Half a decade ago, some characterized the Supreme Court’s 2007 decision in *Bell Atlantic Corp. v. Twombly* as a paradigm shift. The Court’s decision in *Ashcroft v. Iqbal* appeared to continue the revolution. A new gatekeeper—plausibility—now stands between a plaintiff and discovery. Post-*Twombly* and *Iqbal*, however, the fundamental question remains: how does a plaintiff actually “earn the right to engage in discovery?”

The five years after *Twombly* have yielded some guidance, some answers, more questions, and spirited debate. At the district court level, issues arising in franchise cases include:

- How is plausibility defined in theory and practice?
- Do the defendant’s counter-arguments play a role in the analysis?
- What effect does plausibility have on fraud-based pleadings?
- Do the *Twombly/Iqbal* pleading standards apply to affirmative defenses?

Appellate courts, of course, address the same issues. The appellate court conversation, however, has prompted a separate debate on additional issues, including:

- Should a court weigh the parties’ respective explanations of plausibility?
- Do the pleading standards change based on the complexity of the claim?
- Should a court weigh the anticipated expense of discovery in its plausibility assessment?

This article examines these issues.

**I. Genesis: The Supreme Court Cases**

*Twombly* was an antitrust case, an area of the law that has spawned intensely rational legal principles over the past twenty years. Drawing on antitrust roots, the Supreme Court in *Twombly* asked whether the complaint

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3. Swanson v. Citibank, N.A., 614 F.3d 400, 405 (7th Cir. 2010).

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alleged a “plausible” cause of action. Although Rule 8 of the Federal Rules of Civil Procedure requires only a concise statement of the claim, the Court reasoned that the antitrust claim in *Twombly* still had to be plausible:

> While a complaint . . . does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level.

*Iqbal* extended the plausibility test beyond the antitrust arena and described a two-step analysis. A court should “begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” Although legal conclusions can provide the framework of a complaint, they must be supported by factual assumptions. Thus, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” Next, “[w]hen there are well-pled factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”

The venerable principle of *Conley v. Gibson*, which barred dismissal unless there was no set of facts the plaintiff could prove to support the claim, was retired by *Twombly* and *Iqbal*. It is worth noting, however, as the Third Circuit did in *Phillips v. County of Allegheny*, what did not change: Rule 8 was not amended or supplanted, facts alleged in a complaint (but not conclusory statements) must still be taken as true, and all reasonable inferences must be drawn in favor of the plaintiff.

*Twombly* and *Iqbal* focused the light of rationality on the rules of pleading, adding a practical “does this make sense” test. A recitation of elements and the barest of facts are no longer sufficient armor to defeat dismissal. The broad outlines of the revised pleading standards may be easily repeated, but the devil is in the details. As Seventh Circuit Judge Hamilton observed in his dissent in *McCauley v. City of Chicago*:

> As a subordinate federal court, it is our responsibility to do our best to apply the law as stated in *Iqbal*. . . . The problem here is that it is also our responsibility to do our best to apply other Supreme Court decisions involving pleading standards [citations omitted], as well as the Federal Rules of Civil Procedure as adopted by the Court and approved by Congress, and the form pleadings that are part of the Federal Rules of Civil Procedure and that were also approved by the Court and Con-

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8. *Id.* at 678.
9. *Id.* at 679.
11. 515 F.3d 224, 231 (3d Cir. 2008). *Phillips* was decided before *Iqbal*.
12. 671 F.3d 611 (7th Cir. 2011).
gress. *Iqbal* is in serious tension with these other decisions, rules, and forms, and the Court’s opinion fails to grapple with or resolve that tension . . . As a result of this unresolved tension, since *Iqbal* was decided, the lower federal court decisions seeking to apply the new “plausibility” standard are wildly inconsistent with each other, and with the conflicting decisions of the Supreme Court.\(^{13}\)

This is startling candor from an appellate jurist, but his observations, to paraphrase the language of the accused opinions, are “facially plausible.” Abundant uncertainties are reflected in the application of *Twombly* and *Iqbal* by the lower courts.

To compound the conundrum, two apparently contradictory statements by the Supreme Court in *Twombly* have provided rich soil for debate in the appellate courts. The Court in *Twombly* condemned the complaint’s allegations of conspiracy, observing that parallel conduct, allegedly evincing agreement, “fails to bespeak an unlawful agreement” and thus stopped short of plausibility.\(^{14}\) Yet the Court also opined that a claim may proceed “even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.”\(^{15}\) One statement could be read as encouraging an assay of the underlying facts while the other posits a decidedly lower bar. On these two seemingly antithetical statements, a debate in the appellate courts hangs. In the meantime, the district courts soldier on.

### II. *Twombly* and *Iqbal* in the District Courts

#### A. Plausibility in Theory

The district courts are the dismissal battleground. They must interpret and apply the pleading standards of Rules 8 and 9, as well as the pronouncements of *Twombly* and *Iqbal*. Generally, district courts have done so pragmatically. However, as Judge Hamilton observed, application thus far seems “inconsistent.”\(^{16}\) Application of the standards in franchise cases reflects the typical range of approaches and areas of inconsistency.

At first blush, the definitions of “plausibility” do not seem to vary greatly. The bankruptcy court’s definition in *In re Brooke Corp.*,\(^{17}\) one of the many cases arising from the bankruptcy of the Brooke companies, is typical: “[T]he Complaint [must] contain more than a statement of facts that merely

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13. *Id.* at 622. Judge Hamilton defined five “key problems” that *Iqbal* presents to federal courts: (1) Conflict between *Iqbal* and Rule 9(b)’s statement that “malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally”; (2) *Iqbal* did not overrule other Supreme Court precedent rejecting heightened pleading standards in specific situations; (3) *Iqbal* conflicts with the form complaints included in the Federal Rules of Civil Procedure (which *Iqbal* neither amended nor overruled); (4) *Iqbal*’s reliance on the fact/conclusion dichotomy is highly subjective and smacks of long-discredited code pleading standards; and (5) *Iqbal*’s reliance on “judicial experience and common sense” invites judges to subjectively weigh competing explanations. *Id.* at 622–25.


15. *Id.*


creates a suspicion of a legally cognizable right; the factual allegations [must be] enough to allow ‘the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’”

In less formal language, an Illinois district court in Metro Premium Wines v. Bogle Vineyards, Inc., a case involving a failed distribution relationship, explained that the “story [in the complaint must] ‘hold together’” to state a claim. Or, as the district court wrote in Comeaux v. Traban, “the face of the complaint must contain enough factual matter to raise a reasonable expectation that discovery will reveal evidence of each element of the plaintiff’s claim.”

Also illustrative is Echo, Inc. v. Timberland Machines & Irrigation, Inc., a case involving claims for wrongful termination of an outdoor power equipment dealership. A third-party defendant accused of tortious interference moved to dismiss the claims against it, asserting that under Twombly and Iqbal “the allegations of the complaint are insufficiently detailed to paint a definitive picture of insidious meddling on [the defendant’s] part.” The district court rejected the argument, explaining: “We do not read Twombly and Iqbal as establishing a standard whereby a plaintiff, to survive a 12(b)(6) motion, must in every case recite an elaborate set of factual allegations. Rather, these cases elucidate that a cookie cutter approach will not suffice . . .”

Some courts have suggested that as a cause of action becomes increasingly complex, Twombly and Iqbal demand increasingly detailed and specific factual allegations, an approach suggested by the Seventh Circuit in McCauley.

18. Id. at 521.
20. Id. at *4.
24. Id. at *3.
25. Id; see also Lift Truck Lease & Serv., Inc. v. Nissan Forklift Corp., 2012 WL 3891615, *6 (E.D. Mo. Sept. 7, 2012) (“At the dismissal stage, [the plaintiff] is not required to establish a ‘substantial evidentiary basis’ for its claim.”); Beaver v. Inkmart, LLC, 2012 WL 3822264, *3 (S.D. Fla. Sept. 4, 2012) (“Generally, a plaintiff is not required to detail all the facts upon which he bases his claim.”).
26. McCauley v. City of Chicago, 671 F.3d 611, 616–17 (7th Cir. 2011) (“The required level of factual specificity rises with the complexity of the claim.”).
Although the district court in *Midas International Corp. v. Chesley* quoted *McCauley* with apparent approval, it did not appear to apply it in the case. The *Midas* case was a post-termination dispute between a franchisor and its former franchisee—the franchisor asserting Lanham Act, breach of contract, and unfair competition claims, and the former franchisee positing counterclaims for breach of the franchise agreement, bad faith termination, and similar claims. The counterclaims survived a motion to dismiss as the court refused to weigh in on factual issues: “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.”

B. *Plausibility in Practice*

Despite the rough harmony among judicial descriptions of plausibility, in practice the courts applying the inquiry embrace widely varying approaches. The Supreme Court in *Iqbal* acknowledged that a plausibility inquiry is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” Courts have rarely identified common sense as a touchstone, but widely varying approaches to the plausibility inquiry are evident in franchise cases.

At one end of the spectrum are courts that focus strictly on the complaint, refusing to consider contrary explanations and evidence. For example, in *Davidson v. ConocoPhillips Co.*, the court assessed only the allegations of the complaint and refused even to review the franchise agreement between the parties. The plaintiff distributor asserted breach of contract in connection with a rental reimbursement program on which it allegedly relied in incurring significant expense to improve its service station. In its motion to dismiss, the defendant argued that the franchise agreement completely rebutted the plaintiff’s claims. The court refused to consider the terms of the agreement, however, because it was the defendant, not the plaintiff, that relied on the contract.

A similar approach is evident in *Brown v. Moe’s Southwest Grill, LLC*, in which Moe’s franchisees asserted disclosure failures by the franchisor. The Georgia district court set a low bar for compliance with *Twombly* and *Iqbal*: “[T]he burden at this stage of the litigation is only such that the court must be able to reasonably infer a plausible claim and liability from

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28. Id. at *3.
31. Id. at *2. Applicable pre- and post-*Twombly* precedent authorizes a court assessing a Rule 12(b)(6) motion to review documents “whose contents are alleged in a complaint and whose authenticity no party questions.” Id. Cases cited by the court in *Davidson* include *Branch v. Tunnell*, 14 F.3d 449 (9th Cir. 1994).
the alleged facts” and concluded that the plaintiffs had met that standard.34

Significantly, even though the defendant franchisor had produced a signed Uniform Franchising Offering Circular (UFOC) receipt that, if credited, would have barred at least one claim, the court refused to consider it.35

The bankruptcy court in In re Brooke Corp.,36 similarly refused to consider the defendants’ factual arguments, referring to them as “more properly considered . . . defenses.”37

District courts have danced gingerly around the facts in many other franchise cases, refusing to stray too far into interpretation. One such case is Moran v. Mr. Transmission of Chattanooga, Inc.38 The case involved a franchisor’s action against a franchisee who retired; abandoned the franchise; and turned over the assets of the business to his son, who continued to operate the same business in the same location. The court examined the franchise agreement, found an ambiguity as to future royalties, but otherwise refused to consider the weight or veracity of the facts asserted in the complaint.39

Similarly, in Echo,40 the district court refused to weigh the defendant’s interpretation of the scenario described in the complaint, commenting, “at this stage of the litigation we are examining only the legal sufficiency of [plaintiff’s] complaint, not evidence offered to show liability that can be assessed for weight or quality.”41

The district court in DavCo Acquisition Holding, Inc. v. Wendy’s International, Inc.42 showed less reluctance to roam into arguably factual matters in the course of a plausibility assessment. This case arose from Wendy’s decision to designate Coke as its sole approved fountain syrup provider. The franchisees’ efforts to encourage Wendy’s to consider Pepsi as an alternate supplier were, according to the plaintiffs, summarily rejected without explanation. The franchisees claimed that Wendy’s refusal to consider an alternate source, despite a contract provision allowing franchises to propose one, was based solely on Coke’s direct contributions to Wendy’s advertising fund. The court examined the franchise agreements and applied its own

34. Id. at *2.
35. Id.
37. Id. at 521.
38. 725 F. Supp. 2d 712 (E.D. Tenn. 2010).
39. Id. at 719.
rationale to the facts, concluding that the complaint failed to plead a plausible cause of action. 43

Where courts’ local rules require the filing of factual statements collateral to formal pleadings, they have taken those statements into account when assessing compliance with Twombly and Iqbal plausibility standards. 44 In Jay Automotive Group, Inc. v. American Suzuki Motor Corp., 45 for instance, the franchisee auto dealer sued Suzuki asserting Racketeer Influenced and Corruption Organization Act (RICO) violations arising out of Suzuki’s alleged failure to deliver desired models to the dealer, delivery of undesirable models, broken promises of brand promotion and sales growth, and other sins. The Georgia district court’s local rules required that in RICO cases, responses to RICO-specific interrogatories must accompany the complaint. In determining whether plaintiff met the Twombly/Iqbal requirements, the court examined both the complaint and the RICO interrogatory responses. 46 The complaint survived dismissal.

By and large, courts have been predictably lenient in assessing compliance with pro se plaintiffs. However, in at least two franchise-related cases, the claims of pro se plaintiffs were dismissed for failure to satisfy the Twombly/Iqbal standards. 47

Litigants have occasionally sought discovery prior to a decision on dismissal with varying results. The plaintiff in Solomon Realty Co. v. Tim Donut U.S. Ltd. 48 successfully persuaded the district court to allow limited discovery before rendering a decision on a motion to dismiss, but the opposite result occurred in Long John Silver’s, Inc. v. DIWA III, Inc. 49 In Solomon Realty, the plaintiff franchisee served discovery on the defendant franchisor seeking information specifically directed to the defendant’s Rule 12(b)(6) motion. The defendant moved to stay discovery pending a decision on its motion, but the court denied that request and required the defendant to comply with the plaintiff’s “very limited request for a maximum of three specific documents to assist it in responding to the motion to dismiss.” 50 The contrary case, Long John Silver’s, was decided in the context of a motion to amend.

43. Id. at *7 (the court reasoned that Coke was in a position to make concessions and contribute to the advertising fund, and that Wendy’s was in a unique position to negotiate on behalf of all franchisees).
44. Some courts, for example, require RICO-specific case statements and/or responses to interrogatories. See, e.g., M.D. GA. LOCAL RULE 33.3.
46. Id. at *9.
The franchisor sought to amend its claims against the franchisee and certain owners and guarantors, an attempt resisted on the grounds that the amendment would be futile. The franchisee’s corporate structure, ownership structure, and guarantor relationships were complicated, and the franchisor requested limited discovery regarding those relationships in connection with the franchisee’s motion to dismiss. The court refused to allow discovery and refused to allow the amendment.51 It seems that as with much of the assessment process, whether a court will permit motion-specific discovery is anyone’s guess.

The Twombly/Iqbal plausibility inquiry has been applied in various contexts. In Long John Silver’s,52 it was applied to determine whether an amendment would be futile. In other situations, however, courts have refused to undertake a plausibility inquiry. For example, in DLC Dermacare, LLC v. Castillo,53 the Arizona district court rejected the defendants’ argument that a plausibility analysis was applicable to damage allegations and refused to require the amount of damages to be pled with particularity.54 In In re Brooke Corp.,55 the bankruptcy court faced a motion to dismiss the Chapter 7 trustee’s claims to recover monies advanced by Brooke to its insurance agents. The agents moved to dismiss the claim based on the trustee’s failure to plead sufficient facts to support the action. The court declined to apply Twombly and Iqbal, explaining:

Arguably, under Twombly and Iqbal, Chapter 5 [Bankruptcy Code] Complaints lacking such critical information would be subject to dismissal for failure to state a claim. However, the Omnibus Procedures Order, which is essentially an agreement on the procedures applicable to the adversary proceedings negotiated by the Trustee and the many defendants, implicitly modifies the pleading standards in these cases.56

Brooke reflects a very particular situation, but the court’s conclusion raises the interesting proposition that parties could by agreement opt out of Twombly and Iqbal. In a practical sense, it seems unlikely that a defendant would agree to do so, but if parties can agree to opt out, can they also agree to revise the test of plausibility or narrow its application?57 At what point would parties’ agreements impinge on the powers of the court? While intriguing, these questions must go unanswered.

54. Id. at *3.
56. Id. at *3.
57. One could posit some situations in which such an agreement might make sense; for instance, when the plaintiff and the defendant both desire to keep factual allegations confidential.
C. Plausibility in Cases Involving Fraud

In his dissent in McCauley, Judge Hamilton identified Rule 9’s statement that “malice, intent, knowledge and other conditions of a person’s mind may be alleged generally” as one of the five troublesome issues arising from the Twombly/Iqbal plausibility test. In practice, however, Twombly and Iqbal appear to have had very little effect on fraud-based pleading standards because the district courts generally appear to focus instead on the heightened pleading requirements mandated by Rule 9. A case in point, involved RICO and Sherman Act claims. The district court cited Twombly as applicable to the Sherman Act claim, but explained that the heightened standard of Rule 9 governed the RICO allegations. Assessing the plaintiff’s RICO and fraudulent inducement allegations against Rule 9, the district court jettisoned those claims. The Sherman Act claims met the same fate based on the court’s application of Twombly. While they involved separate claims and separate modes of assessment, both met the same fate.

The district court’s opinion in Damabeh v. 7-Eleven, Inc. reflects the same bifurcated analysis. After 7-Eleven terminated his franchise for failing to repair the premises and maintain sufficient equity in the location, the franchisee-plaintiff sued 7-Eleven for breach of the franchise agreement and fraud. The court weighed the plaintiff’s assertion against the Twombly/Iqbal standards, concluding that essential facts were missing. The fraud claim was also rejected, but the court’s analysis focused entirely on Rule 9. Although no court appears to have specifically held that Rule 9 standards are stricter than the plausibility inquiry mandated by Twombly and Iqbal, as a practical matter, the courts appear to believe this to be the case.

D. Plausibility in Affirmative Defenses

In the process of jousting with plausibility, a contentious and unresolved issue has emerged in the district courts, namely whether the Twombly and Iqbal standards should be applied to affirmative defenses. Commenting that “what’s good for the goose is good for the gander,” the district court in

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58. McCauley v. City of Chicago, 671 F.3d 611, 622–25 (7th Cir. 2011).
59. Rule 9 provides that “all averments of fraud or mistake shall be stated with particularity.” This is often summarized as a “who, what, when, how” pleading requirement.
61. Id. at *6. Note that the Seimer case was decided post-Twombly, but pre-Iqbal.
62. Id. at *9.
63. Id. at *11.
65. Id. at *3.
66. Id. at *5–6.
Racick v. Dominion held that affirmative defenses must also meet Twombly/Iqbal standards. In that case and in others that have expressed a similar view, a rationale was found in the text of Federal Rules of Civil Procedure 8(a)(2) and 8(b), both of which require a “short plain” statement. The courts in these cases reasoned that because the Supreme Court in Twombly defined a plausibility test based on Rule 8, the same rationale should apply to affirmative defenses as well.

Courts on the opposite side of the issue cite the differing language in Rule 8(a)(2), which requires “a showing that the pleader is entitled to relief,” and Rule 8(c), which merely requires the defendant to “affirmatively state any avoidance or affirmative defenses.” As the district court in Falley v. Friends University noted, under Rule 8(c) “the pleading party bears no burden of showing an entitlement to relief.” In EEOC v. Joe Ryan Enterprises, Inc., the district court described the latter view as a “growing majority,” but characterized the issue as “an unsolved mystery in the post-Twombly/Iqbal world.” Equally certain of its observation, the court in Barnes & Noble, Inc. v. LSI Corp. remarked that the former view was the majority view, thus embracing the equitable theory that “what is good for the goose’s complaint should be good for the gander’s answer.” To date, no appellate court has addressed the issue.

III. Wisdom from the Appellate Courts

While much remains unclear in the appellate courts, a consistent approach to a method of analysis—referred to elegantly in the First Circuit as a “two-step pavane”—has emerged in appellate precedent. A court should ignore rote recitals of elements, legal conclusions, and conclusory statements, which are not entitled to a presumption of truth; then it should accept factual allegations as true, assess compliance with Rule 8 (or Rule 9 if allegations based on fraud are present), and apply the plausibility barometer.
Aside from an emerging consistency on process, however, the circuit courts are wrestling with plausibility standards. Judge Hamilton is not the only appellate jurist to express angst. Eight Ninth Circuit judges, dissenting from the court’s en banc denial of a petition for rehearing in *Starr v. County of Los Angeles*, 79 decried the appellate path of *Twombly* and *Iqbal* in their circuit. The majority, the dissenters complained, have applied an “*Iqbal Lite*” (“Same insufficient complaints, fewer dismissals!”) standard. 80 They defined the Ninth Circuit approach as follows: “The majority thus creates a sliding scale in which the greater the anticipated discovery expense, the greater the showing of plausibility that is required.” 81

Unsettled issues in the circuit courts abound: Where on the sliding scale of plausibility does the complaint need to fall to survive a motion to dismiss? Does the concept of plausibility change depending on the type of case? If discovery is likely to be expensive, does the case warrant a closer look? What if the defendant posits a more plausible explanation? Just how far into the factual weeds should a court stray in assessing plausibility?

The parameters of plausibility described by the Supreme Court are more than possibility, but less than probability. 82 Seeking familiar territory, courts have stated that the necessary factual allegations do not rise to the level required for preliminary injunctive relief 83 or to survive a motion for summary judgment.84 But short of summary judgment, the distance between possibility and probability remains unclear—it may be a gulf or it may be a hair’s breadth.

The Seventh Circuit has taken a particularly aggressive approach in defining plausibility. In *Limestone Development v. Village of Lemont, Illinois*, 85 Judge Posner opined that to withstand a post-*Twombly* motion to dismiss, the RICO complaint had to reflect facts that indicate a “substantial” case. 86 Sounding like the economist he is, Judge Posner voiced the rationale that the gravitas of the cause of action must be weighed before subjecting a defendant to the tremendous expense of discovery:

> [Twombly] teaches that a defendant should not be forced to undergo costly discovery unless the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case.

...
In a complex antitrust or RICO case a fuller set of factual allegations . . . may be necessary to show that the plaintiff’s claim is not ‘largely groundless.’ (citation omitted).87

Post-\textit{Iqbal}, the Seventh Circuit had occasion to apply the \textit{Twombly} standards to a complaint alleging misdeeds in lending practices in \textit{Swanson v. Citibank, N.A.}88 Writing for the majority, Judge Wood frankly acknowledged the appellate court dilemma: “The question with which courts are still struggling is how much higher the Supreme Court meant to set the bar.”89 Judge Wood recognized the high costs of discovery and the possible use of gatekeeping Rule 12(b)(6) motions as a means of making it “more difficult to earn the right to engage in discovery.”90 Observing that the instant case did not present the complexity of a financial derivatives, tax fraud, or antitrust case warranting a fuller set of allegations, the majority found that the \textit{Swanson} complaint passed muster.91

Judge Posner dissented in \textit{Swanson}, rejecting the majority’s suggestion that the standard of plausibility varies with the complexity of the case, focusing instead on the “obvious alternative explanation” argument. Applying “judicial experience and common sense,” as the Supreme Court counseled in \textit{Iqbal}, Judge Posner concluded that the defendant’s alternative explanation precluded discriminatory lending practices as a plausible inference.92 According to Judge Posner, the defendant’s explanation was more readily plausible, and the plaintiff thus failed to clear the \textit{Twombly/Iqbal} bar.93

Even in a less complex case, the Seventh Circuit weighed competing notions of plausibility. \textit{Brooks v. Ross}94 involved claims against a prison review board in connection with parole hearings. Although the claims were less complex than the antitrust claims in \textit{Limestone Development}, the court nevertheless engaged in the “more or less plausible” discussion. In ultimately rejecting the plaintiff’s complaint, the court reasoned that “[t]he behavior [plaintiff] has alleged that the defendants engaged in is just as consistent with lawful conduct as it is with wrongdoing.”95

In a later case, the Seventh Circuit characterized the equal protection claims against the Chicago police department in \textit{McCauley}96 as more complex than the discriminatory lending claims in \textit{Swanson} and then upheld dismissal of the case because the plausible inferences of unlawful and lawful conduct to be drawn from the allegations were in equipoise.97 Because the

87. Id.
88. 614 F.3d 400 (7th Cir. 2010).
89. Id. at 403.
90. Id. at 405.
91. Id. at 407.
92. Id. at 411.
93. Id.
94. 578 F.3d 574 (7th Cir. 2009).
95. Id. at 581.
96. 671 F.3d 611 (7th Cir. 2011).
97. Id. at 619.
claim was complex, the court concluded that more detail was needed to withstand a motion to dismiss.98

And so we return to Judge Hamilton’s spirited dissent in McCauley. Among the five problems that Judge Hamilton perceives as raised by Iqbal99 is the Supreme Court’s “obvious alternative explanation” reasoning, which “[s]eems to invite judges to weigh competing explanations for alleged conduct and dismiss cases merely because they believe one explanation over another.”100 The problem, according to Judge Hamilton, is that Iqbal’s “more or less likely” language may be erroneously read to mean that a plaintiff loses on the pleadings if a defendant offers a more plausible explanation.101 “A plausible claim can seem less plausible or probable than the obvious alternative and still survive dismissal.”102 The misreading or misapplication of Iqbal, Judge Hamilton warns, will result in “outcomes . . . based on how different judges view the plausibility” of the plaintiff’s theory of the case.103

The Third and Eleventh Circuits have adopted a plausibility test similar to that of the Seventh Circuit.104 The Ninth Circuit is on the same side of the ledger, but rejects the notion that equally plausible scenarios advanced by plaintiff and defendant support dismissal. To the contrary, as the Ninth Circuit explained in Starr v. Baca:105

If there are two alternate explanations, one advanced by the defendant and the other advanced by the plaintiff, both of which are plausible, plaintiff’s complaint survives a motion to dismiss under Rule 12(b)(6). Plaintiff’s complaint may be dismissed only when defendant’s plausible alternative explanation is so convincing that plaintiff’s explanation is implausible.106

Thus, in the Ninth Circuit, if plausibilities are in equipoise, the complaint survives a motion to dismiss.

On the other side of the ledger are the First and Second Circuits, in which the notion of weighing competing plausibility rationales is anathema. In Ocasio-Hernandez v. Fortuno Burset,107 the First Circuit reversed the district court’s dismissal of a § 1983 claim. There, the district court had concluded that the complaint lacked plausibility based on an obvious alternative explanation for the defendants’ actions. Citing Twombly, however, the First Cir-

98. Id. at 616–17.
99. See id. at 622–25.
100. Id. at 625.
101. Id.
102. Id.
103. Id.
104. See, e.g., Burtch v. Milberg Factors, Inc., 662 F.3d 212, 228 (3d Cir. 2011), cert. denied, 132 S. Ct. 1861 (antitrust complaint dismissed, parallel conduct “could just as well” be independent action); Jacobs v. Tempur-Pedic Int’l, Inc., 626 F.3d 1327, 1342 (11th Cir. 2010) (antitrust complaint failed, allegations failed to show that inference of wrongful conduct was “more plausible” than legal, profit-maximizing conduct); Am. Dental Ass’n v. Cigna Corp., 605 F.3d 1283, 1295 (11th Cir. 2010) (RICO case; obvious alternative explanation).
105. 652 F.3d 1202 (9th Cir. 2011).
106. Id. at 1216.
107. 640 F.3d 1 (1st Cir. 2011).
cuit reasoned that the district court could not ignore properly pled factual allegations, “even if it strikes a savvy judge that actual proof of those facts is improbable.”108 The court then went further, holding, “[n]or may a court attempt to forecast a plaintiff’s likelihood of success on the merits.”109

The Second Circuit ruled similarly in Anderson News, LLC v. American Media, Inc.110 “The choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion.”111 The petition for certiorari in Anderson focused squarely on the dueling plausibility issue, but received no traction in the Supreme Court. The Third and Tenth Circuits appear to agree with the First and Second Circuits.112

Three cases in the Sixth Circuit, however, evidence either judicial schizophrenia or movement toward the more liberal views of plausibility in the First and Second Circuits. The first case, an en banc decision in In re Travel Agent Commission Antitrust Litigation,113 opted for the more-or-less probable view of plausibility, citing the concern expressed in Twombly regarding hefty litigation costs.114 Judge Merritt, dissenting, described the debate as follows: “Here my colleagues have seriously misapplied the new standard by requiring not simple ‘plausibility,’ but by requiring the plaintiff to present at the pleading stage a strong probability of winning the case....”115

The Sixth Circuit addressed the plausibility issue again in Watson Carpet & Floor Covering, Inc. v. Mohawk Industries.116 In that antitrust case, the court cited both the “more likely to be explained” rationale and the “savvy judge” language from Twombly, but this time came down more solidly on the side of the latter, stating: “Ferreting out the most likely reason for the defendants’ actions is not appropriate at the pleadings stage.”117 In a more recent encounter with the dismissal standards in an antitrust case, Erie County, Ohio v. Morton Salt, Inc.,118 the Sixth Circuit panel relied on Watson Carpet and remarked that “at the pleading stage, the plaintiff is not required to allege facts showing that an unlawful agreement is more likely than lawful parallel conduct.”119

108. Id. at 12.
109. Id. at 13; see also Fowler v. UPMC Shadyside, 578 F.3d 203, 213 (3d Cir. 2009) (court should not determine whether a prima facie case has been factually alleged); Walters v. McNulty, 684 F.3d 435, 439 (4th Cir. 2013) (plausibility does not require court to forecast evidence; plausible is not probable); Dias v. City & County of Denver, 567 F.3d 1169, 1183 (10th Cir. 2009) (claim survives despite doubt as to merits).
110. 680 F.3d 162 (2d Cir. 2012), cert. denied, 133 S. Ct. 846 (2013).
111. Id. at 185.
112. Fowler, 578 F.3d at 213 (court should not determine whether a prima facie case has been factually alleged); Dias, 567 F.3d at 1183 (claim survives despite doubt as to merits).
113. 583 F.3d 896 (6th Cir. 2009).
114. Id. at 904.
115. Id. at 912.
116. 648 F.3d 452 (6th Cir. 2011).
117. Id. at 458 (also remarking that plausibility is not probability).
118. 702 F.3d 860 (6th Cir. 2012).
119. Id. at 868.
The Fourth Circuit’s position is enigmatic. In *Beasley v. Arcapita, Inc.* Judge Gregory, in dissent, observed that on a Rule 12(b)(6) motion, “even if we may foresee the claim’s later failure at the summary judgment stage, we must refrain from examining its underlying merits.” The majority, however, had dismissed the case based on plaintiff’s failure to allege a plausible basis on which he might have standing to assert discrimination claims against the defendant. Because the case was dismissed on standing grounds, it is unclear whether the majority agreed with Judge Gregory’s statement of the limits of a plausibility inquiry. Later, in *Walters v. McMahen,* the Fourth Circuit faced the plausibility issue again. In affirming the district court’s dismissal, the court explained that “a plaintiff need not ‘forecast’ evidence sufficient to prove the elements of the claim . . . [but] must allege sufficient facts to establish those elements.” Neither *Beasley* nor *Walters* directly address the issue of whether competing assertions of plausibility should be weighed, but the tone of these two cases suggests that the Fourth Circuit is at least inclined toward the First and Second Circuit views.

The issues percolating in the district courts have yet to reach the circuit courts. In the meantime, the efforts to apply *Twombly* and *Iqbal* at the appellate level have generated separate debates, with predictable divergence among the circuits.

IV. The Future

So what does all this mean? Extant appellate precedent demonstrates a split among the circuits on the issue of dueling plausibilities; in the district courts, litigators are left to wonder whether they will be required to increase the factual bulk of affirmative defenses. Theses and antitheses thrive, but will synthesis prevail? That may be up to the Supreme Court.

In the absence of authoritative clarification, an obvious message from *Twombly* and *Iqbal* is the wisdom of bulking up pleadings and even affirmative defenses with facts. Of course, obtaining facts pre-discovery can prove difficult. The most important lesson from *Twombly* and *Iqbal* thus is the silent one—the high value of a thorough pre-filing investigation. Rule 11 burdens counsel with the obligation to investigate prior to filing: “By presenting to the court, a pleading . . . an attorney . . . certifies that to the best of the person’s knowledge, information and belief, formed after an inquiry reasonable under the circumstances . . . the factual circumstances have evidentiary support. . . .” ABA Model Rule of Professional Conduct 3.1 reflects the same obligation. The question that arises, relative to the lawyer’s obligation post-*Twombly,* is whether the ameliorating language of Rule 11 and, for

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120. 436 F. App’x 264 (4th Cir. 2011).
121. *Id.* at 267.
122. *Id.* at 266.
123. 684 F.3d 435 (4th Cir. 2012).
124. *Id.* at 439.
that matter, Model Rule 3.1, has been implicitly abrogated. By softening the attorney’s burden, Rule 11 allows a factual pleading, despite the absence of specific support, if the “factual contentions . . . will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.” Judge Hamilton did not acknowledge this as one of the conundrums arising from the Supreme Court’s decisions, but perhaps it should be added to the list. As with many of the issues addressed in this article, there is no ready answer.

What path the progeny of *Twombly* and *Iqbal* may follow is all but impossible to predict. Lively and fascinating debate aside, the overarching message of the cases is less opaque. Once the pleader has met the appropriate technicalities of Rule 8 or Rule 9, the Supreme Court’s rulings in *Twombly/Iqbal* direct pleaders to take several steps back, focus their vision more broadly, and ponder the question: “Does this make sense?” In legal terms, “Is this plausible?” If the claim fails this test, the plaintiff’s ticket to discovery will not be punched.