UPDATING THE APPENDIX OF FORMS TO THE FEDERAL RULES: WHY NOT PROVIDE OFFICIAL EXAMPLES OF WHAT IS SUFFICIENT?

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ABSTRACT

Until 2014, the Federal Rules of Civil Procedure included an Appendix of Forms. In 2015, however, the Supreme Court abrogated the Appendix. It would be better if the Court were to promulgate an updated Appendix. A set of officially approved Forms would save judicial and attorney resources, introduce beginning lawyers to proper pleading, discourage the tactic of using motions to dismiss for delay and harassment, and reintroduce numerous documents other than complaints and answers that are not obsolete.

The principal reason for abolition of the Forms, presumably, was that they did not comply with the Supreme Court's decisions in Bell Atlantic Corporation v. Twombly *and* Ashcroft v. Iqbal. *These decisions required a complaint to contain factual information making the inference of a claim plausible; conclusions were insufficient. The Appendix, however, was written under an earlier regime that required only a loose kind of notice pleading. The leading Supreme Court decision of that bygone era pronounced that a complaint was sufficient unless it showed beyond doubt that the plaintiff could not recover.*

This Article features an analysis and revision of Original Form 11, which stated a prototypical negligence claim. This complaint did not meet the standards set by Twombly *and* Iqbal *because it contained only a broad conclusion that the defendant "negligently drove a motor vehicle against the plaintiff." No factual allegations accompanied this statement to make the claim plausible. The Revised Form 11 offered here contains hypothetical allegations that could supply what* Twombly *and* Iqbal *require. It also reflects additions to improve the statements of special damages and to address certain strategic matters. Commentary is included to explain each added item.*

Then, using Revised Form 11 as background, this Article proceeds to analyze and offer revisions of other complaints and answers contained in the Appendix. A final section expresses the author's conclusions, which include observations that that this new set of forms reflects many judgment calls that could be made differently, but that revision should not be unduly difficult, and that it would have a number of important benefits.

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I. INTRODUCTION

Until the Supreme Court's decision to abrogate it in 2015, an Appendix of Forms was attached to the Federal Rules of Civil Procedure.[1] The Appendix provided concrete examples of complaints, answers, motions, and other documents that the Rules declared were sufficient.[2] Then, the decisions in *Bell Atlantic Corporation v. Twombly*[3] and *Ashcroft v. Iqbal*[4] made some of the forms obsolete, and they needed updating.[5] Instead of updating the forms, the Advisory Committee recommended abolishing them, and the Supreme Court and Congress did so.

The abrogation of the Appendix of Forms was unfortunate. The Forms could have been modified to comply with the decisions. This Article is an attempt to show why updating the Forms would be desirable, and it suggests a set of Revised Forms that would accomplish the task. Part II of this Article explains why the Appendix of Forms should be brought up to date. This Part explains the impact of *Twombly* and *Iqbal*, and it describes the advantages provided by a set of forms that are models of sufficiency.

The structure of the rest of this Article is unconventional, because of its subject. One of the Federal Forms that is outdated is Form 11, which sets out a prototypical complaint based upon negligence. Therefore, Part III of this Article begins by exploring the ways in which Form 11 might be considered deficient. It then provides a Revised Form that is designed to update the complaint, and it comments on the adequacy and strategy of the revision. The new draft reflects an effort to keep as much of the old language as is consistent with the objective of meeting new requirements. It also tries to retain the same kind of brevity. New language is flagged by bold typeface.

Having dealt with Form 11, this Article proceeds to update other forms that might be considered obsolete. This task starts with Part IV of this Article, which contains treatment of Forms 10 through 21:

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1. FED. R. CIV. P. Appendix of Forms (2014) (repealed 2015).

2. FED. R. CIV. P. 84 (2014) (declaring the Forms to be examples of sufficiency) (repealed 2015).

3. 550 U.S. 544 (2007).

4. 556 U.S. 662 (2009).

5. *See infra* Part II.A. (explaining the effects of *Twombly* and *Iqbal*).

the forms that exemplify complaints. The analysis of Form 11 in Part III provides background for considering other plaintiff's pleadings in Part IV.

Then, Part V of this Article deals with Forms 30 and 31, which depict defensive pleadings. The Supreme Court has not told us whether *Twombly* and *Iqbal* require defendants to plead with plausible facts, but parallel considerations would seem to make those cases apply to affirmative defenses as well as complaints, and perhaps to other defensive pleadings as well. A final section contains the author's conclusions.

II. THE CASE FOR UPDATING THE FORMS

A. The New Regime of Pleading Created by Twombly and Iqbal

Before *Twombly* and *Iqbal*, the Supreme Court had set a loose standard that it called "notice pleading," derived from the requirement in Rule 8 of a "short and plain statement of the claim."[6] This standard required only identification of the legal theory of the claim—such as negligence and a general designation of the factual context—such as that the event occurred while the defendant drove a motor vehicle.[7] No other factual justification of the claim was needed.

Then came *Twombly*. This case included a claim of horizontal market division, which is a *per se* violation of antitrust laws.[8] The plaintiff's complaint alleged in conclusory language that the defendants had conspired to divide the market.[9] The defendants attacked this pleading on the ground that it contained no facts to justify the allegation of conspiracy.[10] The Supreme Court held that the complaint was indeed insufficient, and it set out a requirement—derived from Federal Rule 8—that a complaint include factual allegations supporting a "plausible" inference that a claim exists.[11] This standard was a major break from the historical regime of notice pleading.[12]

Next came *Iqbal*. This was a suit alleging that multiple defendants, including high government officials, had discriminated against the

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6. Conley v. Gibson, 355 U.S. 41, 47 (1957).

7. These requirements are inferred from the then-existing Appendix of Forms, together with then-existing Rule 84, which declared the Forms sufficient. Form 11, for example, fits this description. *See* FED. R. CIV. P. Appendix of Forms (2014) (repealed 2015).

8. *Twombly*, 550 U.S. at 549-51.

9. *Id.* at 550-51 (quoting allegations of "parallel conduct," among other charges).

10. *See id.* at 548-49.

11. *Id.* at 556-57.

12. *See supra* note 6 and accompanying text.

plaintiffs on ethnic grounds by detaining them.[13] The claim required proof of the mental state required to establish liability and to overcome the defendants' immunity.[14] However, the plaintiffs' complaint contained general allegations of these essential elements. The Court applied the reasoning and holding of *Twombly* to decide that these statements were not enough.[15] The Court emphasized that general allegations were insufficient, and that the claim must be supported by "facts," not "conclusions."[16]

There has been a large amount of commentary on *Twombly* and *Iqbal*,[17] but extensive analysis of those decisions is not called for here. It is important to add, however, that the Supreme Court also held that the factual allegations need not make the inference of a claim probable in the sense of more-probable-than-not.[18] All that is required is facts that make a claim plausible.[19]

The plaintiffs in *Twombly* had argued that barebones pleadings should be sufficient because discovery and other proceedings could flesh out the factual support for the claim.[20] The Court observed, however, that discovery can be extraordinarily expensive, and it is wasteful if there is no plausible claim.[21] A requirement of sufficient factual allegations, the Court suggested, would enable a district judge to recognize some claims for which further proceedings would be wasteful.[22] The decisions must be read as implying that the factual allegations are sufficient if they enable the judge to do so and to terminate the proceedings.

B. The Desirability of Updating the Forms after Twombly and Iqbal

Perhaps the Advisory Committee found the Supreme Court's decisions too unsettled to allow it to produce agreement on an official statement for all of the forms. Updating the Appendix would have required effort because the standards set out in *Twombly* and *Iqbal* have carried ambiguities that have raised difficult questions for years.[23] But

13. Ashcroft v. Iqbal, 556 U.S. 662, 666 (2009).

14. *Id.* at 670.

15. *Id.* at 680.

16. *Id.* at 677-78.

17. *See generally, e.g.*, Judy M. Cornett, *Pleading Actual Malice in Defamation Actions After* Twiqbal*: A Circuit Survey*, 17 NEV. L.J. 709 (2017); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Shirin Sinnar, *The Lost Story of* Iqbal, 105 GEO. L.J. 379 (2017).

18. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

19. *Id.*

20. *Id.* at 559.

21. *Id.* at 558-59.

22. *Id.*

23. *See supra* authorities cited in note 17.

the effort would have been manageable, as this Article intends to demonstrate.

There are good reasons for creating approved forms. For example, there is confusion in the requirement that a complaint must include allegations making the inference of a claim "plausible," stated in terms of "facts" and not mere "conclusions."[24] "[T]he line," says one commentary, "is wide and gray."[25] Just how specific does an allegation have to be in order to be factual rather than conclusionary? As the Supreme Court itself has indicated, there is no dividing line between a fact and a conclusion.[26] Years of litigation have followed without exhausting the mystery in this standard.[27] Approved examples provided in an Appendix of Forms might have helped reduce the cost of wrestling with this issue. In other words, by ducking the issue, the Advisory Committee arguably neglected a device that would have lowered the expense and waste of litigation and conserved judicial resources.

In addition, the Appendix of Forms provided other advantages. Beginning lawyers could take from them an idea of what the Federal Rules meant in requiring a complaint to provide a "short and plain statement of the claim . . . ."[28] This language in Rule 8 replaced the technical requirements of so-called "code pleading"[29]—which had replaced even more exacting common-law pleading[30]—and therefore, lawyers who were present at the birth of the Rules had some idea of what was not required. But they and modern lawyers can be forgiven for not having an intuitive sense of what the Supreme Court's decisions demand. Until its abrogation, the Appendix of Forms helped to bridge the gap. An updated Appendix might do the same today after the ambiguities produced by *Twombly* and *Iqbal*.

In addition, law professors could consider a form complaint together with their students. One of my own students, I recall, expressed surprise that a complaint could be readable, instead of being written in "fancy archaic language." Judge Clark—one of the principal drafters of the Rules[31]—explained that the "short and plain statement" requirement did

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24. *See, e.g.*, ABA SECTION OF LITIG., BUS. & COMM. LITIG. IN FED. CTS. § 8.26 (4th ed. 2017) (subtitled "Cutting Off Troublesome Claims with a Little Help from *Twombly*—Distinguishing between Factual Allegations and Legal Conclusions").

25. *Id.*

26. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 170 (1988).

27. *See* ABA SECTION OF LITIG., *supra* note 24.

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

29. *See* DAVID CRUMP ET AL., CASES AND MATERIALS OF CIVIL PROCEDURE § 5.01[C] (5th ed. 2008) (covering code pleading).

30. *See id.* § 5.01[A][1]-[4] (covering common law pleadings and the forms of action).

31. *See* Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976).

not fully convey the intended meeting, but he pointed out that the Appendix of Forms could help with that.[32] If you could not adequately describe what you were saying, he added, at least you could "draw pictures."[33]

Relatedly, there is a more subtle problem that an Appendix of Forms might address. It is well known that discovery can be used to harass and to increase an opponent's costs, and the Federal Rules attempt to avoid this result.[34] Actually, one can readily infer that motions to dismiss or requesting more definite statements based upon *Twombly* and *Iqbal* can be used for the same harassing purpose.[35] Because the Supreme Court's holdings do not create a very precise standard, it is difficult to prevent this kind of behavior.

For example, the author of this Article once had an opponent who wanted to delay proceedings and who stated that the defendant can always file a motion to dismiss based upon the argument that the complaint is conclusionary.[36] The lack of any meaningful distinction between facts and conclusions would allow such an attack on almost any pleading, and the opponent can perhaps make such an attack multiple times—particularly if the motion is granted or if the complaint is amended. Crowded dockets in many federal courts mean that it can take a long time to obtain a hearing and ruling. Furthermore, a motion to dismiss is easy to write, while explaining the sufficiency of the complaint is more difficult. Once again, the existence of an approved set of sufficient complaints, such as those that would be included in an Appendix of Forms, could help to reduce waste.

Finally, the Appendix of Forms included many documents other than complaints and answers, and these were not affected by *Twombly* and *Iqbal*.[37] But these documents, too, were lost with the abrogation of the Appendix. They should be brought back to life.

III. UPDATING FORM 11: A PROTOTYPICAL NEGLIGENCE COMPLAINT

Therefore, this Article turns to the task of revising the forms. Form 11 makes a good starting point because it sets out a simple claim and shows a clear kind of noncompliance with *Twombly* and

32. Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958).

33. *Id.*

34. *See, e.g.*, Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352, 362-66 (1982).

35. *See supra* note 34 and accompanying text.

36. These documents are in the possession of the author, and they contain names and identifying features which have been changed.

37. *See* FED. R. CIV. P. Appendix of Forms (2014) (repealed 2015).

Iqbal. This Form contains a prototypical negligence complaint. It alleges an automobile accident of some unspecified kind.[38] Its allegations are designed to comply with the older standard of "notice pleading," which was described in *Conley v. Gibson*[39] as supporting any complaint that did not show "beyond doubt" that the plaintiff could not recover.[40] In accordance with that obsolete standard, the claim in Form 11 is expressed only in the statement that the defendant, on a specified date and on a specified street, "negligently drove a motor vehicle against the plaintiff."[41]

This complaint would not be sufficient after the *Twombly* case, which required the pleading of "facts" that make the inference of a claim "plausible."[42] Nor could it comply with the holding in *Iqbal*, which reinforced the standard that plausibility must arise from facts and not mere "conclusions," since the only statement about the defendant's fault is the conclusory pleading that the act was done "negligently."[43] Form 11 would more likely meet these standards if it contained allegations describing the conduct of the defendant, such as "failing to apply the brakes in a timely manner." Therefore, an updated version of Form 11 might appear somewhat like the following:

Form 11. Complaint for Negligence

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. On [Date], at [Place], the defendant negligently drove a motor vehicle against the plaintiff. **The defendant's negligence included but was not limited to the following acts and omissions:**

(a) failing to apply the brakes in a timely manner;

(b) failing to keep a proper lookout;

(c) failing to guide the vehicle away from the plaintiff;

(d) failing to maintain a speed that was safe under the circumstances; and

(e) driving at a speed in excess of the limit set by [Law];

each of which acts or omissions, taken singly or together, was a proximate cause of plaintiff's injuries, because the defendant collided with the plaintiff while the plaintiff was crossing the street as a pedestrian.

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38. *See* FED. R. CIV. P. Form 11 (2014) (repealed 2015).

39. 355 U.S. 44, 47-48 (1957).

40. *Id.* at 45-46.

41. FED. R. CIV. P. Form 11 (2014) (repealed 2015).

42. *See supra* note 13 and accompanying text.

43. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

> 3. As a result, the plaintiff was physically injured, lost **past and future** wages or income, suffered **past and future** physical and mental pain, and incurred **past and future** medical expenses of $_____.
>
> Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs.
>
> (Date and sign—See Form 2).

By way of commentary on the Revised Form, one must recognize that the revision itself depends upon what a critic might call "conclusions." Moreover, the conclusions are used to supply the principal ingredient of the defendant's fault. What does the allegation of lack of "timeliness" add, a stickler might ask? Is it not just another way to say that the defendant was negligent? Doesn't a failure to keep a "proper" lookout just collapse into an allegation of negligence?

The answer is yes, these are statements of both facts and "conclusions," but they are not the kind of conclusions that *Twombly* and *Iqbal* condemn. In those cases, the allegations were legal conclusions, not conclusions of fact. In *Twombly*, for example, the complaint charged the defendants with horizontal market division—which is a *per se* antitrust violation—without specification of the means by which any conspiracy to divide the market could be inferred.[44] In *Iqbal*, the allegation was of invidious discrimination, without a statement of facts showing the defendants' wrongful mental state.[45]

In Revised Form 11, by contrast, the allegation about timeliness is tied to the defendant's conduct: application of the brakes. The statement that defendant did not act properly is connected to the specification that the wrongful act concerned the defendant's lookout. These expressions can be attacked only if one fails to recognize that every statement of fact is a conclusion.[46] If a witness were to say that the desk I am using now to write is two and a half feet tall, the witness's meaning is that the light inputs in the witness's eyes, as conveyed to the brain, have produced an impression that the desk is two and a half feet tall, and the expression of this idea is a conclusion. If the witness were to seek greater precision by using a tape measure and reporting the resulting observation, the evidence would consist of the witness's conclusion that the height of the desk was close to a certain line on the measure.

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44. *See supra* note 8 and accompanying text.

45. *See supra* note 13 and accompanying text.

46. *See supra* note 26 and accompanying text.

This reasoning is reinforced by the Supreme Court's statements about the Rules of Evidence, which broadly admit some kinds of conclusions about facts.[47] As the Court noted in *Beech Aircraft Corporation v. Rainey*, "[a]ll statements in language are statements of opinion, i.e., statements of mental processes or perceptions."[48] In other words, every statement one could possibly make about facts is expressed as a conclusion. *Twombly* and *Iqbal* make sense only as statements of degree.

But perhaps the most convincing argument against condemning Revised Form 11 as too conclusionary would reflect the ultimate reason for the *Twombly* and *Iqbal* decisions. The alternative to requiring facts and not mere conclusions is to allow a dubious claim to proceed on the basis of allegations that do not show that it is even plausible.[49] In *Twombly*, such a holding would have meant that the parties would have had to conduct extraordinarily expensive discovery and other pretrial proceedings just to find out about a claim that might have had no legitimate basis to begin with.[50] In *Iqbal*, a similar approach would have meant that high-ranking public servants would be dealing with intimate details of litigation regularly for lengthy enough periods to interfere with their other responsibilities.[51] The requirement of facts rather than mere conclusions provides no guarantee to the contrary, but it mitigates the problem.

In Revised Form 11, by way of contrast, the allegations do show plausibility. Even if they contain conclusions, they allege important facts. The statements that the defendant failed to apply his brakes in a timely manner and did not keep a proper lookout are testable. They enable the court to separate this complaint from insufficient statements that would not support entrusting the case to a jury even if proved. It is this separation that is the aim of the *Twombly* and *Iqbal* decisions.[52]

A few other aspects of the revision merit comment. First, Revised Form 11 contains an explicit statement that the defendant's negligence was a proximate cause of the plaintiff's injuries. It seems doubtful that such a statement is really required. The Original Form's allegation that the defendant "drove a motor vehicle against the plaintiff"

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47. *See, e.g.*, FED. R. EVID. 701 (admitting even conclusions or opinions of lay witnesses if based upon perception and are helpful).

48. Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 168 (1988) (quoting W. King & D. Pillinger, Opinion Evidence in Illinois 4 (1942)) (citation omitted).

49. *See supra* Part II.A.

50. *Id.*

51. *See id.*

52. *Id.*

would seem to supply proximate causation.[53] But adding a few words of type is inexpensive compared to the cost of responding to a motion to dismiss, and so strategy indicates more specificity. Therefore, the Revised Form also adds the words "while the plaintiff was crossing the street as a pedestrian."

The revision contains no explicit statement of the basis of the defendant's duty.[54] In most negligence cases, duty is not an issue, because it is obvious from the factual context.[55] A driver of a motor vehicle owes a duty to avoid negligent injury to others on the road.[56] Original Form 11 stated that the defendant negligently drove a motor vehicle against the plaintiff, whereas the Revised Form contains added language about the plaintiff having been a pedestrian crossing the street. It seems unlikely that more would be required, and throughout the case, duty would almost certainly not be a contested issue.

The statement of damages in the Original Form may be inadequate if the plaintiff is not completely healed, as is often the case. Rule 9 requires "specificity"—or particularity—in statements of special damages.[57] More commonly, therefore, the damages might need to include the words "past and future," which are added here before each item of damage. These revisions may not be necessary, but it is better to add them than to wait and find out. And as always, the pleader should make the allegations depend on the evidence. If the plaintiff is able now to work normally, for example, the word "future" should be omitted.

Finally, the Revised Form contains multiple statements of fact about different acts of negligence. These include both an allegation about speed in excess of safety and an allegation of speed in violation of statute, which is designed to charge *per se* negligence. This feature of the complaint is strategic. Although a single act of negligence would suffice, there is the possibility that the plaintiff, at trial, might develop and prove a different act of negligence from what is alleged. In *Messick v. Turnage*,[58] for example, the plaintiff charged the defendant with

53. FED. R. CIV. P. Form 11 (2014) (repealed 2015).

54. *See, e.g.*, Earle v. United States, No. 6:13-CV-184-DLB-REW, 2016 WL 1417811, at *4 (E.D. Ky. Feb. 8, 2016) (listing elements of a negligence claim in Kentucky, including duty).

55. *See, e.g.*, Seguro v. Cummiskey, 844 A.2d 224, 225 (Conn. App. Ct. 2004) (holding that duty existed as a matter of law under facts of the case).

56. *Cf.* Schrader v. Great Plains Elec. Coop., Inc., 868 P.2d 536, 538 (Kan. Ct. App. 1994) (recognizing duty arising from dangerous condition on highway).

57. FED. R. CIV. P. 9.

58. 83 S.E.2d 654, 655 (N.C. 1954).

negligence in the form of maintaining a leaky roof, which caused ceiling plaster to fall and injure the plaintiff.[59] At trial, a variance developed because although the plaintiff proved that the defendant was indeed negligent, the negligence instead consisted of allowing a drain to clog and leak.[60] Therefore, the plaintiff lost.[61] "Proof without allegation," said the court ominously, "is as unavailing as allegation without proof."[62] The inclusion of multiple ways in which a defendant is alleged to have been negligent reduces the likelihood of a variance between pleading and proof.

IV. FORMS 10 AND 12 THROUGH 21: COMPLAINTS FOR DIFFERING KINDS OF CLAIMS

A. Form 10: Complaint to Recover a Sum Certain

Form 10 exemplifies a complaint for a suit on a promissory note. It also provides language for suits on accounts, for goods sold and delivered, for money lent, for money paid by mistake, and for money had and received.[63] Each claim is expressed in three or fewer sentences.

It is possible to argue that all of these complaints comply with the standards set by *Twombly* and *Iqbal*.[64] The form for a suit on a note, for example, includes the making of the note and the terms of its contents, and therefore it not only impliedly gives notice of the elements of a promissory note claim but provides facts making the basics of the claim plausible.[65] As to the defendant's breach of duty, however, the form says only that the defendant "has not paid the amount owed."[66] Therefore, the sufficiency of the statement is debatable. Although this language seems sufficient to make the claim "plausible," often a note has more than one obligor, and in that event nonpayment by the defendant is not determinative. A stickler for detail might point out that another obligor may have paid the note, and in that event the claim is invalid. Furthermore, the Original Form does not allege ownership of the note.[67]

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. FED. R. CIV. P. Form 10 (2014) (repealed 2015).

64. *See supra* Part II.A.

65. *See, e.g.*, Lugli v. Johnston, 912 N.Y.S.2d 108, 111 (N.Y. App. Div. 2010) (listing elements of a claim on promissory note as existence of note, execution by defendant, unequivocal and unconditional obligation to pay, and failure to pay); Thu Binh Si Ho v. Saigon Nat'l Bank, 438 S.W.3d 871, 875 (Tex. App. 2014) (similar elements, but adding plaintiff's ownership of the note).

66. FED. R. CIV. P. Form 10 (2014) (repealed 2015).

67. *See supra* note 53; *see id.*

Still, it must be remembered that *Twombly* and *Iqbal* do not require the plaintiff to show that entitlement is more probable than not. The standard is only that the pleaded facts show that the inference of a claim is "plausible." The stickler is insisting on detail foreclosing a possibility that the claim is invalid, rather than demanding a short and plain statement showing that the claim is plausible. But it is easy to accommodate this demand by adding words to the effect that the note remains unpaid, along with an allegation about ownership, and then a possible basis for an attack on the complaint can be avoided. Therefore, the Revised Form below includes an allegation that the note "remains unpaid," and it also says that plaintiff owns and possesses[68] the note physically on its premises.[69]

Analysis of the other kinds of claims in Form 10 reaches analogous conclusions. The claim on an account attaches the written document, and thus it covers the basics of a claim on account;[70] however, beyond that, it says only that the defendant "owes" the account.[71] This may be enough, but the imaginary stickler again could complain that the conclusion in the word "owes" does not show how defendant allegedly agreed to pay, ordered the goods, or had them sent. The Revised Form includes language to the effect that the defendant "impliedly agreed to pay for the goods by verbally asking the defendant to send them, and the plaintiff sent them." These or analogous factual allegations should be easy to supply, even if they be may not be necessary.

The claim for goods sold and delivered similarly relies on the conclusion that the defendant "owes" money.[72] Allegations like those added to the account claim should supply the factual plausibility that is required, although again, they may not be necessary. The claim for money lent appears deficient when compared to the required elements of such a claim.[73]

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68. Proof of possession of a note is sufficient proof of its ownership. *In re* Woodberry, 383 B.R. 373, 376-77 (Bankr. D.S.C. 2008). It is possible to prove ownership otherwise, but it is more difficult. *See* Marks v. Braunstein, 439 B.R. 248, 250-51 (Bankr. D. Mass. 2010) (explaining method and deciding that plaintiff did not succeed).

69. The word "possession" may be a legal conclusion that needs explanation of its background. The Revised Form includes the words "on its premises," which enhance the factual plausibility of the claim.

70. *Cf.* Woodhaven Partners Ltd. v. Shamoun & Norman, L.L.P., 422 S.W.3d 821, 832 (Tex. App. 2014) (describing suit on an open account). State law in that case prescribed pleadings under oath, which would not be required in federal pleadings. *See* FED. R. CIV. P. 8 (governing pleadings).

71. FED. R. CIV. P. Form 10 (2014) (repealed 2015).

72. *Id.*

73. The elements of a claim for breach of a loan agreement are existence of a valid agreement, performance by the plaintiff, breach, and damages. Power Up Lending Grp., Ltd v. Danco Painting, LLC, No. 15-cv-4537, 2016 WL 5362558, at *4 (E.D.N.Y. Aug. 10, 2016).

It could be supplemented to cover the required elements[74] by language to the effect that the defendant asked to borrow the sum in question and stated that he would pay it back. This allegation seems appropriate to add since there is a great deal of litigation about whether the sum in question was a loan or a gift, and some states have created rules designed to sort out this question.[75] The form for money had and received by a third person, designated for payment to the plaintiff, could contain factual allegations expressing the means by which this designation was made. In all of these cases, one could hope that the additional allegations would be unnecessary, but the language is easy to add and removes questions that might otherwise create delay and wasteful expense.

The form for money paid by mistake is different in character from the other variations in Form 10. It is governed not only by Federal Rule 8 but also by Rule 9, which requires that an allegation of mistake be made with "particularity."[76] The Advisory Committee finessed this issue by simply telling the pleader, "describe with particularity in accordance with Rule 9(b)," or in other words, by saying, "you are on your own."[77] The result of Rule 9 is a mass of cases imposing varying and inconsistent standards, ranging from requirements of long lists of evidentiary details to rudimentary statements about the central mechanism of the loss.[78] Perhaps a better form would help to stabilize interpretations of Rule 9, and therefore the Revised Form offered here provides an example. Revised Form 10 is as follows:

Form 10. Complaint to Recover a Sum Certain

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

[Use one or more of the following as appropriate and include a demand for judgment.]

[(a) On a Promissory Note]

2. On [Date], the defendant executed and delivered a note promising to pay the plaintiff on [Date] the sum of $_____ with interest at

74. *Cf. id.* (setting out differently expressed elements—but amounting to the same requirements—expressed here to avoid conclusions).

75. *E.g.*, Sparkman v. Murray, No. 03-09-00565-CV, 2010 WL 4260950, at *1 (Tex. App. Oct. 29, 2010) (person claiming a loan rather than a gift if from parent to child must prove it is not a gift by "clear and convincing" evidence).

76. FED. R. CIV. P. 9.

77. FED. R. CIV. P. Form 10 (2014) (repealed 2015).

78. *Compare* Sweeny Co. v. Engineers-Constructors, Inc., 109 F.R.D. 358, 360-61 (E.D. Va. 1986) (providing long lists of evidentiary requirements), *with* Denny v. Carey, 72 F.R.D. 574, 578-79 (E.D. Pa. 1976) (requiring particularity only about "circumstances" of the claim).

the rate of ___ percent. A copy of the note [is attached as Exhibit A] [is summarized as follows: _____.]

3. The defendant has not paid the amount owed**, and it remains unpaid**. **Plaintiff owns the note and possesses it physically on plaintiff's premises.**

[(b) On an Account]

4. The defendant owes the plaintiff $_____ according to the account set out in Exhibit A. **The defendant impliedly agreed to pay for the goods by verbally asking for them, and the plaintiff delivered them, but the account remains unpaid.**

[(c) For Goods Sold and Delivered]

5. The defendant owes the plaintiff $_____ for goods sold and delivered by the plaintiff to the defendant from [Date] to [Date]. **The defendant agreed to pay for the goods by verbally asking for them, and the plaintiff delivered them, but the price for the goods remains unpaid.**

[(d) For Money Lent]

6. The defendant owes the plaintiff $_____ for money lent by the plaintiff to the defendant on [Date]. **The plaintiff gave the defendant a check for $10,000, and the defendant signed and gave to the plaintiff the loan agreement attached as Exhibit A, which promises to pay the plaintiff $10,000 before [Date]. The loan remains unpaid.**

[(e) For Money Paid by Mistake]

7. The defendant owes the plaintiff $_____ for money paid by mistake to the defendant on [Date] under these circumstances: [describe with particularity in accordance with Rule 9(b)]. **The plaintiff's bookkeeper gave a check to the defendant for his wages on [Date] and then, or the next day, mistakenly gave the defendant another check for the same wages. The defendant has refused to repay the sum.**

[(f) For Money Had and Received]

8. The defendant owes the plaintiff $_____ for money that was received from [Name] on [Date] to be paid by the defendant to the plaintiff. **The plaintiff sold and delivered goods to [Name], who gave the defendant a check for the sum, designated to be given to the plaintiff. The defendant has never delivered the sum to the plaintiff.**

Demand for Judgment

Therefore, the plaintiff demands judgment against the defendant for $_____, plus interest and costs.

(Date and sign—See Form 2.)

B. Form 12: Two Defendants Sued in the Alternative for Negligence

Form 12 is a complaint for negligence when the plaintiff does not know who is responsible. The plaintiff therefore sues two defendants.[79] The complaint is designed to illustrate a pleading for liability in the alternative.

Therefore, the statements of fault in Revised Form 12 are very much like those of Revised Form 11.[80] The variation is that because there are two defendants whose actions may have caused the plaintiff's injuries, the plaintiff may need to supply two sets of factual allegations to show plausibility for claims against both.[81] It is possible that the factual allegations regarding both are the same, but the situation will not always allow that kind of pleading, and so this Revised Form calls for two different sets of acts and omissions. Thus, the following Revised Form contains language added to paragraph 2 of the Original Form, which alleged negligence only as a conclusion:

> **Form 12. Complaint for Negligence When the Plaintiff Does Not Know Who Is Responsible**
>
> (Caption—See Form 1.)
>
> 1. (Statement of Jurisdiction—See Form 7.)
>
> 2. On [Date], at [Place], defendant [Name] or defendant [Name] or both of them willfully or recklessly or negligently drove, or caused to be driven, a motor vehicle against the plaintiff. **[Name of Second Defendant] collided with the rear of the vehicle driven by [Name of First Defendant], propelling that vehicle into the plaintiff. [First Defendant]'s negligence included but was not limited to the following:**
>
> **(a) failing to apply the brakes in a timely manner;**
>
> **(b) failing to keep a proper lookout; and**
>
> **(c) failing to guide the vehicle away from the plaintiff;**
>
> **or in the alternative, [Second Defendant]'s negligence included but was not limited to the following:**
>
> **(a) failing to maintain a speed that was safe under the circumstances; and**
>
> **(b) driving at a speed in excess of limit set by [Law];**
>
> **or further in the alternative, both defendants were negligent in the ways here stated; and each of these acts or omissions of negligence, taken singly or together, was a proximate**

79. FED. R. CIV. P. Form 12 (2014) (repealed 2015).

80. *See supra* Part III.

81. FED. R. CIV. P. Form 12 (2014) (repealed 2015).

> **cause of the plaintiff's injuries, because it caused [First Defendant]'s vehicle to collide with the plaintiff while the plaintiff was crossing the street.**
>
> 3. As a result, the plaintiff was physically injured, lost **past and future** wages or income, suffered **past and future** mental and physical pain, and incurred **past and future** medical expenses of $_____.
>
> Therefore, the plaintiff demands judgment against one or both defendants for $_____, plus costs.
>
> (Date and sign—See Form 2.)

A few cautionary notes are in order. First, in order to comply with Rule 11's demand for a belief based on a reasonable investigation in the existence of evidence to support each allegation, the plaintiff must perform the duty commanded by this Rule for each of the allegations against both defendants.[82] In other words, the plaintiff still may not know which defendant is truly liable—or whether they both are—and the complaint can permissibly charge each possibility; but the plaintiff must have evidence, based on a reasonable investigation, to support each allegation of negligence.

Second, for similar reasons, allegations that the defendants acted "willfully" or "recklessly" should be omitted unless there is a basis in some kind of evidence to support them, and they should be directed only against the particular defendant whose conduct they fit. The Revised Form follows the Original Form by including this language, but it may be that the drafters of Original Form 12 were excessively impressed by the breadth that they perceived in the then-existing Federal Rules. A typical automobile accident will not produce evidence supporting claims of recklessness or willfulness, as Rule 11 would require.[83]

Finally, the plaintiff probably should consider adding the words "past and future" to the statements about damages, as in Revised Form 11.[84]

C. Form 13: A FELA Claim for Negligence

Form 13 exemplifies a complaint under the Federal Employers' Liability Act,[85] which creates a statutory claim for negligence applicable to railroad workers. This Original Form has a better chance of passing scrutiny under *Twombly* and *Iqbal* than the negligence claims in Form

82. FED. R. CIV. P. 11.

83. *See id.*

84. *See supra* Part III.

85. 45 U.S.C. §§ 51-60 (2012).

11 and 12 because Original Form 13 contains an allegation of fact that arguably supports a plausible inference that the claim exists.[86] The defendant railroad's negligence is alleged to consist of "put[ting] the plaintiff to work in a section of the tunnel that the defendant had left unprotected and unsupported."[87] The form adds that the plaintiff was "injured by a rock that fell from an unsupported portion of the tunnel."[88] It is possible that Form 13 does not need to be revised.

It might be better, however, if the plaintiff were to add a statement that the defendant's negligence was a proximate cause of the plaintiff's injuries, together with a one-sentence statement of the manner in which causation occurred, such as a statement that the rock "proximately caused the plaintiff's damages by falling on his head, back, and other bodily parts and causing injuries to them." This allegation is probably unnecessary under the Supreme Court's decisions because the existing language arguably supports the required inference of plausibility. The insertion might nevertheless be wise because it could avoid the need to expend resources and suffer delay in the event of a motion attacking the sufficiency of the complaint.

> **Form 13. Complaint for Negligence Under the Federal Employers' Liability Act**
>
> (Caption—See Form 1.)
>
> 1. (Statement of Jurisdiction—See Form 7.)
>
> 2. At the times below, the defendant owned and operated in interstate commerce a railroad line that passed through a tunnel located at _____.
>
> 3. On [Date], the plaintiff was working to repair and enlarge the tunnel to make it convenient and safe for use in interstate commerce.
>
> 4. During this work, the defendant, as the employer, negligently put the plaintiff to work in a section of the tunnel that the defendant had left unprotected and unsupported.
>
> 5. The defendant's negligence caused the plaintiff to be injured by a rock that fell from an unsupported portion of the tunnel. **This incident proximately caused the plaintiff's damages by falling on his head, back, and other bodily parts, and causing injuries to them.**
>
> 6. As a result, the plaintiff was physically injured, lost **past and future** wages or income, suffered **past and future** mental and

86. *See* FED. R. CIV. P. Form 13 (2014) (repealed 2015).

87. *Id.*

88. *Id.*

> physical pain, and incurred **past and future** medical expenses of $_____.
>
> Therefore, the plaintiff demands judgment against the defendant for $_____, and costs.
>
> (Date and sign—See Form 2.)

Strategically, however, the plaintiff might wish to consider two additional kinds of allegations. First, the pleader might consider restating the acts and omissions of negligence in as many ways as the evidence supports. This tactic is exemplified by the lists in Revised Form 11.[89] A variance between the complaint and the proof can easily arise from pleadings at an early stage of the case that cannot be amended when the variance is recognized much later.[90] For example, if the object that hit the plaintiff was actually a piece of a wooden beam, or if it had been deliberately loosened for some reason, the plaintiff may find that the proof fails to support the allegations. At worst, this situation may mean the loss of a fully proved case, and at best, it will be salvageable only with complex and doubtful efforts.

Second, as in the case of Form 11, it may be appropriate to add "past and future" to each of the statements of damages in order to comply with the requirement of particularity in Rule 9.[91] Revised Form 13 includes this language.

D. Form 14: Complaint for Damages under the Merchant Marine Act

Form 14 exemplifies a complaint for negligence and unseaworthiness under the Merchant Marine Act, or Jones Act.[92] Factual plausibility is lacking; the form just tells the pleader to add it.[93] The Revised Form offered here contains a statement describing these elements of the claim so that it complies with *Twombly* and *Iqbal*. The Revised Form also contains an explicit statement about proximate causation.

> **Form 14. Complaint for Damages under the Merchant Marine Act**
>
> (Caption—See Form 1.)
>
> 1. (Statement of Jurisdiction—See Form 7.)

89. *See supra* Part III.

90. *See supra* note 51 and accompanying text.

91. *See supra* Part III.

92. 46 U.S.C. § 30104 (2012) (commonly called the Jones Act). This statute gives seamen or sea workers the same rights as those of railroad employees. *See* Ziegler v. Alaska Portland Packers' Ass'n, 296 P. 38, 41 (1931).

93. FED. R. CIV. P. Form 14 (2014) (repealed 2015).

2. At the times below, the defendant owned and operated the vessel [Name] and used it to transport cargo for hire by water in interstate and foreign commerce.

3. On [Date], at [Place], the defendant hired the plaintiff under seamen's articles of customary form for a voyage from _____ to _____ and return at a wage of $_____ a month and found, which is equal to a shore worker's wage of $_____ a month.

4. On [Date], the vessel was at sea on the return voyage. (Describe the weather and the condition of the vessel.) **The weather was clear and the vessel was in seaworthy condition except for the following.**

5. (Describe as in Form 11 the defendant's negligent conduct.) **The defendant negligently maintained the vessel and rendered it unseaworthy by allowing liquid to accumulate on deck. The plaintiff slipped and fell because of this condition of the vessel, injuring his back and other parts of his body. The negligence and unseaworthiness were proximate causes of the plaintiff's injuries and damages.**

6. As a result of the defendant's negligent conduct and the unseaworthiness of the vessel, the plaintiff was physically injured, has been **and will in the future be** incapable of any gainful activity, suffered **past and future** mental and physical pain, and has incurred **past and future** medical expenses of $_____.

Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs.

(Date and sign—See Form 2.)

Some aspects of this form deserve commentary. First, it seems unlikely that an express statement about weather or the general condition of the vessel is necessary. The Original Form called for it, and in keeping with the effort to retain original language when possible, a statement is supplied here. Second, as in Forms 11, 12, and 13,[94] it seems doubtful that an explicit statement about proximate causation is required. The inference of a claim is plausible from the other facts. It is added here, however, for the same reason as in those forms: to avoid the need for response to a motion to dismiss. Words incorporating future damages are added—subject (as in Revised Form 11) to the evidence—to comply with the particularity standards of Rule 9.[95]

Finally, a list of multiple negligent acts and omissions, as in Form 11, might be appropriate to prevent a variance.[96] For example, if the evidence showed that the slip-and-fall was due to a solid object, such

94. *See supra* Part III.

95. *See id.*

96. *See id.*

as a loose sheet of metal or merely to a recent polishing, the proof would not support the allegation. Describing the negligence in multiple ways can reduce the likelihood of this kind of variance.

E. Form 15: Complaint for the Conversion of Property

Form 15, which provides a complaint for conversion, raises issues similar to those created by Form 14. It directs the pleader to supply a description of the property, rather than providing an example of sufficient language.[97] In addition, it contains no factual allegations about the conversion itself; it states only that the defendant "converted to the defendant's own use property owned by the plaintiff."[98] Finally, the form contains no allegations to support the assertion that the plaintiff owns the property, and this issue presumably is contested in some conversion cases. It would be better if the complaint were written with the elements of the claim in mind, even if element-by-element pleading is not required.[99] The Revised Form adds factual allegations to make these aspects of the claim plausible.

> **Form 15. Complaint for the Conversion of Property**
>
> (Caption—See Form 1.)
>
> 1. (Statement of Jurisdiction—See Form 7.)
>
> 2. On [Date], at [Place], the defendant converted to the defendant's own use property owned by the plaintiff **by physically removing it from the plaintiff's office to a place known to the defendant**. The property converted consists of [describe] [**a computer, which the plaintiff owned because plaintiff had purchased it at Smal-Mart]**.
>
> 3. The property is worth $_____.
>
> Therefore, the plaintiff demands judgment against the defendant for $_____, plus costs.
>
> (Date and sign—See Form 2.)

This Revised Form shows an instance in which *Twombly* and *Iqbal* seem like signposts in the wrong direction. Little is gained by these revisions beyond technical compliance with the decisions. This criticism

97. FED. R. CIV. P. Form 15 (2014) (repealed 2015).

98. *Id.*

99. Conversion is an unauthorized act that deprives another of his property, or an unauthorized assumption and exercise of the powers of an owner to his harm. Deming v. Nationwide Mut. Ins. Co., 905 A.2d 623, 639 (Conn. 2006); *see also, e.g.*, DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997) (roughly similar but defining conversion in terms of "willful interference").

may frequently fit simple claims.[100] But the Supreme Court's decisions do not appear to imply a simple-case exception, and so technical compliance is necessary.

F. Form 16: Third-Party Complaint

Form 16 is designed to be adapted to all possible theories of recovery in third-party complaints, and so it is understandable that it is written without factual particulars.[101] For those, the pleader would need to adapt one of the other complaint forms—or, more probably, create an analogous statement including plausible facts fitting the situation. There is one aspect of the form, however, to which factual allegations might advantageously be added: to show why the third-party defendant is liable to the third-party plaintiff. Therefore, this Revised Form does so.

> **Form 16. Third-Party Complaint**
>
> (Caption—See Form 1.)
>
> 1. Plaintiff [Name] has filed against defendant [Name] a complaint, a copy of which is attached.
>
> 2. (State grounds entitling [defendant's name] to recover from [third-party defendant's name] for (all or an identified share) of any judgment for [plaintiff's name] against [defendant's name].) [**For example:] Third-party defendant became a part of a three-vehicle collision by negligence that consisted of [here adapt and include the factual allegations in Revised Form 11]. This negligence proximately caused third-party defendant's vehicle to collide with that of third-party plaintiff and to propel both vehicles into that of the plaintiff. For these reasons, third-party defendant is liable to third-party plaintiff for contribution and indemnity.**
>
> Therefore, the defendant demands judgment against [third-party defendant's name] for [all or an identified share] of sums that may be adjudged against the defendant in the plaintiff's favor.
>
> (Date and sign—See Form 2.)

The necessary new allegations are here appended to paragraph 2 of the form, in language that might fit a common situation in which multiple-party negligence is claimed. It should be added that the language of the Original Form suggesting that the pleader specify "an identified

100. *Cf.* Williams v. Limpert, 50 V.I. 467, 471 (D.V.I. 2008) (deciding pleading dispute in relatively simple negligence case and observing that "issues raised by *Twombly* are not easily resolved").

101. *See* FED. R. CIV. P. Form 16 (2014) (repealed 2015).

share" of contribution may be appropriate in some cases,[102] but in other instances today, an identifiable share is not knowable at the pleading stage. Some states' laws make contribution depend upon findings by the jury at trial.[103]

As in the case of Form 15, complying with *Twombly* and *Iqbal* in the circumstances of this claim seems to provide little gain for its complexity,[104] but the Revised Form is designed to provide the necessary compliance with these decisions.

G. Form 17: Complaint for Specific Performance of a Contract to Convey Land

Original Form 17, a complaint for specific performance of a land conveyance contract, calls for attaching the contract.[105] It recites the plaintiff's tender of the purchase price and the defendant's refusal to accept it or to convey the land.[106] Unless one criticizes the terms "tender," "accept," or "convey" on the ground that they are mere conclusions, this language seems sufficient. The complaint contains enough by way of factual matter to make the claim plausible, and this is what *Twombly* and *Iqbal* demand.[107] Unlike most of the forms, this one appears not to require revision.

> **Form 17. Complaint for Specific Performance of a Contract to Convey Land**
>
> (Caption—See Form 1.)
>
> 1. (Statement of Jurisdiction—See Form 7.)
>
> 2. On [Date], the parties agreed to the contract [attached as Exhibit A] [summarize the contract].
>
> 3. As agreed, the plaintiff tendered the purchase price and requested a conveyance of the land, but the defendant refused to accept the money or make a conveyance.
>
> 4. The plaintiff now offers to pay the purchase price.
>
> Therefore, the plaintiff demands that:

---

102. *Id.*

103. *See, e.g.*, Lee's Hawaiian Islanders, Inc., v. Safety First Prods., Inc., 480 A.2d 927, 933-34 (N.J. Super. Ct. App. Div. 1984) (contribution depends upon percentages of negligence, which would be found by a jury); C & H Nationwide, Inc. v. Thompson, 903 S.W.2d 315, 320-21 (Tex. 1994).

104. *See supra* note 77 and accompanying text.

105. *See* FED. R. CIV. P. Form 17 (2014) (repealed 2015).

106. *Id.*

107. *See supra* Part II.A.

(a) the defendant be required to specifically perform the agreement and pay damages of $_____, plus interest and costs, or

(b) if specific performance is not ordered, the defendant be required to pay damages of $_____, plus interest and costs.

(Date and sign—See Form 2.)[108]

H. Form 18: Complaint for Patent Infringement

Form 18 is a patent infringement complaint. It does not include any description of the patented invention other than that it is an electric motor.[109] Likewise, it does not contain facts that show how the defendant is infringing the patent. The Revised Form includes factual allegations about these elements of the claim.

Form 18. Complaint for Patent Infringement

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. On [Date], United States Letters Patent No. _____ were issued to the plaintiff for an invention in an electric motor. **The patent application and letters of patent are attached as Exhibits A and B to this complaint.** The plaintiff owned the patent throughout the period of the defendant's infringing acts and still owns the patent.

3. The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention, and the defendant will continue to do so unless enjoined by this court. **The infringing aspects of the defendant's device include but are not limited to printed circuits, coils, and wiring identical to or similar to the plaintiff's.**

4. The plaintiff has complied with the statutory requirement of placing a notice of the Letters Patent on all electric motors it manufactures and sells and has given the defendant written notice of the infringement.

Therefore, the plaintiff demands:

(a) a preliminary and final injunction against the continuing infringement;

(b) an accounting for damages; and

(c) interest and costs.

(Date and sign—See Form 2.)

108. FED. R. CIV. P. Form 17 (2014) (repealed 2015).

109. *See* FED. R. CIV. P. Form 18 (2014) (repealed 2015).

By way of commentary, one might point out that attachment of the patent application and patent might be omitted and the patent number inserted instead, allowing access to the same public documents. If the application is long, perhaps that approach is reasonable. In addition, the pleader should realize that the allegation that the plaintiff "owns" the patent is conclusionary. Some cases may depend on resolution of the legal issue of ownership. A description of the manner in which the plaintiff acquired and has retained the patent, similar to the brief explanation of ownership in Revised Form 15,[110] may be required in such a case.

I. Form 19: Complaint for Copyright Infringement and Unfair Competition

As in the case of Form 17, this Original Form seems not to require revision, at least insofar as the copyright claim is concerned. The form identifies the work, attaches it, recites the fact of its creation as an original work, identifies and attaches the infringing work, and describes the acts by which the defendant is alleged to have infringed the copyright.[111] There are conclusions, such as that the work "may be copyrighted under United States law,"[112] but the relevant consideration is that the pleader has attached the work itself, as along with the infringing work. It remains to be added that the hypothetical work in this complaint—a book—[113]would be clumsy to attach unless is it is very short.

The allegation of unfair competition, however, is entirely conclusionary. It alleges that the defendant "further has engaged in unfair trade practices and unfair competition in connection with the publication and sale of the infringing book, thus causing irreparable damage."[114] It is possible that this set of allegations is supported by the same factual statements as the copyright claim, in which event the pleader should so state; otherwise, the form requires further factual detail about the unfairness and irreparable damage.

Form 19. Complaint for Copyright Infringement and Unfair Competition

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. Before [Date], the plaintiff, a United States citizen, wrote a book entitled _____.

110. *See supra* Part IV.E.

111. *See* FED. R. CIV. P. Form 19 (2014) (repealed 2015).

112. *Id.*

113. *Id.*

114. *Id.*

3. The book is an original work that may be copyrighted under United States law. A copy of the book is attached as Exhibit A.

4. Between [Date] and [Date], the plaintiff applied to the copyright office and received a certificate of registration dated _____ and identified as [Date, Class, Number].

5. Since [Date], the plaintiff has either published or licensed for publication all copies of the book in compliance with the copyright laws and has remained the sole owner of the copyright.

6. After the copyright was issued, the defendant infringed the copyright by publishing and selling a book entitled _____, which was copied largely from the plaintiff's book. A copy of the defendant's book is attached as Exhibit B.

7. The plaintiff has notified the defendant in writing of the infringement.

8. The defendant continues to infringe the copyright by continuing to publish and sell the infringing book in violation of the copyright, and further has engaged in unfair trade practices and unfair competition in connection with its publication and sale of the infringing book, thus causing irreparable damage. **The defendant has engaged in unfair trade practices by placing advertisements in magazines and newspapers passing off the copied work as his authorship. This conduct, as well as the infringement, has caused and continues to cause irreparable injury in the form of lost sales and diminution of the plaintiff's reputation.**

Therefore, the plaintiff demands that:

(a) until this case is decided the defendant and the defendant's agents be enjoined from disposing of any copies of the defendant's book by sale or otherwise;

(b) the defendant account for and pay as damages to the plaintiff all profits and advantages gained from unfair trade practices and unfair competition in selling the defendant's book, and all profits and advantages gained from infringing the plaintiff's copyright (but no less than the statutory minimum);

(c) the defendant deliver for impoundment all copies of the book in the defendant's possession or control and deliver for destruction all infringing copies and all plates, molds, and other materials for making infringing copies;

(d) the defendant pay the plaintiff interest, costs, and reasonable attorney's fees; and

(e) the plaintiff be awarded any other just relief.

(Date and sign—See Form 2.)

J. Form 20: Complaint for Interpleader and Declaratory Relief

Form 20 says that multiple persons made claims against the single fund payable under a life insurance policy. It denies all claims but, in the alternative, asks that the two claimants be required to interplead.[115] The Original Form closely corresponds to the elements of interpleader,[116] and it may be in compliance with the Supreme Court's decisions except for one issue.

The first person's claim is described as arising from an alleged substitution of the named beneficiary.[117] The remaining claimants are said to assert a right of the deceased's estate, of which they are representatives.[118] The invalidity of both types of claims is alleged to arise from a specified nonpayment of the premium for the policy, but there is no allegation of fact describing either the claim of the first claimant or that of the other two claimants. This Revised Form, therefore, supplies examples of allegations that might serve that purpose.

> **Form 20. Complaint for Interpleader and Declaratory Relief**
>
> (Caption—See Form 1.)
>
> 1. (Statement of Jurisdiction—See Form 7.)
>
> 2. On [Date], the plaintiff issued a life insurance policy on the life of [Name] with [Name] as the named beneficiary.
>
> 3. As a condition for keeping the policy in force, the policy required payment of a premium during the first year and then annually.
>
> 4. The premium due on [Date] was never paid, and the policy lapsed after that date.
>
> 5. On [Date], after the policy had lapsed, both the insured and the named beneficiary died in an automobile collision.
>
> 6. Defendant [Name] claims to be the beneficiary in place of [Name] and has filed a claim to be paid the policy's full amount. **This first defendant has filed a formal claim under the policy alleging that the named beneficiary was [Name] and that this defendant was assigned the beneficiary's rights by [Name].**
>
> 7. The other two defendants are representatives of the deceased persons' estates. Each defendant has filed a claim on behalf of each estate to receive payment of the policy's full amount. **These defendants claim that the designation on the policy does not de-**

115. FED. R. CIV. P. Form 20 (2014) (repealed 2015).

116. *See* Red Beryl, Inc. v. Sarasota Vault Depository, Inc., 176 So.3d 375, 383 (Fla. 2d DCA 2015); Byers v. Sansom-Thayar Comm'n Co., 111 Ill. App. 575, 578 (Ill. App. Ct. 1904).

117. *Byers*, 111 Ill. App. at 577-78.

118. *Id.*

scribe [Name], that there is no identifiable named beneficiary, and that therefore the policy is payable to the decedent's estate.

8. If the policy was in force at the time of death, the plaintiff is in doubt about who should be paid.

Therefore, the plaintiff demands that:

(a) each defendant be restrained from commencing any action against the plaintiff on the policy;

(b) a judgment be entered that no defendant is entitled to the proceeds of the policy or any part of it, but if the court determines that the policy was in effect at the time of the insured's death, that the defendants be required to interplead and settle among themselves their rights to the proceeds, and that the plaintiff be discharged from all liability except to the defendant determined to be entitled to the proceeds; and

(c) the plaintiff recover its costs.

(Date and sign—See Form 2.)

This Revised Form contains additional facts designed to assure compliance. But the added facts contribute little of value other than compliance. As Shakespeare said, "[t]o gild refined gold, to paint the lily . . . is wasteful and ridiculous excess."[119] Actually, the claims in Original Form 20 that are the basis of the interpleader are described in more detail than can be found in most of the forms—as are the conflict among them, the reasons for denying the claims, and the interpleader remedy. Upon reading the form, one probably has the sense that the allegations make the claim plausible. Therefore, it appears that this form might not require revision. Still, the pleader might wish to add the indicated kinds of allegations to avoid the need to defend the complaint.

K. Form 21: A Debt Claim Together with a Fraudulent Conveyance Claim

The first allegations in Original Form 21 are a claim for nonpayment of a promissory note.[120] They repeat the relevant language of Form 10. Therefore, the first two paragraphs of the claim (which are paragraphs 2 and 3 of the form) can be revised by substitution of the language in Revised Form 10.[121] Appropriate words are inserted here.

119. WILLIAM SHAKESPEARE, KING JOHN, act 4, sc. 2, lines 11-16 (4th ed. 1965).

120. FED. R. CIV. P. Form 21 (2014) (repealed 2015).

121. *See supra* Part IV.

The fourth paragraph contains allegations to show a fraudulent conveyance. It alleges that the defendant on a given date conveyed all of the defendant's property to a named individual or conveyed specifically described property. It also alleges that the defendant did so "for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt."[122] The latter allegation might be considered conclusionary after *Iqbal*, which held that a statement about mental state—without factual elaboration—was insufficient.[123] This Revised Form adds language to address that issue.

In addition, Rule 9 requires particularity in an allegation of fraud.[124] The added language is intended to accomplish this purpose as well.

Form 21. Complaint on a Claim for a Debt and to Set Aside a Fraudulent Conveyance Under Rule 18(b)

(Caption—See Form 1.)

1. (Statement of Jurisdiction—See Form 7.)

2. On [Date], defendant [Name] signed a note promising to pay to the plaintiff on [Date] the sum of $_____ with interest at the rate of ___ percent. [The pleader may, but need not, attach a copy or plead the note verbatim.]

3. Defendant [Name] owes the plaintiff the amount of the note and interest.

4. On [Date], defendant [Name] conveyed all defendant's real and personal property (if less than all, describe it fully) to defendant [Name] for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt. **The defendant's purpose is shown by the defendant's having used words to the effect that the defendant would act to make sure that the plaintiff would not be able to collect the debt.**

Therefore, the plaintiff demands that:

(a) judgment for $_____, plus costs, be entered against defendant(s) [Name(s)]; and

(b) the conveyance to defendant [Name] be declared void and any judgment granted be made a lien on the property.

(Date and sign—See Form 2.)

122. *Id.*

123. *See supra* Part II.A.

124. FED. R. CIV. P. 9.

V. FORMS 30 AND 31: DEFENDANT'S PLEADINGS

A. Form 30: Answer Including an Affirmative Defense

Do *Twombly* and *Iqbal* require factually supplied plausibility in a defendants' pleadings? The Supreme Court has not said so, but some lower courts have.[125] The reasoning in the cases applies equally to a defendants' answers by way of affirmative defense. If the pleading cannot be made specific enough factually without showing that it is unmeritorious, further proceedings on this defensive issue—including expensive discovery—should be avoided.

Thus, Original Form 30 contains an allegation supporting a defense of limitation.[126] The statement is arguably conclusionary: "The plaintiff's claim is barred by the statute of limitations because it arose more than [_____] years before this action was commenced."[127] The statement about the claim's arising, as well as the statement about the action's having commenced, are conclusionary because the beginning and ending dates of the limitation period are dependent upon facts. This argument would lead to a requirement that the pleader add allegations somewhat like those included here.

Original Form 30 also includes types of pleadings that are presumably not affected by requirements of factual plausibility. The first defense responds to allegations in the complaint by unexplained statements of admission, denial, and lack of information.[128] The form of these pleadings, which contain no factual support, is authorized by Rule 8(b).[129] The form also includes a dilatory plea of failure to add a person necessary for just adjudication, which is not a subject of the Supreme Court decisions on factual plausibility.[130] Likewise, there is an allegation of failure to state a claim upon which relief can be granted, which also is not a subject of *Twombly* and *Iqbal*.

Form 30. Answer Presenting Defenses Under Rule 12(b)

(Caption—See Form 1.)

Responding to Allegations in the Complaint

1. Defendant admits the allegations in paragraphs _____.

2. Defendant lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraphs _____.

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125. *E.g.*, Vogel v. Huntington Oaks Del. Partners, LLC, 291 F.R.D. 438, 440 (C.D. Cal. 2013); Hayden v. United States, 147 F. Supp. 3d 1125, 1128 (D. Or. 2015).

126. FED. R. CIV. P. Form 30 (2014) (repealed 2015).

127. *Id.*

128. *Id.*

129. FED. R. CIV. P. 8(b).

130. *Id.*

> 3. Defendant admits [identify part of the allegation] in paragraph _____ and denies or lacks knowledge or information sufficient to form a belief about the truth of the rest of the paragraph.
>
> Failure to State a Claim
>
> 4. The complaint fails to state a claim upon which relief can be granted.
>
> Failure to Join a Required Party
>
> 5. If there is a debt, it is owed jointly by the defendant and [Name] who is a citizen of _____. This person can be made a party without depriving this court of jurisdiction over the existing parties.
>
> Affirmative Defense—Statute of Limitations
>
> 6. The plaintiff's claim is barred by the statute of limitations because it arose more than _____ years before this action was commenced. **The complaint in this case is against an alleged insurer for nonpayment of an alleged loss. The claim arose under the discovery rule, at the latest, on [Date], when the plaintiff received a letter from the defendant insurer denying coverage, and this action was commenced more than four years later, on [Date], by the filing of this suit.**
>
> Counterclaim
>
> 7. [Set forth any counterclaim in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.]
>
> Crossclaim
>
> 8. [Set forth a crossclaim against a coparty in the same way a claim is pleaded in a complaint. Include a further statement of jurisdiction if needed.]
>
> (Date and sign—See Form 2.)

The plea is dubious because it attacks the omission of a potential defendant who appears to be a joint obligor, and who ordinarily would not be a person needed for just adjudication;[131] but perhaps the drafter had in mind an instance in which such a party might be needed.

B. Form 31: An Answer with a Counterclaim for Interpleader

Form 31 may also be one of the few forms containing complaints and answers that does not require revision. It is an answer containing a counterclaim for interpleader.[132] The gist of an interpleader is inconsistent claims. The form recites that the defendant received a deposit

131. *See, e.g.*, Wolgin v. Atlas United Furniture Corp., 397 F. Supp. 1003, 1011-12 (E.D. Pa. 1975).

132. FED. R. CIV. P. Form 31 (2014) (repealed 2015).

from the plaintiff, that another person claims the right of payment of the deposit by reason of an assignment, and that the plaintiff alleges that the purported assignment is not valid and also claims the right to payment of the same deposit.[133] Unless the defendant is required to plead evidence, this set of statements is sufficient to supply plausibility to the allegations underlying the right to interpleader.

Form 31. Answer to a Complaint for Money Had and Received with a Counterclaim for Interpleader

(Caption—See Form 1.)

Response to the Allegations in the Complaint

(See Form 30.)

Counterclaim for Interpleader

1. The defendant received from [Name] a deposit of $_____.

2. The plaintiff demands payment of the deposit because of a purported assignment from [Name], who has notified the defendant that the assignment is not valid and who continues to hold the defendant responsible for the deposit.

Therefore, the defendant demands that:

(a) [Name] be made a party to this action;

(b) the plaintiff and [Name] be required to interplead their respective claims;

(c) the court decide whether the plaintiff or [Name] or either of them is entitled to the deposit and discharge the defendant of any liability except to the person entitled to the deposit; and

(d) the defendant recover costs and attorney's fees.

(Date and sign—See Form 2.)

VI. CONCLUSION

The Supreme Court's updating of the Appendix of Forms would have several advantages. First, by providing official examples of sufficiency under the Rules and decisions, a set of revised forms would give guidance to both practitioners and judges about implementing the decisions in *Twombly* and *Iqbal*. The costs of inefficiency caused by the ambiguities in these two decisions must be enormous. Furthermore, an updated Appendix would give beginning lawyers a clear introduction to initiating and answering litigation. And lawyers who seek to cause delay and increase costs by filing unmeritorious, but arguable, motions to dismiss would find this tactic discouraged by a resource

133. *Id.*

that, in some cases at least, would make their motions less viable. Finally, the original Appendix contained forms for many important documents other than complaints and answers—ranging from summonses to discovery papers—that are not affected by *Twombly* and *Iqbal*, and it would be good if these were given new life.

The task should not be excessively difficult for the Rules Advisory Committee to initiate. This Article shows one way in which it could be accomplished. There are, of course, judgment calls to be made, and many of them might be made differently than those that this Article reflects. But there were judgment calls in the original Appendix too, and the Supreme Court is the body to make or adopt this kind of guidance for lawyers. The furnishing of an updated Appendix of Forms would surely be preferable to the wrestling with *Twombly* and *Iqbal* that occupies so much attorney and judicial effort today.