1935)).

> fact, unmixed with any matter of law. When a pleader alleges title to or ownership of property, or the execution of a deed in the usual form, these are not statements of pure fact. They are all conclusions from certain probative or evidential facts not stated. They are in part conclusions of law and in part statements of facts, or rather the ultimate facts drawn from these probative or evidential facts not stated; yet these forms are universally held to be good pleading.[54]

The difficulty posed by the seemingly illusive distinction between ultimate facts, evidentiary facts, and legal conclusions often "left claimants mired in the same highly technical attention to detail present under the common law."[55]

The Federal Rules of Civil Procedure remedied this problem in the federal courts.[56] Rule 8(a)(2) merely requires every claim for relief to contain "a short and plain statement of the claim" showing the pleader's entitlement to relief without prescribing a particular form for pleading.[57] If a claim for relief fails to comply with that rule, Rule 12 permits the district court to dismiss it as one failing to state a claim for which relief can be granted.[58] The Minnesota Rules of Civil Procedure mirror the Federal Rules in this regard.[59]

In order to understand exactly what Rule 8 requires of pleaders stating claims for relief, it is necessary to understand what the word "claim" means.[60] Neither the Federal Rules of Civil Procedure nor the Minnesota Rules of Civil Procedure define the word "claim" as used in Rule 8(a)(2) or Rule 8.01.[61] The Minnesota Supreme Court has equated the word "claim" with the phrase "cause of action" by stating: "A cause of action, often referred to as a *claim*, is '[a] group of operative facts giving rise to one or

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[54] Clark v. Chi., Milwaukee & St. Paul Ry. Co., 9 N.W. 75, 71 (Minn. 1881).

[55] Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL'Y 1107, 1116 (2010).

[56] Simplifying the hyper-technicality of code pleading is but one problem the Federal Rules of Civil Procedure remedied. Before Congress passed the Rules Enabling Act in 1933, *see* 28 U.S.C. § 2071 (2012), the Conformity Act of 1872 governed federal district court procedure. *See* 17 Stat. 197; R.S. 914; 28 U.S.C. § 724 (1872). The latter legislation "required federal courts to apply the procedural law of the forum State in nonequity cases." Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501 (2001). Thus, to the extent state courts disagreed about what constituted appropriate pleading under the code, that disagreement would have carried over into the federal courts.

[57] FED. R. CIV. P. 8(a)(2).

[58] *See* FED. R. CIV. P. 12(b)(6).

[59] *See* MINN. R. CIV. P. 8.01; MINN. R. CIV. P. 12.02(e).

[60] *See* FED. R. CIV. P. 8(a)(2).

[61] *See* FED R. CIV. P. 8(a)(2); MINN. R. CIV. P. 801.

more bases for suing' or '[the] legal theory of a lawsuit.'"[62] Accordingly, one can understand the word "claim" in both a broad and a narrow sense.[63] In the narrow sense, a "claim" refers to a group of operative facts giving rise to one or more theories of legal liability.[64] In the broad sense, a "claim" means the legal theory alleged, such as negligence, strict liability, premises liability, etc.[65]

What Rule 8 requires of pleaders stating claims for relief depends upon whether the court understands the word "claim" in the narrow or the broad sense.[66] If the court understands the word "claim" narrowly, Rule 8 requires pleaders stating claims for relief "to allege, if only in sketchy terms, the existence of circumstances that they had reason to believe were true and that, if true, would entitle them to relief of some kind."[67] It requires the following:

> [A] detailed narrative in ordinary language—one setting forth all elements of a claim under applicable substantive law. That is, the key would have been not that the complaint was to be above all "short," but that it was to be above all "plain" and showing entitlement to relief as a matter of law.[68]

Charles E. Clark, the principal architect of the Federal Rules of Civil Procedure, seemed to take that view when he wrote: "The prevailing idea at the present time is that notice should be given of all the operative facts going to make up the plaintiff's cause of action, except, of course, those which are presumed or may properly come from the other side."[69] Professor James Wm. Moore put it this way:

> Perhaps it is not entirely accurate to say, as one court has said, that "it is only necessary to state a claim in the pleadings and not a cause of action." While the Rules have substituted "claim" or "claim for relief" in lieu of the older

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[62] Martin v. City of Rochester, 642 N.W.2d 1, 9 (Minn. 2002) (emphasis added) (quoting BLACK'S LAW DICTIONARY 214 (7th ed. 1999)).

[63] *See id.*

[64] *See id.*

[65] *See id.*

[66] *See infra* text accompanying notes 67–79 (explaining the various interpretations court interpret the word claim).

[67] FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 3.6, at 147 (4th ed. 1992).

[68] Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 9 (2008) (citing Geoffrey C. Hazard, Jr., *From Whom No Secrets are Hid*, 76 TEX. L. REV. 1665, 1685 (1998)).

[69] CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 2, at 240 (2d ed. 1947).

> and troublesome term "cause of action," the pleading must still state a "cause of action" in the sense that it must show "that the pleader is entitled to relief." It is not enough to indicate merely that the plaintiff has a grievance. Sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is asserting, and can see that there is some legal basis for recovery.[70]

Similarly, the United States District Court for the District of Hawaii observed the following:

> [I]t seems to be the purpose of Rule 8 to relieve the pleader from the niceties of the dotted i and the crossed t and the uncertainties of distinguishing in advance between evidentiary and ultimate facts, while still requiring, in a practical and sensible way, that he set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery.[71]

Understanding the word "claim" narrowly obligates the pleader to allege facts with sufficient clarity and heft to allow the court and responding parties reasonably to infer the liability theories stated from the facts alleged.[72] A claim for relief that fails to contain such factual allegations would merit dismissal as failing to state a claim for which relief could be granted.[73]

Less of a pleader is required under Rule 8 when stating a claim for relief if the court understands the word "claim" broadly.[74] In that situation, the facts alleged may not have to suggest any particular liability theory at all.[75] Even the most general statement of operative facts would suffice to state an actionable claim for relief.[76] Legal conclusions without factual enhancement could suffice.[77] The discovery process would determine whether the legal theories raised ultimately were actionable.[78] If discovery failed to reveal any facts in the form of evidence that might sustain the

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[70] 2A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 8.13, at 1704–05 (2d ed. 1975) (footnotes omitted) (quoting Mortensen v. Chi., Great W. Ry., 2 F.R.D. 121, 121 (S.D. Iowa 1941)).

[71] Daves v. Hawaiian Dredging Co., 114 F.Supp. 643, 645 (D. Haw. 1953).

[72] *See id.*

[73] *See* FED. R. CIV. P. 12(b)(6).

[74] *See* Martin v. City of Rochester, 642 N.W.2d 1, 9 (Minn. 2002) (emphasis added) (quoting BLACK'S LAW DICTIONARY 214 (7th ed. 1999)).

[75] *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (defining "claim" in a broad sense); N. States Power Co. v. Franklin, 122 N.W.2d 26, 29 (Minn. 1963) (interpreting the word "claim" broadly).

[76] *See Conley*, 355 U.S. at 45–46; *Franklin*, 122 N.W.2d at 29.

[77] *See Conley*, 355 U.S. at 45–46; *Franklin*, 122 N.W.2d at 29.

[78] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

liability theories alleged, then summary judgment, not dismissal under Rule 12, would dispose of the claim.[79]

The United States Supreme Court evidently understood the word "claim" broadly when it stated the *Conley* rule.[80] There it held the following:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule 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 him to relief.[81]

The Minnesota Supreme Court evidently shared that understanding of the word "claim" when it stated the *Franklin* rule, Minnesota's counterpart to *Conley*.[82] There it held: "A claim is sufficient against a motion to dismiss based on Rule [12.02(e)] if it is possible on any *evidence which might be produced*, consistent with the pleader's theory, to grant the relief demanded." [83] The Minnesota Supreme Court apparently had the same understanding of the word "claim" when it decided *First National Bank v. Olson*, where it followed a liberal interpretation of the rule stating that "there is no justification for dismissing a complaint for insufficiency *** * *** unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of *facts which could be proved* in support of the claim."[84]

Thus, under *Conley*, *Franklin*, and *Olson*, a court would not use Rule 12 to dismiss an action merely because the complaint's factual allegations were vague, unclear, or lacking. [85] The Minnesota Supreme Court acknowledged this point in *Franklin*, saying that "a motion to dismiss based on [Rule 12(b)(6) or 12.02(e)] serves an extremely limited function."[86] About the only way the defendant could prevail on such a motion would be to show that the plaintiff was incapable of *proving* facts consistent with the facts and theories alleged.[87] A neutral set of operative facts, such as facts failing to suggest any kind of actual wrongdoing, would never fail to state a claim because of the possibility that discovery might uncover evidence of actual wrongdoing consistent with the legal theories conclusively alleged.[88] Thus,

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79 *See* FED. R. CIV. P. 12(b)(6).

80 *Conley*, 355 U.S. at 45–46.

81 *Id.* (emphasis added).

82 *Franklin*, 122 N.W.2d at 29.

83 *Id.* (emphasis added).

84 First Nat'l Bank of Henning v. Olson, 74 N.W.2d 123, 129 (Minn. 1955) (emphasis added) (quoting Dennis v. Vill. of Tonka Bay, 151 F.2d 411, 412 (8th Cir. 1945)).

85 *See Conley*, 355 U.S. at 45–46; *Franklin*, 122 N.W.2d at 29; *Olson*, 74 N.W.2d at 129.

86 *Franklin*, 122 N.W.2d at 29.

87 *Id.*

88 *See id.*

under Rule 12, motions to dismiss perform a very limited role when courts understand the word "claim" broadly.[89]

Interestingly, the result in *Conley* would have been the same whether the High Court understood the word "claim" broadly or narrowly.[90] In *Conley*, African-American railroad workers sued under the Railroad Labor Act ("RLA"), claiming their union violated the RLA by failing to provide them with the same protection given to white employees.[91] Specifically, the African-American workers alleged that their union failed to represent their interests when the railroad supposedly eliminated their jobs and subsequently filled the jobs ostensibly eliminated with white employees.[92] Such operative facts clearly infer an RLA violation, even if one understands the word "claim" narrowly.[93] Understanding the word "claim" broadly, as the High Court did in *Conley*, simply means that many other claims framed with even less factual detail could avoid a motion to dismiss for failure to state a claim.[94]

Similar observations follow from the Minnesota Supreme Court's decision in *Franklin*.[95] That action involved the issue of whether a counterclaim alleging a continuing trespass stated a claim for which relief could be granted.[96] It determined that the counterclaim stated an actionable trespass claim, not because the pleader characterized the claim as one for continuing trespass, but because the pleader had alleged facts sufficient to permit the district court and the parties to infer that a continuing trespass had occurred.[97] Like the United States Supreme Court's decision in *Conley*, the Minnesota Supreme Court in *Franklin* articulated a rule governing the sufficiency of pleadings and Rule 12 motion practice that was broader than necessary to accomplish the result in each case, essentially because each Court understood the word "claim" as used in Rule 8 broadly.[98]

Why these Courts took the broad view of the word "claim" is a mystery.[99] In *Conley*, neither the briefing nor the oral arguments focused heavily on the Rule 8 pleading requirements.[100] Nothing in the *Franklin* opinion indicated that the parties had any fundamental disagreement about

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89 *See id.*

90 *See infra* text accompanying notes 91–93 (explaining how interpreting the word claim differently would not have changed the result in *Conley*).

91 *See* Conley v. Gibson, 355 U.S. 41, 42–43 (1957).

92 *See id.*

93 *See id.*

94 *See* FED. R. CIV. P. 8(a)(2).

95 *See* N. States Power Co. v. Franklin, 122 N.W.2d 26, 28 (Minn. 1963).

96 *See id.*

97 *See id.* at 30–31.

98 *See id.*; Conley, 355 U.S. at 46–48.

99 The courts did not offer an explanation as to why they interpreted "claim" broadly.

100 *See* Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and* Conley v. Gibson, 52 HOW. L.J. 73, 89–92 (2008) (discussing the parties' briefs and oral arguments in *Conley*).

what Minn. R. Civ. P. 8.01 required of pleaders.[101] This mystery is, and perhaps always shall remain, a curiosity for historians and legal scholars.

III. THE PLAUSIBILITY STANDARD REPRESENTS A SHIFT FROM THE BROAD TO THE NARROW DEFINITION OF A "CLAIM" FOR RELIEF, MAKING RULE 12 MOTIONS AN INTEGRAL PART OF FEDERAL CIVIL PROCEDURE

Conley's "no set of facts" rule guaranteed that for the next fifty years courts and lawyers understood the word "claim" as used in Rule 8 broadly and the concept of notice pleading as liberally permitting claims for relief to provide notice of the claim in only the most general terms.[102] As a result, courts and lawyers generally paid little attention to the factual substance underlying claims for relief.[103] That state of affairs changed abruptly when the Supreme Court of the United States decided *Twombly* in 2007, holding that claims needed to be substantively (as well as formally) sufficient by alleging facts giving rise to a plausible claim for relief.[104] Two years later the High Court decided *Iqbal*, emphasizing that *Twombly's* plausibility standard applied to claims for relief in all civil actions.[105] Both of these landmark decisions show that the plausibility standard rests on the narrow definition of the word "claim."[106]

A. Twombly *Changed Federal Pleading Practice by Imposing a Substantive Notice Requirement on Pleading.*

Twombly involved a putative class action lawsuit alleging a violation of § 1 of the Sherman Antitrust Act.[107] That provision forbids the formation of a "contract, combination . . . or conspiracy, in restraint of trade or commerce."[108] The plaintiffs were consumers of telecommunication services who alleged that incumbent local exchange carriers ("ILECs") engaged in parallel conduct whereby they agreed not to compete with one another.[109] This conduct allegedly had the effect of preventing competition by competing local exchange carriers ("CLECs").[110] But the complaint never actually alleged facts suggesting that the ILECs actually formed a contract,

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101 *See Franklin*, 122 N.W.2d at 28.

102 *See Conley*, 355 U.S. at 45–46. The United States Supreme Court's decision in *Conley* became binding precedent for other courts to follow. The *Twombly* decision abruptly changed the pleading standard in 2007.

103 *See Conley*, 355 U.S. at 45–46 (stating the "no set of facts" rule).

104 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562–63 (2007).

105 Ashcroft v. Iqbal, 556 U.S. 662, 678–81 (2009).

106 *See id.*; *Twombly*, 550 U.S. at 562–63.

107 *Twombly*, 550 U.S. at 548.

108 *Id.* (quoting 15 U.S.C. § 1 (2004)).

109 *Id.* at 551.

110 *Id.*

combination, or conspiracy to restrain trade by refusing to compete in one another's markets as CLECs.[111]

The district court dismissed the action pursuant to Fed. R. Civ. P. 12(b)(6) because "the behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory."[112] It determined that the complaint failed to raise the inference that the ILECs' acts resulted from a conspiracy because the plaintiffs failed to allege facts which suggested that such conduct was contrary to the ILECs' apparent economic interest.[113]

The Second Circuit reversed, holding that the district court used the wrong standard to test the legal sufficiency of the plaintiffs' complaint.[114] Although it acknowledged that the plaintiffs had to plead facts which "include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss," the Second Circuit ruled that "a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence" in order "to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim."[115]

The United States Supreme Court reversed the Second Circuit, holding that a complaint must allege "enough facts to state a claim to relief that is plausible on its face."[116] Justice Souter, writing for the majority, noted that parallel business behavior or even conscious parallelism is not unlawful and does not establish a conspiracy to restrain trade.[117] Evidence indicative of nothing more than parallel conduct would not entitle a plaintiff alleging a Sherman Act violation to a directed verdict.[118] Nor would such evidence be legally sufficient to avoid summary judgment by ruling out the possibility that the defendants were acting independently as opposed to being involved in a contract, combination, or conspiracy to restrain trade.[119]

From this, the Court reasoned, it followed that a complaint alleging a violation of the Sherman Antitrust Act had to allege more than parallel conduct to state a claim for which relief could be granted.[120] Under Rule 8(a)(2) the complaint not only must amount to a short and plain statement of the claim, its factual allegations also must provide the grounds, or basis, for the pleader's entitlement to relief.[121] The complaint must do more than provide mere labels, conclusions, and a formulaic recitation of the cause of

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111 *Id.* at 552.
112 *Id.*
113 *Twombly*, 550 U.S. at 552.
114 *Id.* at 553.
115 *Id.*
116 *Id.* at 570.
117 *See id.* at 553–54.
118 *Id.* at 554.
119 *See Twombly,* 550 U.S. at 554.
120 *See id.* at 554–57.
121 *Id.* at 555.

action's elements.[122] Its factual allegations "must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true . . . ."[123] The pleader's entitlement to relief must be facially plausible, meaning that, within the context of a Sherman Antitrust claim, the complaint must contain "enough factual matter (taken as true) to suggest that an agreement was made."[124]

In imposing factual plausibility as a pleading requirement under Rule 8, the Court emphasized that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [an] illegal agreement."[125] Whether a plaintiff can actually prove the existence of such an agreement is immaterial to deciding whether the complaint states a plausible set of facts.[126] The plausibility standard, held the Court, requires the pleader to allege facts suggestive of, not conduct merely consistent with, unlawful activity.[127]

The Court's imposition of this plausibility standard on pleading clearly was motivated in large part by the expense of discovery in antitrust cases.[128] The Court quoted its decision in *Associated General Contractors of California, Inc. v. Carpenters*, noting that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."[129] That consideration was particularly strong in *Twombly*, where the "plaintiffs represent[ed] a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms . . . ."[130]

Yet *Twombly's* plausibility standard appears motivated by more than simply the desire to conserve costs.[131] The High Court viewed the plausibility standard as essential to a court's ability to control the course and scope of litigation effectively.[132] Justice Souter wrote:

> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case

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[122] *Id.*

[123] *Id.* (citing 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §1216, at 235–36 (3d ed. 2004)).

[124] *Id.* at 556.

[125] *Twombly*, 550 U.S. at 556.

[126] *See id.*

[127] *Id.* at 557.

[128] *See id.* at 558.

[129] *Id.* (quoting Ass'n Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n. 17 (1983)).

[130] *Id.* at 559

[131] *See Twombly,* 550 U.S. at 558–59.

[132] *See id.*

> management," given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries," the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.[133]

Hence, the plausibility standard recognizes, especially in large and complicated cases, the need for pleadings to define the issues so that judges and lawyers can perform their jobs effectively and efficiently.[134]

After imposing the plausibility standard, the High Court observed that "a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard."[135] It then retired the "no set of facts rule," stating that "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[136] *Twombly* held that the *Conley* rule actually "described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."[137]

Thus, *Twombly* understands the term "claim" narrowly and is a landmark decision for at least three reasons.[138] First, it requires pleaders to support claims for relief with factual substance in addition to providing formal notice of the legal theories advanced.[139] Second, it requires pleaders to do more than state legal conclusions or recite a claim's elements by alleging facts, taken as true, which plausibly suggest wrongdoing under one or more legal theories.[140] Third, claims failing to allege plausible facts are subject to dismissal under Fed. R. Civ. P. 12(b)(6), thereby enabling courts to control discovery costs, particularly in large, class-action cases.[141]

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133 *Id*. at 559 (citations omitted).
134 *See id.*
135 *Id.* at 562 (citations omitted).
136 *Id.* at 563.
137 *Twombly*, 550 U.S. at 563.
138 *See infra* text accompanying notes 139–141 (stating the three reasons that make *Twombly* a landmark case).
139 *See Twombly*, 550 U.S. at 555.
140 *See id.* at 556.
141 *See id.* at 555–58.

B. Twombly *Raised Interesting Issues While Transforming the Landscape of Federal Pleading Practice.*

Although *Twombly* transformed the landscape of federal pleading practice by construing the word "claim" as used in Fed. R. Civ. P. 8(a)(2) narrowly, it also raised some interesting questions.[142] Did *Twombly* signal a return to code pleading?[143] The High Court evidently did not think so.[144] During the very same term it also decided *Erickson v. Pardus*.[145] That case involved a pro se inmate's § 1983 claim alleging that Colorado state prison officials violated his Eighth Amendment right to be free from cruel and unusual punishment when they commenced, then wrongfully terminated, medical treatment for hepatitis C.[146] The United States Court of Appeals for the Tenth Circuit deemed these allegations "conclusory" under *Twombly* and affirmed the district court's dismissal of Erickson's complaint.[147] The Supreme Court reversed the Tenth Circuit, noting that Rule 8(a)(2) merely requires a short and plain statement of the claim showing the pleader's entitlement to relief and that the pleading of specific facts is unnecessary.[148] The complaint alleged that a prison doctor's decision to remove Erickson from prescribed hepatitis C medication was endangering his life.[149] "This alone," held the Court, "was enough to satisfy Rule 8(a)(2)."[150]

Does *Twombly's* plausibility standard apply to claims for relief made by pro se parties?[151] In *Erickson* the High Court observed that pro se complaints, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."[152] It also quoted *Twombly* and *Conley*, saying that Rule 8(a)(2) requires the pleader to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[153] Although the High Court does not say it expressly in *Erickson*, "fair notice" in the post-*Twombly* world requires the complaint to contain "enough facts to state a claim to relief that is plausible on its face."[154] It logically follows that a pro se complaint also must comply with *Twombly's* plausibility standard, even though federal courts will apply the standard to pro se parties deferentially.[155]

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142 *Id.*
143 *See id.*
144 *See id.*; Erickson v. Pardus, 551 U.S. 89, 94 (2007).
145 *Erickson*, 551 U.S. at 94 (per curiam).
146 *Id.* at 89–90.
147 *Id.* at 90.
148 *Id.* at 93.
149 *Id.* at 94.
150 *Id.*
151 *See infra* text accompanying notes 152–155 (explaining why the *Twombly* standard applies to pro se parties).
152 *Erickson*, 551 U.S. at 94 (citing Estelle v. Gamble, 429 U.S. 97, 106 (1976)).
153 Conley v. Gibson, 355 U.S. 41, 47 (1957).
154 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (1955).
155 *Erickson*, 551 U.S. at 94 (citing Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

After *Twombly*, it was unclear whether the plausibility standard would apply to all civil cases, just complex cases involving burdensome discovery, or just antitrust cases.[156] Also unclear was the degree to which the plausibility standard affected a pleader's obligation under Rule 8(a)(2).[157] The United States Supreme Court addressed these questions directly and indirectly two years later in *Ashcroft v. Iqbal*.[158]

C. **Iqbal** *Addressed the Issues* **Twombly** *Raised by Applying the Plausibility Standard to All Civil Cases in Federal Court.*

Iqbal arose from a *Bivens* action against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation ("FBI").[159] Javaid Iqbal, a Muslim Pakistani citizen, claimed the government deprived him of various constitutional protections afforded by the First and Fifth Amendments during his detention as a person of high interest under harsh conditions at the Metropolitan Detention Center in Brooklyn following the September 11 terrorist attacks.[160] He alleged that the FBI arrested and detained thousands of Arab Muslim men as part of its investigation into those attacks during the ensuing months.[161] The complaint alleged that many of those men, including Iqbal, were designated as persons of high interest solely because of their race, religion, and national origin.[162] According to the complaint, Ashcroft and Mueller approved a policy of holding these detainees in highly restrictive conditions until the FBI cleared them of involvement in terrorism.[163] Iqbal claimed that prison staff subjected him to inhumane living conditions, failed to provide him with adequate food, brutally beat him on two occasions, denied him medical care, and subjected him to daily strip and body-cavity searches.[164] He also claimed that prison staff interfered with his prayers, confiscated his Koran, and refused to allow him to attend Friday prayer services.[165]

The defendants filed motions to dismiss on a variety of grounds, including qualified immunity.[166] Their qualified immunity arguments fell into four broad categories: (1) the plaintiffs failed to allege violations of a clearly established right, (2) the plaintiffs failed to allege sufficient personal

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156 *See Twombly*, 550 U.S. at 544.
157 *See id.*
158 *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009).
159 *See* Elmaghraby v. Ashcroft, No. 04 CV 01809, 2005 U.S. Dist. LEXIS 21434, at *4–5 (E.D.N.Y. Sept. 27, 2005).
160 *See* Iqbal v. Hasty, 490 F.3d 143, 147–49 (2d Cir. 2007).
161 *Id.* at 148.
162 *Id.*
163 *Id.*
164 *Id.* at 148–49.
165 *Id.* at 149.
166 *Iqbal*, 490 F.3d at 150.

involvement by the defendants in the challenged actions, (3) the plaintiffs' allegations were too conclusory to overcome a qualified immunity defense, and (4) the defendants' actions were objectively reasonable.[167] The United States District Court for the Eastern District of New York denied most of the motions to dismiss, including those made on qualified immunity grounds.[168] The defendants appealed from that decision on an interlocutory basis.[169]

On appeal before the United States Court of Appeals for the Second Circuit, the parties disputed the extent to which a plaintiff must plead specific facts to overcome a qualified immunity defense at the motion-to-dismiss stage.[170] After discussing four Supreme Court cases it characterized as providing "not readily harmonized" guidance,[171] the Second Circuit observed that *Twombly* created "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings . . . ."[172] It noted that some statements in *Twombly* suggested that a new and heightened pleading standard be applied universally while other statements suggested that *Twombly's* holding had a more limited application.[173] Ultimately, the Second Circuit determined that *Twombly* did not require a universal, heightened pleading standard but "a flexible 'plausibility standard,' which obligates a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible."[174] After conducting a detailed analysis of Iqbal's various claims under this "flexible" standard, the Second Circuit affirmed the district court's denial of the defendants' motions to dismiss with limited exception.[175] In a separate concurring opinion, the Honorable Jose A. Cabranes invited the Supreme Court at the earliest opportunity to reconsider some of its "less than crystal clear" precedent concerning pleading.[176]

The High Court accepted that invitation by accepting review of the case and using it as an opportunity to reverse the Second Circuit.[177] Justice Kennedy, writing for the majority, noted that a *Bivens* action within the context of First and Fifth Amendment violations requires a plaintiff to plead and prove that the defendant acted with a discriminatory purpose.[178] The Court noted that such purposeful discrimination "requires more than 'intent

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167 *Id.* at 151.
168 *See id.* at 151–52.
169 *Id.* at 147.
170 *Id.* at 153.
171 *Id.* at 153–54.
172 *Iqbal*, 490 F.3d at 155.
173 *See id.* at 155–57.
174 *Id.* at 157–58.
175 *Id.* at 177–78.
176 *See id.* at 178–79.
177 *See* Ashcroft v. Iqbal, 556 U.S. 662, 687 (2009).
178 *Id.* at 676 (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 540–41 (1993); Washington v. Davis, 426 U.S. 229, 240 (1976)).

as volition or intent as awareness of consequences.'"[179] Rather, it requires pleading and proof that an official took "a course of action 'because of', not merely 'in spite of', [the action's] adverse effects upon an identifiable group.[180] The Court reasoned that,

> to state a claim based on a violation of a clearly established right, [Iqbal had to] plead sufficient factual matter to show that [officials] adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.[181]

Turning to *Iqbal*'s complaint, the Court observed that *Twombly* required courts to employ a "two-pronged approach" when deciding whether a complaint fails to state a claim for which relief can be granted.[182] First, although courts must accept as true all facts alleged, legal conclusions are not entitled to the presumption of truth.[183] Legal conclusions include "[t]hreadbare recitals of the elements of a cause of action," which *Twombly* referred to as "legal conclusion couched as a factional allegation."[184] Second, the pleaded facts must permit the court to infer more than the mere possibility of misconduct.[185] Although the determination of whether a complaint states a plausible claim for relief is a context-specific task requiring a court to draw upon judicial experience and common sense, the facts alleged must show the pleader is entitled to the relief sought.[186]

The Court then demonstrated how this two-pronged approach operated when applied to Iqbal's complaint.[187] It began by identifying and isolating the allegations that amounted to mere legal conclusions.[188] The Court observed:

> Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The complaint alleges that Ashcroft was the "principal architect" of this invidious

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179 *Id.* (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).
180 *Id.* at 676–77 (alteration in original) (citing *Feeney*, 442 U.S. at 279).
181 *Id.* at 677.
182 *See id.* at 679.
183 *Iqbal*, 556 U.S. at 678.
184 *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555 (1955)).
185 *Id*. at 678–79.
186 *Id.* at 679.
187 *Id.* at 680–84.
188 *Id.* at 680–81.

> policy, and that Mueller was "instrumental" in adopting and executing it.[189]

The Court went on to hold that "[t]hese bare assertions amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim . . . ." because they merely accused federal officials of adopting a policy because of its discriminatory effect upon an identifiable group of people.[190]

Having identified and isolated the complaint's conclusory allegations, the Court next considered whether the remaining factual allegations stated a plausible claim for relief.[191] What remained were Iqbal's allegations that FBI Director Mueller directed, and Attorney General Ashcroft approved the arrest and detention of thousands of Arab Muslim men as part of the government's September 11 investigation and that authorities held these detainees in highly restrictive conditions until cleared of wrongdoing.[192] The Court held that, although these allegations were consistent with a claim for purposeful discrimination, they did not plausibly establish that government officials acted with such a purpose.[193] Given the fact that nineteen Arab Muslim hijackers perpetrated the September 11 attacks, the Court reasoned that "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims."[194] It was just as likely, said the Court, that Ashcroft and Mueller oversaw a policy that was both lawful and justified by arresting and detaining persons having potential connections to the September 11 terrorists.[195]

The Court further noted that Iqbal would not be entitled to relief even if one could plausibly infer from the alleged facts that unconstitutional discrimination led to his arrest.[196] The complaint did not challenge the constitutionality of Iqbal's arrest or detention in the MDC.[197] Iqbal claimed that government officials violated his constitutional rights by implementing a policy of holding him and other "high interest" detainees.[198] Yet the complaint contained no factual allegations showing that government officials purposefully housed detainees due to their race, religion, and national

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189 *Iqbal*, 556 U.S. at 680–81 (alteration in original) (citations omitted).
190 *Id.* at 681 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555 (1955)).
191 *Id.*
192 *Id.*
193 *Id.*
194 *Id.* at 682.
195 *Iqbal*, 556 U.S. at 682.
196 *Id.*
197 *Id.*
198 *Id.*

origin.[199] "All it plausibly suggest[ed] [was] that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."[200] The Court held that, under these circumstances, the complaint did not comply with Rule 8 because the facts alleged failed to comply with the requirement that a pleader state facts showing entitlement to relief.[201]

Iqbal not only applies *Twombly* to *Bivens* actions involving qualified immunity defenses, it is a landmark decision in its own right for at least three reasons.[202] First, *Iqbal* rejected the argument that *Twombly* is limited to pleadings involving antitrust claims.[203] The High Court emphasized that *Twombly* "was based on our interpretation and application of Rule 8."[204] As such, *Twombly* "governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'"[205] Because the plausibility standard applies universally to all claims for relief within federal civil litigation, one can fairly infer that *Twombly* does not apply only to complex cases where the anticipated discovery costs are high. After *Iqbal*, lower courts also held that the plausibility standard applies even to pro se parties, although their pleadings receive more deferential treatment than those drafted by lawyers.[206]

Second, *Iqbal* reemphasizes that motions to dismiss for failure to state a claim do not turn on what facts the claimant might uncover through discovery.[207] This statement is especially true in the qualified immunity context, where the doctrine's basic thrust "is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'"[208] Nevertheless, *no claim* deficient under Rule 8 is entitled to reach the discovery phase.[209]

Third, although Rule 9 of the Federal Rules of Civil Procedure permits pleaders to allege some matters generally, such as discriminatory intent, it "does not give him license to evade the less rigid — though still

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[199] *Id.*

[200] *Id.* at 683.

[201] *Iqbal,* 556 U.S. at 683.

[202] *Id.* at 684; *See also infra* text accompanying notes 203–211 (stating why *Iqbal* is a landmark decision).

[203] *Iqbal*, 556 U.S. at 684.

[204] *Id.*

[205] *Id.* (quoting FED. R. CIV. P. 1).

[206] *See, e.g.*, Ventura-Vera v. Dewitt, No. 11-1130, 417 Fed.Appx. 591, 592 (8th Cir. June 7, 2011) (per curiam); Williams v. Dept. of Corr., No. 11 Civ. 1515 (SAS), 2011 U.S. Dist. LEXIS 100803, at *4 (S.D.N.Y. Sept. 7, 2011); Smith v. Virginia, No. 3:08cv800, 2009 U.S. Dist. LEXIS 60828, at *6 (E.D. Va. July 16, 2009) (citing Giarratano v. Johnson, 521 F.3d 298, 304 n.5 (4th Cir. 2008); Thigpen v. McDonnell, No. 06-7719, 273 Fed.Appx. 271, 273 (4th Cir. 2008)).

[207] *Iqbal*, 556 U.S. at 684–85.

[208] *Id.* at 685 (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991)).

[209] *Id.* at 685–86.

operative — strictures of Rule 8."[210] Because Rule 8 requires a pleader to allege facts showing entitlement to relief, it does not follow that the pleader may simply "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss."[211] The pleading must allege sufficient *factual matter*, accepted as true, showing the pleader's entitlement to the relief sought.[212] The fact that one may plead certain matters in general terms does not absolve the pleader of the need to allege facts suggestive of wrongdoing in accordance with the theories alleged.[213]

D. By Understanding a "Claim" for Relief Narrowly, the Plausibility Standard Makes Rule 12 Motions an Integral Part of Federal Civil Procedure.

The plausibility standard has altered the landscape of federal pleading practice by changing the understanding of a "claim" for relief under Rule 8.[214] *Twombly's* retirement of *Conley's* "no set of facts" rule shows that federal courts now view a "claim" for relief narrowly.[215] Hence, in federal court, a complaint consisting of conclusory statements married to legal theories will not survive a motion to dismiss for failure to state a claim.[216] Stating an actionable claim for relief in federal court now requires the pleader to state operative facts suggesting one or more legal theories.[217]

Yet the plausibility standard really is part of a larger shift in the way federal courts view dispositive motion practice.[218] That shift began in 1986, when the Supreme Court of the United States decided the *Celotex* trilogy, which altered the way lower courts viewed summary judgment as a means for disposing of litigation.[219] In *Celotex Corp. v. Catrett*, the United States Supreme Court made the following observation about summary judgment procedure under the federal rules:

> The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather

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[210] *Id.* at 686–87.
[211] *Id.* at 687.
[212] *See id.*
[213] *See Iqbal,* 556 U.S. at 687–88.
[214] *Compare* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561–63 (2007) *with* Conley v. Gibson, 355 U.S. 41, 45–46 (1957).
[215] *See Twombly*, 550 U.S. at 561–63.
[216] *See id.* at 555–56; Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009).
[217] *See Iqbal,* 556 U.S. at 678–79; *Twombly,* 550 U.S. at 555–56.
[218] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327–28 (1986).
[219] *Id.*

> as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."[220]

According to *Celotex*, federal district courts should have no inherent predisposition against summary judgment motions.[221] Summary judgment procedure simply is a mechanism allowing the district courts to dismiss cases without a trial when the undisputed material facts adduced through discovery fail to support one or more essential elements of a claim for relief.[222]

The plausibility standard now allows one to make a similar point about dispositive motion practice challenging the legal sufficiency of pleadings to state claims.[223] For over fifty years the Federal Rules of Civil Procedure have authorized motions for judgment on the pleadings upon a proper showing that the complaint fails to state a claim for which relief can be granted.[224] That circumstance exists when the complaint fails to contain sufficient factual matter, taken as true, stating a plausible claim for relief.[225] When evaluating a pleading's sufficiency to state a claim, the court's focus is not on whether the pleader ultimately can establish liability under the legal theories alleged.[226] Nor does the court's determination necessarily hinge on the number and detail of facts alleged.[227] Rather, the inquiry is whether the factual matter alleged is legally sufficient to suggest wrongdoing consistent with the stated legal theories.[228] The plausibility standard ensures that motions challenging the legal sufficiency of pleadings to state claims also are properly regarded, not as disfavored procedural shortcuts, but rather as integral parts of the Federal Rules as a whole, which are designed "to secure the just, speedy, and inexpensive determination of every action."[229]

Thus, the plausibility standard lends a thematic harmony to the manner in which federal courts interpret the Federal Rules of Civil Procedure in the area of dispositive motion practice.[230] Summary judgment procedure under Rule 56(c) challenges the non-moving party's entitlement to a trial by testing the legal sufficiency of the non-moving party's evidence to establish the essential elements of the claim.[231] A party lacking evidence legally

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220 *Id.* at 327 (quoting FED. R. CIV. P. 1).

221 *See id.*

222 *See id.*

223 Here we have in mind motions made pursuant to FED. R. CIV. P. 12(b)(6) and 12(c).

224 *See* FED. R. CIV. P. 12(b)(6) and 12(c).

225 *See* FED. R. CIV. P. 12(b)(6) and 12(c).

226 *See* FED. R. CIV. P. 8.

227 *See* FED. R. CIV. P. 8.

228 *See* FED. R. CIV. P. 8.

229 FED. R. CIV. P. 1.

230 *See* FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 12(c); FED. R. CIV. P. 56(c); *infra* text accompanying notes 231–234.

231 *See* FED. R. CIV. P. 56(c).

sufficient to create a genuine issue of material fact is not entitled to a trial of the claim.[232] Dispositive motion practice under Rules 12(b)(6) and 12(c) challenges a pleader's entitlement to discovery by testing the legal sufficiency of factual allegations to state a plausible claim for relief.[233] Just as a lack of admissible evidence relative to a claim's essential elements entitles the moving party to summary judgment, the lack of legally sufficient factual matter indicative of a claim's essential elements entitles the moving party to dismissal for failure to state a claim.[234] Therefore, the plausibility standard, properly understood and applied, yields results consistent with the overall purpose of the Federal Rules of Civil Procedure.[235]

IV. THE *BAHR-HEBERT-FRANKLIN* PARADOX IS AN UNNECESSARY PROBLEM THAT THE PLAUSIBILITY STANDARD CAN SOLVE IF PROPERLY UNDERSTOOD AND APPLIED

The *Bahr-Hebert-Franklin* paradox exists because the pleading rules stated in those cases test the sufficiency of pleadings under conflicting standards.[236] Like the *Conley* rule, the *Franklin* rule, literally read, makes a complaint's sufficiency to state a claim depend upon what the plaintiff might be able to prove, something that only the discovery process can determine.[237] The prohibition against pleading by legal conclusion, as stated in *Bahr* and *Hebert*, makes the complaint's success or failure depend on the legal sufficiency of the facts alleged.[238] *Twombly's* plausibility standard solves the paradox acceptably, provided that lawyers and judges properly understand, use, and apply it in a practical way that effectuates the purpose of modern civil procedure related to pleading standards.[239]

A. Hebert *Created a Paradox in Minnesota's Pleading and Rule 12.02(e) Jurisprudence by Tacitly Applying the Plausibility Standard Without Discussing Its Impact on the* Franklin *Rule*

The Minnesota Supreme Court first cited *Twombly* in *Hebert*, a declaratory judgment action wherein landowners sought equitable relief in the form of ejectment and trespass damages against the City of Fifty

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[232] *See* FED. R. CIV. P. 56(c); FED. R. CIV. P. 12(b)(6).

[233] *See* FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 12(c).

[234] *See* FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 12(c).

[235] *See* FED. R. CIV. P. 1.

[236] *See infra* Part IV.A; *see infra* Part IV.B; *see infra* Part IV.C (discussing the *Bahr-Hebert-Franklin* paradox).

[237] N. States Power Co. v. Franklin, 122 N.W.2d 26, 29 (Minn. 1963).

[238] *See* Bahr v. Capella Univ., 788 N.W.2d 76, 80 (Minn. 2010); Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 228 (Minn. 2008).

[239] *See infra* Part IV.C (explaining how the plausibility standard solves the *Bahr-Hebert-Franklin* paradox).

Lakes.[240] The landowners alleged that the City constructed a gravel road in 1971 that deviated from the sixty-six foot wide area dedicated as a public roadway on plat drawings recorded in 1954.[241] They alleged that the City refused to remove the road from their property despite their demands.[242] The complaint did not allege when the landowners demanded the City remove the road.[243] Nevertheless, the landowners characterized the road construction as a "continuing trespass."[244] The City moved to dismiss the landowners' complaint pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim for which relief could be granted.[245] The district court granted the City's motion. The Minnesota Court of Appeals reversed and an appeal to the Minnesota Supreme Court followed.[246]

After stating the case's facts, the Minnesota Supreme Court discussed the standard of review applicable to motions for dismissal for failure to state a claim.[247] It articulated that standard without even invoking the *Franklin* rule, stating the following:

> When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before this court is whether the complaint sets forth a legally sufficient claim for relief. Our review is de novo. We are to "consider *only the facts alleged* in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party," the landowners in this case.[248]

In articulating the applicable standard of review, the court focused entirely on the legal sufficiency of the factual matter alleged, not the landowners' ultimate ability to prove their claims with evidence adduced through the discovery process.[249] This approach to Rule 12 motion practice subtly resembles *Twombly*, even though the court did not invoke *Twombly* when discussing the standard of review.[250]

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240 Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 228 (Minn. 2008).
241 *Id.*
242 *Id.*
243 *Id.*
244 *See id.* at 233–34.
245 *Id.* at 228–29.
246 *Hebert*, 744 N.W.2d at 228.
247 *Id*. at 229.
248 *Id.* (emphasis added) (citations omitted) (quoting Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553 (Minn. 2003)).
249 *See id.*
250 *Compare* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007) *with Hebert,* 744 N.W.2d at 228.

Hebert's subtle resemblance to *Twombly* does not end with the standard of review.[251] The court analyzed the landowners' trespass claim in a manner that accords with *Twombly*.[252] It observed that whether the landowners' trespass claim survived dismissal under Rule 12.02(e) depended upon the character of the trespass alleged.[253] If the landowners alleged a permanent trespass, one stemming from the City's 1971 road construction, then the six-year statute of limitations would bar the landowners' claim.[254] If, on the other hand, the landowners alleged a continuing trespass, a recurring intrusion onto their property, then the six-year statute of limitations could not bar the claim as a matter of law.[255] The court looked only to the factual matter alleged in order to determine the true character of the trespass alleged.[256] Citing a decision from the Third Circuit and *Twombly*, the court acknowledged: "We are not bound by legal conclusions stated in a complaint when determining whether the complaint survives a motion to dismiss for failure to state a claim."[257] With this acknowledgment in mind, the court decided that the landowners alleged a continuing trespass, not because they characterized the trespass as such, but because the landowners had alleged that they unsuccessfully demanded that the City remove the road.[258] Then, quoting *Franklin*, the court observed that the landowners' allegation of an unsuccessful demand for removal of the road was legally sufficient to state a claim for continuing trespass because it signaled that "the landowner[s] 'consent[ed] to an entry upon the land' and because of that consent, 'the failure to remove the structures, rather than the original entry, characterize[d] the wrong and support[ed] [a] theory of continuing trespass.'" [259] Accordingly, the Minnesota Supreme Court decided that the six-year statute of limitations did not bar the landowners' continuing trespass claim based on the alleged facts.[260]

Despite its very *Twombly*-like legal analysis and its antecedent standard of review, *Hebert* never clarified, corrected, or explained the *Franklin* rule as the Supreme Court of the United States clarified, corrected, and explained the *Conley* rule.[261] This omission is puzzling, given the court's heavy reliance on *Franklin's* rationale.[262] Although the *Franklin* rule literally

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[251] *See Hebert*, 744 N.W.2d at 233–36.

[252] *See id.*

[253] *See id.* at 233–34.

[254] *Id.*

[255] *Id.*

[256] *See id.* at 234–35.

[257] *Hebert*, 744 N.W.2d at 235 (citing Anspach v. City of Philadelphia, 503 F.3d 256, 260 (3d Cir. 2007); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553–54 (2007)).

[258] *See id.* at 235–36.

[259] *Id.* at 236 (second and third alterations in original) (quoting N. States Power Co. v. Franklin, 122 N.W.2d 26, 30 (Minn. 1963)).

[260] *See id.* at 236.

[261] *Compare Twombly*, 550 U.S. at 543 *with Hebert*, 744 N.W.2d at 226.

[262] *See Hebert*, 744 N.W.2d at 236.

states that "[a] claim is sufficient against a motion to dismiss based on Rule [12.02(e)] if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded,"[263] its disposition, as noted above, did not turn on the plaintiff's characterization of the alleged wrong as a continuing trespass subject to evidence adduced in discovery. Rather, it turned on the factual matter the plaintiff had alleged, namely that she had unsuccessfully demanded removal of NSP's transmission line towers, signaling that the alleged wrongdoing involved NSP's continual refusal to terminate the trespass, not its construction of the transmission line towers.[264] It, therefore, is strange that the Minnesota Supreme Court did not borrow from *Twombly* to explain the *Franklin* rule as "describ[ing] the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."[265]

In *Hebert*, the Minnesota Supreme Court essentially applied *Twombly's* plausibility standard without expressly adopting that standard for pleading in Minnesota's state courts.[266] *Franklin* itself analyzed a trespass claim's survival on a motion to dismiss based on the factual matter alleged as opposed to the mere legal conclusions assigned to the facts.[267] Yet the *Franklin* rule, read literally, permits a claim to survive a motion to dismiss even if premised on mere legal conclusions.[268] *Franklin* also discussed how the Minnesota Rules of Civil Procedure liberalized pleading by citing *First National Bank v. Olson*, a case explaining that those rules had abolished the distinction between facts and legal conclusions and permitted pleading by way of broad conclusions rather than ultimate facts.[269] Thus, *Hebert* presents a paradox because it applies a pleading standard at odds with the letter of the *Franklin* rule and the traditional, liberal understanding of notice pleading under the rules.[270]

B. **Bahr** *Perpetuated the Paradox* **Hebert** *Created in Minnesota's Pleading and Rule 12.02(e) Jurisprudence.*

The Minnesota Supreme Court's decision in *Bahr* merely perpetuated the paradox *Hebert* started.[271] *Bahr* involved a claim for retaliation discrimination under the Minnesota Human Rights Act

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263 *Franklin*, 122 N.W.2d at 29.
264 *See id.* at 30.
265 *Twombly*, 550 U.S. at 563.
266 *See Hebert*, 744 N.W.2d at 235–36.
267 *See Franklin*, 122 N.W.2d at 30–31.
268 *See id.* at 29–31.
269 *See id.* at 29 n.2; First Nat'l Bank of Henning v. Olson, 74 N.W.2d 123, 129 (Minn. 1955).
270 *Compare Hebert*, 744 N.W.2d at 228 *with* Franklin, 122 N.W.2d at 29.
271 *See* Bahr v. Capella Univ., 788 N.W.2d 76, 78 (Minn. 2010).

("MHRA").[272] Elen Bahr, a Caucasian woman, worked in Capella's communications department and supervised L.A., an African-American employee.[273] Bahr claimed that she was the victim of reprisal discrimination because she opposed Capella's treatment of L.A., specifically the decision not to place L.A. on a formal performance improvement plan ("PIP"), which Bahr viewed as discriminatory to L.A. and other employees.[274] The district court held that Bahr's complaint failed to state a claim for which relief could be granted because Capella's decision not to place L.A. on a PIP did not amount to an adverse employment action.[275] The district court never reached the issue of whether Bahr had adequately pled a good faith, reasonable belief that Capella discriminated against L.A. by not placing her on a PIP.[276]

The Minnesota Court of Appeals reversed, reasoning that Bahr's complaint survived dismissal because she adequately alleged her own good faith, reasonable belief that Capella's actions, which she opposed, violated the MHRA.[277] The court of appeals noted that Bahr had alleged that Capella refused to implement a PIP for L.A. four times in an effort to help her improve her job performance despite allowing her to initiate PIPs for other employees.[278] The court also observed that Bahr alleged that Capella's human resources department commented that L.A. had a racially-biased history with Capella and that it was concerned that initiating a PIP would prompt a lawsuit.[279] For these reasons, the Minnesota Court of Appeals concluded that Bahr adequately alleged objectively reasonable grounds supporting her subjective belief that Capella treated L.A. differently because of her race in violation of the MHRA.[280]

With regard to the applicable pleading standard, however, the Minnesota Court of Appeals viewed *Twombly* as having corrected the *Franklin* rule.[281] After reciting the *Franklin* rule, the court of appeals emphatically stated:

> [W]e are mindful that the United States Supreme Court has recently corrected this standard insofar as it suggests that the future introduction of evidence can substitute for an adequate statement of facts in the complaint; the statement of entitlement to relief must go beyond "labels and conclusions" or the "speculative" presentation of a claim.[282]

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272 Bahr v. Capella Univ., 788 N.W.2d 76, 78 (Minn. 2010).
273 *Id*.
274 *Id.* at 82.
275 *Id.* at 80.
276 *Id.*
277 *Id.;* Bahr v. Capella Univ., 765 N.W.2d 428, 438–39 (Minn. Ct. App. 2009).
278 *Bahr,* 765 N.W.2d at 437.
279 *Id.*
280 *See id.* at 439.
281 *Id.* at 436–37.
282 *Id.* (citations omitted).

The Minnesota Court of Appeals expressed the view that current pleading jurisprudence "demands that the complaint state 'enough factual matter' . . . to suggest, short of 'probability,' 'plausible grounds' for a claim—a pleading with 'enough heft' to show entitlement."[283] This statement virtually invited the Minnesota Supreme Court to adopt *Twombly's* plausibility standard.[284]

Although the Minnesota Supreme Court accepted review, it did not accept the invitation to formally adopt the plausibility standard as Minnesota's rule for pleading and deciding Rule 12.02(e) motions.[285] It reversed the court of appeals without commenting on whether it correctly interpreted Minnesota's pleading and Rule 12 jurisprudence in light of *Twombly*.[286] After setting forth the case's facts and procedural background, the court recited the standard of review applicable to motions to dismiss for failure to state a claim in a way that illustrates the paradox *Hebert* created:

> We have said that "a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *N. States Power Co. v. Franklin*, 265 Minn. 391, 395, 122 N.W.2d 26, 29 (1963). But a legal conclusion in the complaint is not binding on us. *Herbert*, 744 N.W.2d at 235. A plaintiff must provide more than labels and conclusions. *See id*. (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).[287]

This recitation of the standard for reviewing a Rule 12.02(e) motion illustrates just how paradoxical Minnesota's pleading jurisprudence has become.[288] Literally read, the *Franklin* rule makes the success of a Rule 12.02(e) motion depend on the potential existence of facts ultimately proven as opposed to the legal sufficiency of the facts actually alleged.[289] *Hebert* says that pleading by legal conclusion fails to state an actionable claim for relief, and *Twombly* holds that a complaint consisting of nothing more than labels and conclusions will not suffice.[290] Clearly *Hebert* and *Twombly* conflict with a literal understanding of the *Franklin* rule, resulting in a

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283 *Id*. at 437 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–57 (2007)).
284 *See Bahr*, 765 N.W.2d at 437.
285 *See* Bahr v. Capella Univ., 788 N.W.2d 76, 83–85 (Minn. 2010).
286 *See id.*
287 *Id.* at 80.
288 *See id.*
289 *See* N. States Power Co. v. Franklin, 122 N.W.2d 26, 29 (Minn. 1963).
290 *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 235 (Minn. 2008).

paradox.[291] Unfortunately, the Minnesota Supreme Court did not address this paradox in *Bahr* when discussing the standard of review.[292]

As it did in *Hebert*, the Minnesota Supreme Court then engaged in a *Twombly*-like analysis of Bahr's complaint.[293] The court said the following:

> Bahr alleges that she opposed "discriminatory employment practices." But Bahr's complaint indicates that there was ongoing communication between Bahr and Capella concerning L.A.'s performance issues. Bahr wanted to put L.A. on a formal PIP; Human Resources disagreed, instructed Bahr not to implement a formal PIP, and indicated that L.A. had a "history" at Capella that was racially based and Capella was concerned that L.A. might file a discrimination lawsuit. The complaint states that Bahr told employees in Human Resources on four occasions that she believed Capella's treatment of L.A. was unfair and discriminatory to L.A. and to other employees. On two occasions, Bahr stated that she was unwilling to engage in what she believed to be discriminatory treatment. Although the complaint makes vague references that Capella somehow discriminated against employees other than L.A., the underlying actions were only with respect to L.A. Bahr appears to allege that Capella discriminated against L.A. because Bahr was not allowed to put L.A. on a formal PIP and L.A.'s performance issues were handled differently because of L.A.'s race.[294]

The court then noted that Capella did not contest whether Bahr acted in good faith but whether it was objectively reasonable for Bahr to believe Capella's decision not to place L.A. on a PIP violated the MHRA.[295] "Accordingly," said the court, "the issue here concerns the objective component—was Bahr's opposition based on a legal theory and facts that are *plausible?*"[296] The court ultimately reversed the court of appeals, determining that "no reasonable person could believe that Capella's treatment of L.A. was forbidden by the MHRA because L.A. was not subjected to anything that could remotely be considered an adverse employment action."[297] Clearly, the Minnesota Supreme Court employed the plausibility standard when deciding

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[291] *See supra* text accompanying notes 289–290 (discussing how the rulings in *Hebert*, *Twombly*, and *Franklin* create a paradox).

[292] *Bahr*, 788 N.W.2d at 80–85.

[293] *Id.* at 82.

[294] *Id.*

[295] *Id.*

[296] *Id.* (emphasis added).

[297] *Id.* at 84–85.

whether Bahr stated a legally sufficient claim for reprisal discrimination under the MHRA.[298]

As in *Hebert*, the Minnesota Supreme Court in *Bahr* essentially applied the plausibility standard to determine whether the complaint stated a claim for which relief could be granted.[299] In *Bahr*, however, the court was blunt about what it was doing. *Bahr* implies but does not hold that Minnesota courts should use *Twombly's* plausibility standard to judge the legal sufficiency of pleadings to state claims for relief.[300] Unfortunately, *Bahr* does not repudiate a literal reading of the *Franklin* rule, nor does it explain how the *Franklin* rule, phrased in terms of the pleader's ability to produce evidence, can continue as a viable interpretation of Rule 8.01 in light of *Hebert* and *Bahr*.[301]

C. The Plausibility Standard, Properly Understood and Applied, Acceptably Solves the Paradox, Thereby Advancing the Purpose Behind the Minnesota Rules of Civil Procedure.

The Minnesota Rules of Civil Procedure serve a virtual trinity of objectives.[302] According to Rule 1, the Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."[303] This requirement applies to procedural rules involving pleading and motions to dismiss no less than other procedural rules.[304] Minnesota State courts should require a pleading standard that is neither too complicated for effective use by claimants nor so formalistic that it fosters abuse by defendants who use it to play a game of technicalities.[305] Pleading a legally sufficient claim for relief should not require rocket science, especially in big cases involving astronomical numbers of relevant details.[306] Moreover, it is impossible to require a claimant to know every last detail supporting a claim before commencing an action, and imposing such a requirement "improperly den[ies] the plaintiff the opportunity to prove [the] claim."[307]

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298 *See Bahr*, 788 N.W.2d at 83–85.

299 *See id*.

300 *See id.*

301 *See id.*

302 *See* MINN. R. CIV. P. 1.

303 MINN. R. CIV. P. 1.

304 MINN. R. CIV. P. 1.

305 *See* 2 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 8.04 (3d ed. 2006) (stating "[t]he intent of the liberal notice pleading system is to ensure that claims are determined on their merits rather than through missteps in pleading.").

306 *See* Equal Emp't Opportunity Comm'n v. Concentra Health Servs., Inc., 496 F.3d 773, 779 (7th Cir. 2007) (discussing the intent and purposes behind liberal notice pleading under the federal rules and the impracticality of imposing formalized pleading requirements to large, complex cases).

307 *Id.* at 780 (citing Am. Nurses' Assoc. v. Illinois, 783 F.3d 716, 723 (7th Cir. 1986); Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chi., 747 F.2d 384, 404 (7th Cir. 1984), *aff'd*., 473 U.S. 606 (1985)).

Yet the rules also should not obligate parties to spend thousands, and in some cases millions, of dollars defending themselves against meritless claims that can never be proven because the factual matter alleged signals no reasonably founded hope that discovery will yield the required proof.[308] A pleading standard that cares little or not at all about the legal sufficiency of a claim's factual allegations would permit a plaintiff to waste the time and money of others, needlessly giving settlement value to a worthless claim.[309] Minnesota needs a pleading standard that avoids all of these abuses and shortcomings.[310]

The plausibility standard, properly understood and applied, solves the *Bahr-Hebert-Franklin* paradox in accordance with Minn. R. Civ. P. 8.01 by making the success of a claim for relief depend upon the legal sufficiency of the pleading's factual allegations themselves instead of evidence that discovery might produce.[311] It requires that claims for relief possess a minimal level of focus that gives the parties a better understanding of the claim and enhances the court's ability to manage discovery issues.[312] By describing the minimum requirement for legally sufficient pleading under Rule 8.01, the plausibility standard fits within the overall purpose of the Minnesota Rules of Civil Procedure and enhances the thematic harmony of those rules.[313]

Rule 8.01 of the Minnesota Rules of Civil Procedure requires every claim, counterclaim, cross-claim, or third-party claim to allege "a short and plain statement of the claim *showing that the pleader is entitled to relief* . . . ."[314] According to this rule's plain language, it is the claimant's "short and plain statement of the claim," not evidence obtained through discovery, which must *show* the pleader's entitlement to relief.[315] The required "showing" is not one of proof but of demonstration through alleged facts.[316] The claim's factual matter, however alleged, must indicate or suggest the claimant's entitlement to relief under the liability theories asserted.[317] A claim that merely accuses another party of wrongdoing, without stating any factual matter describing the wrongful conduct, does not *show* or *explain* in any factual way why the pleader is entitled to the relief sought.[318] As such, it

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[308] *See* Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005).

[309] *See id.*

[310] *See supra* text accompanying notes 305–309 (discussing the abuses and shortcomings of the current pleading standard).

[311] *See supra* text accompanying notes 85–88 (discussing the pleading standard of evidence educed through discovery).

[312] *See supra* text accompanying notes 85–88 (discussing the pleading standard of evidence educed through discovery).

[313] *See* MINN. R. CIV. P. 1; *supra* text accompanying notes 303–312 (discussing how the plausibility standard comports with the Minnesota Rules of Civil Procedure).

[314] MINN. R. CIV. P. 8.01 (emphasis added).

[315] *See* MINN. R. CIV. P. 8.01.

[316] *See* MINN. R. CIV. P. 8.01.

[317] FED. R. CIV. P. 8(a)(2); MINN. R. CIV. P. 8.01.

[318] *See* FED. R. CIV. P. 8(a)(2); MINN. R. CIV. P. 8.01.

fails to state a claim for which relief can be granted and should be dismissed pursuant to Rule 12.02(e).[319]

The juxtaposition of these rules tells us as the High Court recognized in *Twombly* that claims for relief which fail to contain legally sufficient facts supporting the liability theories asserted are not entitled to discovery.[320] Hence, the Minnesota Rules of Civil Procedure themselves permit district courts to dispose of claims for relief which fail to allege factual matter supporting the liability theories asserted.[321] This result is just because claims for relief that cannot show or demonstrate entitlement to relief through legally sufficient factual allegations do not comply with Rule 8.01 which requires substantive as well as procedural notice of the claims presented.[322]

Read and applied literally, the *Franklin* rule prevents Rule 12.02(e) from operating as designed by absolving the pleader of having to comply with the substantive notice obligation that Rule 8.01 imposes.[323] By its literal terms, the *Franklin* rule makes the legal sufficiency of a claim for relief, as well as the success of a Rule 12.02(e) motion to dismiss, depend on facts proven from evidence obtained through discovery.[324] It is impossible to know at the pleading stage what facts the claimant might prove or what evidence the claimant might produce.[325] Indeed, *Franklin* itself holds that proof problems "cannot be reached or resolved short of a motion for summary judgment or a trial."[326] A pleading standard premised on what the claimant ultimately can prove practically guarantees the failure of any Rule 12.02(e) motion challenging the legal sufficiency of factual allegations to state valid claims for relief.[327] Thus, the *Franklin* rule, literally understood and applied, actually prevents the Minnesota Rules of Civil Procedure from operating as designed and militates against the overarching goal of civil procedure: "the just, speedy, and inexpensive determination of every action."[328]

The plausibility standard, on the other hand, acknowledges that Rule 8.01 really means something when it requires the short and plain statement of the claim to *show* or *demonstrate* the pleader's entitlement to relief.[329] An

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[319] *See* MINN. R. CIV. P. 12.02(e).

[320] *See supra* text accompanying notes 121–141 (discussing the rule set out in *Twombly*).

[321] *See* MINN. R. CIV. P. 8.01; MINN. R. CIV. P. 12.02(e).

[322] *See* MINN. R. CIV. P. 8.01.

[323] *See supra* text accompanying note 83 (stating the rule set out in *Franklin*).

[324] *See supra* text accompanying notes 85–88 (expanding upon the rule set out in *Franklin*).

[325] *See supra* text accompanying note 88 (showing the court acknowledged this in *Franklin*).

[326] N. States Power Co. v. Franklin, 122 N.W.2d 26, 31 (Minn. 1963).

[327] *See supra* text accompanying note 88 (discussing this rule as set out in *Franklin*).

[328] MINN. R. CIV. P. 1.

[329] *See supra* text accompanying notes 131–137 (explaining the plausibility standard).

example illustrates this point. Suppose a plaintiff named Smith interposes a complaint against Jones following an automobile accident by alleging:

> 1. Plaintiff Smith is a citizen of the state of Minnesota and resides in the County of Hennepin.
>
> 2. Defendant Jones is a citizen of the state of Minnesota and resides in the County of Ramsey.
>
> 3. On December 20, 2011, a vehicle owned and operated by Defendant Jones collided with the vehicle owned and Operated by Plaintiff Smith.
>
> 4. Defendant Jones was negligent.
>
> 5. The collision caused severe and permanent bodily injury to Plaintiff Smith resulting in disability for 60 days or more.
>
> WHEREFORE, Plaintiff Smith prays for judgment against Defendant Jones in excess of $50,000, including reasonable costs, disbursements, and such other relief as the court deems equitable and just.

This hypothetical complaint simply accuses Jones of negligence without adequately explaining in factual terms what made him negligent. Under the *facts* alleged (*i.e.*, the two vehicles collided), it is *possible* that Jones' vehicle collided with Smith's vehicle because Jones failed to keep a careful look out, was driving too fast, or failed to yield a right of way. Yet under the same facts, it also is *possible* that Jones' vehicle collided with Smith's vehicle because Jones had an unexpected heart attack and died. In Minnesota, it is "the settled rule that the mere occasion of injury does not in itself support an inference of negligence."[330] The above hypothetical complaint simply alleges the mere occasion for injury without alleging factual matter providing a basis for accusing Jones of negligence. It alleges only a *possible* claim for relief, making it subject to dismissal under the plausibility standard.[331]

Yet the plausibility standard does not represent a return to common law or code pleading, nor should courts and lawyers treat it that way.[332] *Twombly* itself acknowledges that a complaint does not have to state

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[330] Lenz v. Johnson, 122 N.W.2d 96, 99 (Minn. 1963).

[331] *See supra* text accompanying notes 131–137 (explaining the plausibility standard).

[332] *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Erickson v. Pardus, 551 U.S. 89, 89–94 (2007) (per curiam).

"detailed factual allegations" in order to survive a motion to dismiss.[333] The High Court's decision in *Erickson*, decided between *Twombly* and *Iqbal*, said nothing indicating that *Twombly's* plausibility standard is a reversion to a more rigid, formalistic pleading style.[334] Similarly, *Iqbal* acknowledges that Rule 8, which itself demands factual allegations showing entitlement to relief, "marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era . . . ."[335] Thus, the High Court's own statements clearly note that the plausibility standard does not signal a return to formalistic pleading practices of an earlier era.[336]

Opinions from various United States Circuit Courts of Appeal recognize this point and apply the plausibility standard accordingly.[337] For example, the Eighth Circuit recognized that *Iqbal* and *Twombly* "did not abrogate the notice pleading standard of Rule 8(a)(2),"[338] and held that a plaintiff claiming employer's liability under Missouri law could merely allege that he was the defendants' employee without alleging specific facts indicative of the alleged employment relationship.[339] Similarly, the Seventh Circuit held that all a plaintiff needed to do to state an actionable claim for unlawful discrimination in residential real estate transactions was to identify the type of discrimination that occurred and when it happened.[340] It reached that conclusion by recognizing that the plausibility standard does not amount to "a *sub rosa* campaign to reinstate the old fact-pleading system called for by the Field Code or even more modern codes."[341] Within a year after the High Court decided *Twombly*, the Third Circuit disavowed the notion that claimants must plead elemental facts to state a viable claim for relief, noting that the plausibility standard simply requires the pleading of facts *suggesting* a claim's required elements,[342] and criticizing "an unduly crabbed reading of the complaint" as denying the plaintiff "the inferences to which her complaint is entitled."[343] In remanding the case for further proceedings, the Third Circuit directed the district court to provide the plaintiff with an opportunity to amend her complaint with respect to certain claims.[344]

Given the fact that a valid claim for relief needs only to *suggest* a claim's required elements, the prior hypothetical complaint may be corrected

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333 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

334 *See Erickson*, 551 U.S. at 89–94.

335 *Iqbal*, 556 U.S. at 678.

336 *See supra* text accompanying notes 332–335 (explaining why the plausibility standard is not a return to previous pleading practices).

337 *See* Hamilton v. Palm, 621 F.3d 816, 817 (8th Cir. 2010); Swanson v. Citibank, N.A., 614 F.3d 400, 405 (7th Cir. 2010); Phillips v. Cnty. of Allegheny, 515 F.3d 224, 234–35 (3d Cir. 2008).

338 *Hamilton*, 621 F.3d at 817.

339 *See id.* at 818–19.

340 *Swanson*, 614 F.3d at 405.

341 *Id.* at 404.

342 *See Phillips*, 515 F.3d at 234–35.

343 *Id.* at 237.

344 *Id.* at 246.

with minimal effort.[345] Because the plausibility standard does not require particularized pleading except where the claim alleges fraud or mistake, correcting pleading deficiencies should be relatively easy in most cases under the plausibility standard.[346] For example, the prior hypothetical complaint could be corrected with minimal effort:

> 1. Plaintiff Smith is a citizen of the state of Minnesota and resides in the County of Hennepin.
>
> 2. Defendant Jones is a citizen of the state of Minnesota and resides in the County of Ramsey.
>
> 3. On December 20, 2011, Defendant Jones negligently operated his motor vehicle so as to cause it to collide with a vehicle owned and operated by Plaintiff Smith.
>
> 4. The collision caused severe and permanent bodily injury to Plaintiff Smith resulting in disability for 60 days or more.
>
> WHEREFORE, Plaintiff Smith prays for judgment against Defendant Jones in excess of $50,000, including reasonable costs, disbursements, and such other relief as the court deems equitable and just.

Every negligence claim consists of four elements: duty, breach, causation, and damages.[347] The foregoing allegations suggest that Jones owed a legal duty to Smith by alleging that Jones owned and operated a motor vehicle. They suggest a breach of that duty by alleging that Jones negligently operated his vehicle. While this allegation amounts to a mixed statement of law and fact, it is sufficient to alert Jones that Smith's claim focuses on Jones' lack of reasonable care in driving, even if the precise lack of care at issue can be determined only through discovery.[348] Causation and damages are plainly alleged as factual conclusions. The ease with which a claimant can modify a claim to make it comply with the plausibility standard suggests

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345 *See id.* at 234–35.

346 *See supra* text accompanying notes 131–137 (explaining the plausibility standard).

347 Hudson v. Snyder Body, Inc., 326 N.W.2d 149, 157 (Minn. 1982).

348 The flexibility of allowing parties to plead mixed statements of law and fact is essential to efficient pleading, "otherwise pleadings would become intolerably prolix, and mere statements of the evidence." Clark v. Chi., Milwaukee, & St. Paul Ry. Co., 9 N.W. 75, 75 (Minn. 1881). The plausibility standard does not prohibit pleading allegations which amount to mixed statements of law and fact. *See* Hamilton v. Palm, 621 F.3d 716, 818–19 (8th Cir. 2010).

that courts should allow a claimant to defend against a Rule 12.02(e) motion by demonstrating the ability to cure the pleading deficiency through amendment.[349]

The plausibility standard also helps keep litigation costs in check by ensuring that only well-pled claims are subject to discovery.[350] Under the *Franklin* rule's literal application, claims for relief proceed to discovery even though they fail to comply with the requirement of Rule 8.01.[351] The Minnesota Rules of Civil Procedure, like their federal counterpart, frame the scope of discovery in terms of the claims and defenses asserted in the action.[352] The cost of discovery necessarily increases every time a claim that is not properly pled passes to the discovery phase.[353] The discovery process, particularly with the advent of electronic discovery, becomes an unnecessarily time consuming and expensive excursion when the facts alleged fail to indicate that the claimant has any reasonably founded hope of obtaining relevant evidence through the use of discovery procedures.[354] The plausibility standard enables courts and parties to maintain focused discovery while controlling the associated expenses.[355]

The plausibility standard also enhances a thematic harmony within the Minnesota Rules of Civil Procedure just as it does within the Federal Rules.[356] In 1997, the Minnesota Supreme Court recognized the *Celotex* trilogy as "instructive" with respect to Minnesota's summary judgment procedure.[357] This recognition has prompted the Minnesota Court of Appeals three years later to recognize that summary judgment is "'an integral part' of civil procedure, not a 'disfavored procedural shortcut,' and is 'designed to secure the just, speedy, and inexpensive determination of every action.'"[358] In effect, Minnesota's appellate courts, like the federal courts, have backed away from the notion that summary judgment is a disfavored procedural tool.[359] Rather in Minnesota courts, as in the federal courts, summary judgment simply is another procedural tool permitting the early disposal of claims lacking evidentiary support post-discovery.[360] The plausibility standard similarly would make Rule 12.02(e) an integral part of Minnesota's civil procedure by enabling already over-burdened and underfunded district

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[349] FED. R. CIV. P. 12.02(e).

[350] *See supra* text accompanying notes 131–137 (explaining the plausibility standard).

[351] *See supra* text accompanying note 83 (stating the rule set out in *Franklin*).

[352] *Compare* FED. R. CIV. P. 26(b)(1) *with* MINN. R. CIV. P. 26.02(a).

[353] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559–60 (2007).

[354] *See id.*

[355] *See supra* text accompanying notes 131–137 (explaining the plausibility standard).

[356] *See supra* text accompanying notes 131–137 and 303–313.

[357] *See* DLH, Inc. v. Russ, 566 N.W.2d 60, 70 (Minn. 1997).

[358] Dixon v. Depositors Ins. Co., 619 N.W.2d 752, 757 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)).

[359] *See id.*

[360] *See id.*

courts to dispose of claims unsupported by legally sufficient factual allegations.[361]

Therefore, the time has come for Minnesota formally to adopt *Twombly's* plausibility standard as the pleading standard applicable to claims for relief in all civil actions brought in the State's district courts.[362] Having already applied the plausibility standard in *Hebert* and *Bahr*, it only seems logical that the Minnesota Supreme Court should retire the *Franklin* rule (though not its holding) as "an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[363] Accordingly, the *Franklin* rule, like the *Conley* rule, "describe[s] the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."[364] The *Bahr-Hebert-Franklin* paradox will continue to foster confusion about the requirement for adequate pleading in state civil actions until the Minnesota Supreme Court expressly adopts the plausibility standard.[365]

D. Although the Plausibility Standard Acceptably Solves the Bahr-Hebert-Franklin *Paradox, Important Considerations Remain*

At least two important considerations remain even if the Minnesota Supreme Court formally adopts the plausibility standard.[366] One consideration is whether the plausibility standard will result in an increased use of Rule 12.02(e) to dispose of claims.[367] Underlying this consideration is the concern that an increase in Rule 12.02(e) motions will inundate an overburdened and underfunded district court system.[368] In response to those pressures, a secondary concern is that district courts would overzealously apply the plausibility standard simply to clear dockets.

A recent Federal Judicial Center study conducted for the Judicial Conference Advisory Committee on Civil Rules indicates that this

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[361] *See* MINN. R. CIV. P. 12.02(e); *supra* text accompanying notes 131–137 (explaining the plausibility standard).

[362] *See supra* text accompanying notes 346–361; *supra infra* text accompanying notes 363–365 (setting forth the reasons Minnesota should adopt *Twombly*'s plausibility standard).

[363] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 (2007).

[364] *Id.*

[365] *See supra* Part IV.A (explaining how *Hebert* created the *Bahr-Hebert-Franklin* paradox).

[366] *See infra* text accompanying notes 367–379 (stating the important considerations remaining).

[367] *See supra* text accompanying notes 356–361 (explaining the use of Rule 12.02(e)).

[368] *See supra* text accompanying notes 356–361 (explaining the use of Rule 12.02(e)).

consideration may not be as profound as some might expect.[369] That study "compared motion activity in 23 federal district courts in 2006 and 2010 and included an assessment of the outcome of motions in orders that do not appear in the computerized legal reference systems such as Westlaw."[370] It used statistical models "to control for such factors as differences in levels of motion activity in individual federal district courts and types of cases."[371] The study found that the filing rate of motions to dismiss for failure to state a claim generally increased from 2006 to 2010.[372] However, the rate at which courts granted motions to dismiss in general without leave to amend did not increase.[373] Moreover, the study showed no increase from 2006 to 2010 in the rate at which motions to dismiss terminated cases.[374]

A second important consideration is whether courts should apply the plausibility standard to affirmative defenses.[375] The federal circuits, including the Eighth Circuit, have yet to decide that question.[376] Presently that question divides the judges of the United States District Court for the District of Minnesota.[377] Some of the judges have held that the plausibility standard does not apply to affirmative defenses.[378] Others have taken the opposite view, holding that affirmative defenses also are subject to the plausibility standard.[379]

A careful review of the Minnesota Rules of Civil Procedure indicates that the plausibility standard should not apply to affirmative defenses.[380] As noted above, the plausibility standard derives from Rule 8.01, which requires "a short and plain statement of the claim showing that the pleader is entitled

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[369] *See* JOE S. CECIL, GEORGE W. CORT, MARGARET S. WILLIAMS & JARED J. BATAILLON, MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER IQBAL: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf.

[370] CECIL ET AL., *supra* note 369, at 13.

[371] *Id.* at 7.

[372] *Id.* at 7–12.

[373] *Id.* at 12–16.

[374] *Id.*

[375] *See infra* text accompanying notes 376–378 (discussing whether the court should apply the plausibility standard to affirmative defenses).

[376] *See infra* notes 378–379 (showing that although federal circuits have yet to decide this question many district courts have).

[377] *See infra* notes 378–379 and accompanying text (showing judges are divided on this issue).

[378] *See* U.S. Bank, Nat'l Assoc., v. Educ. Loans, Inc., Civ. No. 11-1445 (RHK/JJG), 2011 U.S. Dist. LEXIS 131453, at *15–16 (D. Minn. Nov. 14, 2011) (holding that the plausibility standard does not apply to affirmative defenses); *accord.* Schlief v. Nu-Source, Inc., Civ. No. 10-4477 (DWF/SER), 2011 U.S. Dist. LEXIS 44446 at *22–25 (D. Minn. April 25, 2011); Wells Fargo & Co. v. United States, 750 F.Supp.2d 1049, 1051 (D. Minn. 2010).

[379] *See* Ahle v. Veracity Research Co., 738 F.Supp.2d 896, 924–25 (D. Minn. 2010) (applying the plausibility standard to affirmative defenses); *accord.* Equal Emp't Opportunity Comm'n v. Hibbing Taconite Co., 266 F.R.D. 260, 268 (D. Minn. 2009).

[380] *See* MINN. R. CIV. P. 8.01.

to relief . . . ."[381] Unlike its federal counterpart, Rule 8.01 specifically lists the kinds of pleadings setting forth a claim for relief as: "an original claim, counterclaim, cross-claim, or third-party claim . . . ."[382] Rule 8.02, a completely separate rule, applies to general defenses.[383] They need only be stated "in short and plain terms" and consist only of admissions, denials, or a lack of "knowledge or information sufficient to form a belief as to the truth of an averment."[384] Rule 8.03 applies to affirmative defenses.[385] But unlike Rule 8.01, neither Rule 8.02 nor 8.03 requires that any defense, be it general or affirmative, be accompanied by any short and plain statement showing the defendant's entitlement to raise any defense.[386] Moreover, defenses, be they general or affirmative, by definition do not state claims, i.e., an "aggregate of operative facts giving rise to a right enforceable by a court."[387] Rather, a defense merely is a "stated reason why the plaintiff or prosecutor has no valid case."[388] Although the defendant bears the burden of proof with respect to affirmative defenses, they really amount to pleas in avoidance, not claims of entitlement to relief or remedy.[389] Accordingly, it would seem that the plausibility standard should not apply to affirmative defenses raised in an answer or other responsive pleading given the plain language of Minn. R. Civ. P. 8.[390]

V. CONCLUSION

Minnesota's pleading and Rule 12 jurisprudence presently states a paradox.[391] The *Franklin* rule leads us to believe that almost any kind of factual allegations suffice to state a legally viable claim for relief because a Rule 12.02(e) motion's success depends on what facts the plaintiff ultimately might prove.[392] *Hebert* and *Bahr*, on the other hand, say that a complaint that merely alleges legal conclusions does not suffice, thereby conditioning the viability of a claim for relief on what the plaintiff has alleged, as opposed to what the plaintiff might prove.[393] Although *Hebert* and *Bahr* embrace *Twombly's* analysis to varying degrees, neither expressly adopts *Twombly's* plausibility standard, nor do those cases attempt to explain how the *Franklin*

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381 MINN. R. CIV. P. 8.01.
382 MINN. R. CIV. P. 8.01.
383 MINN. R. CIV. P. 8.02.
384 MINN. R. CIV. P. 8.02.
385 MINN. R. CIV. P. 8.03.
386 *Compare* MINN. R. CIV. P. 8.02 *and* MINN. R. CIV. P. 8.03 *with* MINN. R. CIV. P. 8.01.
387 BLACK'S LAW DICTIONARY 281 (9th ed. 2009).
388 *Id.* at 482.
389 *See id.*
390 *See* MINN. R. CIV. P. 8.
391 *See supra* Part IV (explaining the current *Bahr-Hebert-Franklin* paradox).
392 *See supra* Part IV.A (explaining the rule set out in *Franklin*).
393 *See supra* Part IV.A (discussing the *Bahr-Hebert-Franklin* paradox).

rule squares with *Twombly's* analysis and the plausibility standard from which it flows.[394]

The time is ripe for the Minnesota Supreme Court to decide whether to accept the plausibility standard for evaluating whether claims for relief are properly pled. If adopted in Minnesota, the plausibility standard would acceptably solve the *Bahr-Hebert-Franklin* paradox.[395] Consistent with Rule 8.01, the standard would require district courts faced with Rule 12.02(e) motions to focus on the legal sufficiency of the factual matter alleged rather than what the claimant ultimately might prove through evidence adduced in discovery.[396] The standard is flexible enough to allow claimants to plead claims easily and sufficiently structured to define the issues to be litigated in a way that controls discovery costs and contributes to efficient case management.[397] Moreover, the plausibility standard enhances the thematic harmony of the Minnesota Rules of Civil Procedure by making Rule 12 motion practice an integral part of those Rules and allowing that procedure to function in a manner consistent with their purpose.[398] Thus, it makes sense that the Minnesota Supreme Court should expressly adopt the plausibility standard as the rule for judging the legal sufficiency of claims for relief in Minnesota at its earliest opportunity.[399]

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394 *See supra* Part IV.A (discussing how *Hebert* created a paradox).

395 *See supra* Part IV.C (explaining how the plausibility standard solves the *Bahr-Hebert-Franklin* paradox).

396 *See supra* Part IV.C (discussing the plausibility standard).

397 *See supra* Part IV.C (discussing the plausibility standard).

398 *See supra* Part IV.C (discussing how the plausibility standard comports with the purpose behind the Minnesota Rules of Civil Procedure).

399 *See supra* Part IV.C (explaining why the plausibility standard should be adopted).