

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Faculty Scholarship

2020

What's the Difference Between a Conclusion and a Fact?

Howard Erichson

Follow this and additional works at: https://ir.lawnet.fordham.edu/faculty_scholarship



Part of the Law Commons

WHAT IS THE DIFFERENCE BETWEEN A CONCLUSION AND A FACT?

Howard M. Erichson*

Forthcoming, 41 *Cardozo L. Rev.* __ (2020)

Ten years after *Ashcroft v. Iqbal*,¹ its most basic lesson—that courts must treat a complaint’s *conclusions* differently from its allegations of *fact*—still perplexes me, but I am gradually coming to terms with the distinction. While *Iqbal*’s approach remains troubling as a matter of procedural policy, some of the cases applying *Iqbal*’s conclusion-fact distinction fall into buckets where application of the distinction is relatively straightforward. The more I see how district judges apply the distinction, the less incoherent it seems, even as I continue to worry that it denies court access to some plaintiffs with meritorious claims. In this essay, I shall attempt to explain the definitional trouble with the distinction but also the way district judges pump meaning into it in several categories of cases.

I. *The Instruction to Distinguish Conclusions from Facts*

When the Supreme Court decided *Bell Atlantic Corp. v. Twombly*,² the reaction among many lawyers and civil procedure scholars was bewilderment.³ The Court held an antitrust complaint insufficient despite the complaint’s allegation that a group of telecommunications companies agreed not to compete in each other’s geographic markets. Whether one agreed or disagreed with the outcome as a matter of policy, the decision seemed clearly wrong as an interpretation of Federal Rule of Civil Procedure 8 in light of the rule’s language, history, and prior judicial treatment. Rule 8’s language said that a complaint must provide a “short and plain” statement of the claim.⁴ The

* Professor of Law, Fordham University School of Law. My thanks to the *Cardozo Law Review* and the Floersheimer Center for Constitutional Democracy for sponsoring this symposium; to my co-panelists Stephen Burbank, Robin Effron, Myriam Gilles, and Alex Reinert for their comments; and to Serhiy Moshak and Samara Perlman for research assistance.

¹ 556 U.S. 662 (2009).

² 550 U.S. 544 (2007).

³ See Adam N. Steinman, *The Pleading Problem*, 62 *Stan. L. Rev.* 1293, 1305 & nn.67-69 (2010) (noting that *Twombly* “sent shockwaves throughout the legal community—for academics, practitioners, and judges alike,” and citing sources).

⁴ A complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). See also Fed. R. Civ. P. 84 (stating that the forms “suffice under these rules and illustrate the simplicity and brevity that these rules contemplate”) (abrogated 2015); Fed. R. Civ. P. Form 11 (illustrating the

rule's history suggested that the function of the complaint was to notify the defendant of the claim against it rather than to establish the truth of the plaintiffs' allegations.⁵ Rule 8's context emphasized the permissiveness of the standard in contrast to the heightened pleading standard established by its neighboring rule.⁶ Courts routinely declared that, for purposes of a motion to dismiss for failure to state a claim, the complaint's allegations are assumed to be true.⁷ From every direction, it was difficult to square *Twombly* with the prior understanding of Rule 8. When the decision was announced, however, it seemed arguably limited to a particular type of case. Justice Souter's majority opinion in *Twombly* stated, "We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct, and now reverse."⁸ The Court's reasoning, moreover, focused on the particular problem of expensive discovery in a complex antitrust class action.⁹ Thus, notwithstanding the usual principle that Federal Rules of Civil Procedure apply transsubstantively,¹⁰ some thought that *Twombly's* impact would be limited.¹¹

Two years later, in *Ashcroft v. Iqbal*,¹² the Supreme Court removed any doubt about the impact of *Twombly*. If *Twombly* was wrong, *Iqbal* multiplied the wrong by explicitly making the *Twombly* interpretation of Rule 8 transsubstantive.¹³ The

barebones approach to pleading considered sufficient under the Federal Rules of Civil Procedure) (abrogated 2015).

⁵ See Stephen B. Burbank & Sean Farhang, *Rights & Retrenchment* 137-38 (Cambridge U. Press 2017).

⁶ The Federal Rules of Civil Procedure require that fraud and mistake be pleaded "with particularity." Fed. R. Civ. P. 9(b). The Supreme Court and others regularly invoked the maxim *expression unius est exclusion alterius* in connection with Rule 9(b) to explain that other types of pleadings need not be pleaded with particularity. See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

⁷ See, e.g., *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002); *Leatherman*, 507 U.S. 163; *Conley v. Gibson*, 355 U.S. 41 (1957).

⁸ 550 U.S. at 553.

⁹ See *id.* at 558.

¹⁰ See Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts ...").

¹¹ See, e.g., Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 635 (2007); see also Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. Pa. L. Rev. 473, 477-79 (2010) (citing arguments that *Twombly* was limited to antitrust cases or to complex cases with a likelihood of expensive discovery); Steinman, *supra* note 3, at 1305-06 (same).

¹² *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

¹³ *Id.* at 684 ("Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard 'in all civil actions and proceedings in the United States district courts.' Fed. Rule Civ. P. 1. Our decision in *Twombly*

sufficiency of every civil complaint in federal court was to be judged according to the *Twombly* analysis.

For those who found *Twombly* mystifying, *Iqbal* had an apparent silver lining: *Iqbal* explained what judges were supposed to do with *Twombly*. Not only did *Iqbal* make *Twombly* transsubstantive, it spelled out the steps of the analysis. Whereas *Twombly* offered little guidance—the opinion said that complaints must be “plausible” but it did not explain what that word meant or how judges should deploy it—the *Iqbal* majority turned *Twombly* into a set of judicial instructions for deciding motions to dismiss.¹⁴

When reviewing the sufficiency of a complaint, *Iqbal* instructed, a judge must separate *conclusions* from *facts*. On a motion to dismiss, a complaint’s allegations of facts are assumed to be true while its allegations of conclusions are not entitled to the same assumption. This, according to *Iqbal*, is the first lesson of *Twombly*. As Justice Kennedy explained in the majority opinion, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”¹⁵ The opinion makes the point multiple times: “Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’”¹⁶ Going into instruction-manual mode, the *Iqbal* opinion says that a “court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”¹⁷

II. *It’s not about Legal Conclusions*

The instructions seem clear enough at first glance: separate the complaint’s *legal conclusions* from its *factual allegations*; assume the factual allegations are true; and ask whether those factual allegations state a valid legal claim. When one thinks about these instructions in light of their application in *Twombly* and *Iqbal*, however,

expounded the pleading standard for ‘all civil actions,’ and it applies to antitrust and discrimination suits alike.”).

¹⁴ See Donald J. Kochan, While Effusive, “Conclusory” is Still Quite Elusive: The Story of a Word, *Iqbal*, and a Perplexing Lexical Inquiry of Supreme Importance, 73 U. Pitt. L. Rev. 215, 240 (2011) (“*Twombly* hinted at the importance of the meaning of ‘conclusory’ to judicial review of the sufficiency of pleading, but it was *Iqbal* that brought it front and center.”).

¹⁵ *Iqbal*, 556 U.S. at 678.

¹⁶ *Id.* (quoting *Twombly*). See also *id.* at 678-79 (“Rule 8 ... does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”); *id.* at 678 (“A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’”) (quoting *Twombly*).

¹⁷ *Id.* at 679.

the apparent clarity fades. The problem is that the terms *legal conclusions* and *factual allegations* do not match what the Supreme Court did in *Twombly* and *Iqbal*.

Suppose a complaint's only substantive allegation states, "Defendant is liable to Plaintiff for violating the Sherman Act." Every judge would agree that this is a legal conclusion; if the complaint says nothing more, it should be dismissed for failure to state a claim. Now, suppose instead that the complaint alleges the existence of an agreement among the telecommunications companies BellSouth, Qwest, SBC, and Verizon to refrain from competing in each other's geographic markets for Internet and local telephone service.¹⁸ The latter is not a legal conclusion; it is a factual allegation. It may turn out to be true or untrue, provable or unprovable, but what it asserts is not a matter of law but rather matter of fact concerning the existence of an agreement in the real world among a group of telecommunications companies.

Similarly, suppose a complaint's only substantive allegation states, "Defendant is liable to Plaintiff for violating Plaintiff's rights under the Equal Protection Clause." Again, any judge would label this a legal conclusion, and if the complaint says nothing more, it should be dismissed. But suppose instead that the complaint alleges the state of mind of two individuals—John Ashcroft and Robert Mueller—that each of them acted with the purpose of discriminating on the basis of race, religion, or national origin.¹⁹ The latter is not a legal conclusion; it is a factual allegation. It concerns a fact with legal consequences, to be sure, but this does not make it a legal assertion rather than a factual one. The allegation that Ashcroft and Mueller designed and implemented a policy with discriminatory intent is an assertion of fact just as much as the statement, "I drove to the store because I wanted to buy a pair of socks." Neither "I drove to the store" (my conduct) nor "because I wanted to buy a pair of socks" (my state of mind) is an assertion of law. Both are assertions of fact.

Despite the Supreme Court's language in *Twombly* and *Iqbal* about "legal conclusions," neither *Twombly* nor *Iqbal* depended upon a difference between *legal* and *factual* assertions. Rather, they relied on a distinction between factual *conclusions* (whether the *Twombly* defendants agreed not to compete, whether Ashcroft and Mueller intended to discriminate) and factual *supporting allegations* (what the telecommunications companies said and did, what Ashcroft and Mueller said and did).²⁰ These cases involved distinguishing two types of allegations—legally operative factual conclusions, on one side, and supporting facts, on the other—but the relevant line is not a law-fact distinction. The phrase "legal conclusion," as used in *Twombly* and *Iqbal*, is distinctly unhelpful and misleading.²¹

¹⁸ See *Twombly*, 550 U.S. at 551 (quoting paragraph 51 of *Twombly*'s and Marcus's antitrust complaint).

¹⁹ See *Iqbal*, 556 U.S. at 680 (quoting paragraph 96 of *Iqbal*'s civil rights complaint).

²⁰ See, e.g., *id.* at 681 ("To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. ... It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.").

²¹ See Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 Notre Dame L. Rev. 849, 859 (2010) ("The majority in *Iqbal* is extremely unclear as to why these allegations were legal conclusions.").

III. *Keeping an Open Mind about an Elusive Distinction*

Once one sees that the cases involve a conclusion-fact distinction rather than a law-fact distinction, one may ask whether the distinction has any meaning at all. I am a proceduralist, not an epistemologist. But even I can understand that, deep down, there is no satisfying difference between a *conclusion* and a *fact*. At some level, everything is inference; all factual assertions are conclusions. I have struggled with *Iqbal* because the distinction struck me as empty from the start. It is hard to discern why Ashcroft's and Mueller's state of mind and the telecommunications companies' agreement are deemed conclusions while other allegations in the complaints are deemed non-conclusions entitled to an assumption of truth.

I am not the only one who found the *Iqbal* distinction perplexing.²² But I have tried to keep an open mind about the distinction for two reasons. The first reason, simply put, is that the Supreme Court is the Supreme Court, and I'm not. They have the power to say what the law is, including the meaning of Federal Rules of Civil Procedure. I can criticize, but it is not productive for me to throw up my hands and refuse to understand what they said.

The second reason I have tried to remain open to *Iqbal's* conclusion-fact distinction is more substantive. In other endeavors, plenty of humans, including myself, distinguish between conclusions and the facts that permit them to reach those conclusions. In a scientific paper, for example, the author reports the facts—what experiment was conducted and what happened—as well as the conclusions the author draws from those facts.²³ Even if readers assume the author's factual recitation is true (the experimental method and data), they may question whether the author's inferences are justified. If, in other endeavors, we routinely draw distinctions between conclusions and supporting facts, perhaps the task of doing so with regard to pleadings is not hopeless.²⁴ The distinction concerns factual assertions to be believed only if supported by other factual assertions.

The academic literature on pleadings has offered a number of ways to think about applying *Iqbal* to distinguish between allegations that warrant an assumption of truth and those that do not. To the extent there is any unifying theme, it is a general agreement on the elusiveness of the distinction.

²² See, e.g., *id.* at 885 (“*Iqbal* ... adopts a two-pronged approach with a first prong that makes little sense.”); Kochan, *supra* note 14, at 249 (“We are left with none of the Justices really telling us what ‘conclusory’ means, but each knowing when or if they saw it.”); Alex Reinert, Pleading as Information-Forcing, 75 *Law & Contemp. Probs.* 1, 2 (2012) (“But even more striking is the confusion that the two cases have created for the advocates and judges who have to grapple with the new pleading standard.”).

²³ My thanks to Benjamin Zipursky for this analogy.

²⁴ Moreover, even under a notice pleading regime, a pleading must do more than assert that the defendant is liable; the complaint must tell a narrative from which a court can conclude that, if proved, the story meets the elements of a claim. See *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (requiring that a complaint give the defendant “fair notice of what the plaintiff’s claim is and the grounds upon which it rests”).

Donald Kochan produced a thorough exploration of the word “conclusory” as used throughout legal history and as brought to the fore in *Iqbal*.²⁵ He concluded that the word lacks a single coherent definition, and he found it “questionable whether the *Iqbal* test provides anything approaching a workable standard.”²⁶ Kochan focused specifically and lexicographically on the word *conclusory* rather than more broadly on the conclusion-fact distinction, but his analysis sheds lights on the elusiveness of the concept of conclusoriness, not merely on the word itself. He analogized the *Iqbal* standard to Justice Potter Stewart’s notorious standard for identifying hard-core pornography in the first-amendment context: “I know it when I see it.”²⁷ Because of the lack of definition in *Iqbal*, Kochan predicted uncertainty in its application. “Until there is some more concrete and understandable guidance on the first prong of *Iqbal*,” Kochan wrote, “the meaning of ‘conclusory’ in that case will remain quite elusory to all those involved in civil litigation.”²⁸

Others have offered their own spin on *Twombly* and *Iqbal* for analyzing the sufficiency of pleadings. Edward Hartnett’s helpful formulation explained the cases in terms of stepping back from a statement of each element of a claim and offering a narrative to support that element.²⁹ To explain the *Iqbal* conclusion-fact distinction, Hartnett invoked commentaries on pleading by Charles Clark, a framer of the original Federal Rules of Civil Procedure. Quoting Clark, Hartnett wrote, “A conclusory allegation is one that asserts ‘the final and ultimate conclusion which the court is to make in deciding the case for him,’ that is, one that alleges an element of a claim.”³⁰

Robert Bone similarly explained the Court’s reasoning in terms of disregarding allegations that are pleaded at too high a level of generality.³¹ In contrast to Hartnett, Bone deemphasized whether a pleading tracks the elements of a legal claim, instead focusing on whether a complaint as a whole offers enough specificity to permit courts to screen for non-meritorious claims.³² On Bone’s view, the conclusion-fact prong of the analysis disappears into the plausibility analysis.³³

Adam Steinman suggested that *Twombly* and *Iqbal* could be reconciled with prior cases by viewing them as requiring a transactional approach to pleading, or what he labeled plain pleading.³⁴ “The key question going forward,” according to Steinman, “is to assess whether an allegation may be disregarded as conclusory under the *Iqbal* framework. One answer is to define conclusory in *transactional* terms: an

²⁵ Kochan, *supra* note 14.

²⁶ *Id.* at 306.

²⁷ *Id.* at 219 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

²⁸ *Id.* at 222.

²⁹ Hartnett, *supra* note 11.

³⁰ *Id.* at 491 (quoting Charles E. Clark, *Handbook of the Law of Code Pleading* 234 (2d ed. 1947)).

³¹ Bone, *supra* note 21, at 860.

³² *See id.* at 868.

³³ *See id.* at 869.

³⁴ Steinman, *supra* note 3, at 1339. *See also* Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 *Vand. L. Rev.* 333 (2016).

allegation is conclusory only when it fails to identify adequately the acts or events that entitle the plaintiff to relief from the defendant.”³⁵

IV. *Coming to Terms with the Conclusion-Fact Distinction, Bucket by Bucket*

The best hope for understanding *Iqbal*'s conclusion-fact distinction is to look at how it is applied by district courts in a variety of recent cases. What are district judges actually doing with the distinction, ten years after *Iqbal*?³⁶

A number of cases applying the distinction seem to fall into a few big buckets. These buckets include cases involving (a) pleadings that fail to specify the involvement of particular defendants in multi-defendant actions; (b) pleadings that fail to specify the basis for alleging the existence of a custom, practice, or policy; (c) pleadings that fail to specify the basis for alleging the existence of an agreement or conspiracy; and (d) pleadings that allege a defendant's state of mind without alleging observable facts to support the inference. In some cases, the pleadings fall into more than one of these buckets, such as civil rights cases involving complaints that generally allege a practice or policy and generally allege the involvement of multiple defendants.

A. *Cases Regarding Individual Participation*

A set of cases that follow the *Iqbal* model closely are those that treat allegations of supervisors' participation as mere conclusions that are not entitled to an assumption of truth. Some of these cases concern supervisors' liability. As occurred in *Iqbal*, courts have dismissed claims against supervisors upon concluding that plaintiffs overreached by naming defendants up the chain of command without sufficient allegations to specify the basis for liability against the higher-up defendants. Others of these cases concern groups of defendants—not necessarily supervisors—without sufficient allegations regarding each defendant's individual participation.

For example, in *Hyberg v. Enslow*,³⁷ an inmate filed a section 1983 claim against four correctional facility employees, asserting that they conducted illegal strip searches. One of the defendants, Rittenhouse, was not alleged to have been present during either of the strip searches but was alleged to have ordered the searches under illegal conditions. After reciting the *Iqbal* framework,³⁸ the magistrate judge found the complaint's allegations insufficient: “These allegations are too conclusory to plausibly allege Mr. Rittenhouse's personal participation in either the January 24 or April 17, 2017 search.”³⁹

³⁵ Steinman, *supra* note 3, at 1298.

³⁶ This section offers an account of recent district court cases applying the *Iqbal* conclusion-fact distinction. It does not purport to offer a thorough empirical analysis. While not exhaustive, it should suffice to illustrate several categories of cases in which the conclusion-fact distinction frames judicial analysis of pleadings.

³⁷ 2019 WL 979026 (D. Colo. Feb. 28, 2019).

³⁸ *Id.* at *3.

³⁹ *Id.* at *8.

Similarly, in *Miller v. Luzerne County Department of Corrections*,⁴⁰ an inmate asserted claims against fourteen defendants related to a strip search. The district court dismissed the claims with respect to five of the fourteen defendants. Regarding the claims against a particular correctional officer and trooper, after setting forth the *Iqbal* framework,⁴¹ the court explained, “Mr. Miller fails to make any specific averments with respect to CO Flynn or Tpr. Kosakevitch’s involvement in the various events which allegedly led to the violation of his constitutional rights. Neither defendant is alleged to have known of or participated in the April 2016 strip search.”⁴² The court granted the plaintiff twenty-one days “to file an amended complaint alleging the personal involvement of CO Flynn and Tpr. Kosakevitch and any others he claims were involved” in the strip search or in acts of retaliation.⁴³

In *Korth v. Hoover*,⁴⁴ plaintiff Korth alleged that he was assaulted by police officer Botts when Korth went to the municipal building to file a grievance. His complaint asserted claims against the officer’s supervisors, alleging that the supervisors “condoned, if not encouraged, the unlawful behavior of Botts leading up to and including the attack upon Mr. Korth.”⁴⁵ The complaint alleged that the supervisors provided “either no, or inadequate, training to Botts pertaining to the outrageous and egregiously unprofessional misconduct, including sexual harassment and similar complaints against police officers, including the handling of citizens like Mr. Korth who made such complaints.”⁴⁶ The complaint alleged that the defendants failed “to appropriately hire, train, supervise, discipline, and investigate Botts,” and that the “individual defendants assisted each other in performing the various actions described, and lent their physical presence, support and the authority of their office to each other during said events.”⁴⁷ Applying the *Twombly-Iqbal* conclusion-fact distinction,⁴⁸ the court found these allegations insufficient. The district judge explained, “Plaintiff had to specify what Botts’ previous ‘outrageous and egregious unprofessional misconduct’ was and describe what the ‘numerous citizen complaints’ were.”⁴⁹ Regarding the “failure to” claims (failure to hire, train, supervise, discipline, and investigate), “Plaintiff also had to allege specific training that should have been provided and the supervisory practice that was not employed.”⁵⁰

In non-supervisor cases, as well, allegations of participation by multiple defendants have been treated as conclusions. In *Robb v. Connecticut Board of Veterinary Medicine*,⁵¹ a veterinarian asserted an antitrust claim against the state

⁴⁰ 2019 WL 1040675 (M.D. Pa. Mar. 5, 2019).

⁴¹ *Id.* at *2.

⁴² *Id.* at *5.

⁴³ *Id.*

⁴⁴ 190 F. Supp. 3d 394 (M.D. Pa. 2016).

⁴⁵ *Id.* at 405.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 398-99.

⁴⁹ *Id.* at 405.

⁵⁰ *Id.* (internal citation omitted).

⁵¹ 157 F. Supp. 3d 130 (D. Conn. 2016).

veterinary board and its five individual members. The court found the complaint inadequate, and explained its reasoning both in terms of insufficient allegations of agreement à la *Twombly* and in terms of insufficient allegations of participation by each individual defendant:

Dr. Robb makes only conclusory allegations as to an agreement among the Individual Defendants, either tacit or express. The Amended Complaint does not describe any action to that effect engaged in by any of the Individual Defendants. The pleading refers to the alleged conspirators by name only once, and then only to identify the parties to the litigation. By failing to make a single allegation as to the conduct of the individuals that allegedly came to an illegal agreement, [plaintiff has failed adequately to allege an antitrust violation].⁵²

In *Lentz v. Taylor*,⁵³ the plaintiff alleged that a large number of defendants “deliberately fabricated, suppressed, and destroyed exculpatory evidence” and thereby violated her due process rights in connection with her criminal trial.⁵⁴ The court, applying the *Iqbal* framework, found the allegations “overly vague and conclusory” because they lumped defendants together. “This grouping of Defendants erodes any specific factual allegations against each Defendant. ... This Court will not impute generalized allegations onto specific Defendants.”⁵⁵

The bottom line is that district courts apply *Iqbal* to require that pleadings particularize allegations as to individual defendants rather than lump all defendants together. Even if a plaintiff may have a claim against *someone*, these cases make it clear that the plaintiff cannot simply name *anyone* as a defendant, even if they are part of a group that has acted wrongly, and even if they occupy a position of supervisory responsibility. District courts seem to take *Iqbal* as an instruction and reaffirmation that a complaint against multiple defendants must state the basis for liability against each.

B. Cases Regarding Custom, Practice, or Policy

Some cases treat allegations of the existence of a custom, practice, or policy as mere conclusions that are not entitled to an assumption of truth. In particular, courts have applied *Iqbal* to throw out claims of “unofficial policies” where the complaint

⁵² *Id.* at 144.

⁵³ 2019 WL 1091392 (D.N.J. Mar. 8, 2019).

⁵⁴ *Id.* at *11.

⁵⁵ *Id.* at *12 (citing *Vaughn v. Geo Grp.*, 2018 WL 3056066 (D.N.J. June 20, 2018)). *See also* *Martin v. County of Atlantic*, 2019 WL 1012011 at *5 n.6 (D.N.J. Mar. 4, 2019) (“Plaintiff’s failure to identify which officers, aside from Perna, engaged in the alleged ‘protective sweep’ by the barn fails to sufficiently allege each party’s personal involvement in the alleged violation. If Plaintiff decides to amend, she must specify which Defendants engaged in which allegedly wrongful conduct on this and all other counts pled as a group.”).

does not adequately say what the policy is or offer more than speculation regarding the policy's existence.

In *DeLeon v. Vista*,⁵⁶ the complaint alleged that law enforcement officers used excessive force, and asserted a *Monell* claim⁵⁷ against the city, county, sheriff, and deputy mayor. The complaint alleged that these municipal and supervisory defendants should be liable for “unlawful policies, customs and habits of improper and inadequate hiring, training, retention, discipline and supervision of its deputies/patrol officers, proximately causing the constitutional deprivations.” The complaint further alleged that “the City and County, through its patrol division, has a custom, policy or practice of failing to properly investigate citizen complaints and failing to take corrective or disciplinary action against officers who act improperly, thus leading to constitutional violations against Thomas,” and the complaint added allegations about several incidents in which deputies were alleged to have used unnecessary force.⁵⁸ The district court, relying on *Iqbal*, found the allegations inadequate:

[The Second Amended Complaint's (“SAC's”)] allegations fall short of establishing a *Monell* claim. The SAC's reference to several random incidents allegedly involving County and City officials using unnecessary force do not establish a cognizable § 1983 claim. Of the approximately 15,000 annual contacts between the citizenry and County and City's deputies, Plaintiffs cite only a few incidents of alleged excessive force. Such allegations do not reasonably establish either a custom, practice, or policy; and are insufficient to establish a claim for liability under *Monell*. Plaintiffs' conclusory allegations fail to comply with the requisite pleading standards. After *Iqbal*, boilerplate allegations and ‘threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice’ to state a claim.⁵⁹

Because the complaint had failed adequately to allege a municipal custom, practice, or policy, the court dismissed the *Monell* claim against the municipal defendants even as the court denied motions to dismiss the plaintiff's state law claims.⁶⁰

In *Estate of Binn v. Adamsville*,⁶¹ the complaint alleged that the defendant city and two supervisors, Cotton and Carter, had an “unofficial custom” and “unofficial policy” of failing to investigate crimes.⁶² As to the supervisors, the court found the allegations “wholly conclusory,”⁶³ explaining:

⁵⁶ 2019 WL 969544 (S.D. Cal. Feb. 28, 2019).

⁵⁷ See *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978).

⁵⁸ *DeLeon*, 2019 WL 969544, at *4.

⁵⁹ *Id.* (quoting *Iqbal*, 56 U.S. at 662).

⁶⁰ *Id.* at *6.

⁶¹ 2019 WL 968904 (N.D. Ala. Feb. 28, 2019).

⁶² *Id.* at *8.

⁶³ *Id.*

Plaintiff has alleged no *facts* showing a specific policy implemented or enforced by Cotton and Carter. Plaintiff has not alleged any facts supporting a custom of failing to investigate or any facts showing a persistent and widespread practice of failing to investigate. In fact, Plaintiff has alleged no facts regarding any other investigation.⁶⁴

As to the municipality, the court similarly found the complaint's allegation of an "unofficial custom" and "unofficial policy" unavailing:

Plaintiff has not alleged with proper specificity a custom or practice by Adamsville allowing such behavior. For example, Plaintiff has not alleged that any similar incidents occurred that would have placed Adamsville on notice of the need for additional training and supervision. Similarly, Plaintiff has not made any other factual allegations which would explain why additional training or supervision was obviously necessary.⁶⁵

Finding the allegations "conclusory and devoid of factual content," the court dismissed the claim against the municipality.⁶⁶

In *Whitener v. Parker*,⁶⁷ a prisoner *pro se* plaintiff alleged that the defendants failed to provide him adequate medical care. The district judge explained why the complaint must be dismissed:

Plaintiff avers that unspecified Defendants essentially gave him the runaround and ignored his need for surgery "in order to save cost." But Whitener provides only conclusions that [Tennessee Department of Corrections] policies were in play to prevent his medical care. He does not set forth any factual allegations to support his claim that the policies were the moving force behind the alleged deficiencies in his medical treatment.⁶⁸

Citing the *Iqbal* principle that conclusions are not entitled to the assumption of truth and must be supported by factual allegations,⁶⁹ the judge dismissed the complaint but granted leave to amend.⁷⁰

In *Korth*, discussed above in connection with supervisory liability, the court found that the complaint failed to specify the policy or custom that allegedly caused the assault on the plaintiff by a police officer. "We disagree with Plaintiff that he has

⁶⁴ *Id.*

⁶⁵ *Id.* at *9.

⁶⁶ *Id.*

⁶⁷ 2019 WL 1030544 (W.D. Tenn. Mar. 4, 2019).

⁶⁸ *Id.* at *3.

⁶⁹ *Id.* at *2.

⁷⁰ *Id.* at *4.

clearly specified the policies and customs that caused him harm. As noted above, Plaintiff must plead sufficient facts to make his claim plausible, and we cannot accept allegations that are mere conclusions,” the court explained. “As set forth above, Plaintiff’s allegations bearing on policy and custom are totally conclusional.”⁷¹

C. Cases Regarding Agreement or Conspiracy

Some cases, closely following the *Twombly* model, treat allegations of agreement or conspiracy as mere conclusions that are not entitled to an assumption of truth.

In *Robb*, the court not only found the allegations insufficient as to each of the individual defendants,⁷² it also, relatedly, found the allegation of agreement unsatisfactory: “[T]o satisfy the pleading requirement at the Rule 12(b)(6) stage, an antitrust plaintiff may not simply allege that ‘the parties agreed.’ ... [A]ny conclusory allegation of an ‘agreement’ is not to be accepted as true; the plaintiff must allege *facts* affirmatively demonstrating such an agreement.”⁷³ The court went on to suggest what sort of allegations might have sufficed:

By failing to make a single allegation as to the conduct of the individuals that allegedly came to an illegal agreement, nor as to the form, dates, place, structure, or detail of such an agreement, Dr. Robb faces a significant hurdle, as a matter of law, to support his claim of an antitrust conspiracy. To establish the factual underpinning of an actual “agreement,” a party must allege facts that in some way describe the process of that agreement’s formation.⁷⁴

Similarly, in *Kerwin v. Parx Casino*,⁷⁵ the court dismissed the plaintiff’s Sherman Act claim because the complaint failed to provide supporting facts for its allegation of agreement:

Plaintiff alleges an agreement to boycott Plaintiff and his MMA events only in the most conclusory of terms. For example, the *sole* allegation in the Amended Complaint of an alleged conspiracy states: “[a]ll of the

⁷¹ *Korth*, 190 F. Supp. 3d at 406. *See also* *Najera v. Green*, 2019 WL 1059684 (C.D. Cal. Mar. 6, 2019) (finding that the complaint, which alleged that the mayor of Los Angeles failed to enforce rules and regulations, was insufficient because it “fails to set forth any factual allegations that a specific policy or custom promulgated by the City of Los Angeles was the ‘actionable cause’ of a specific constitutional violation, and because it did not state “what specific rules or regulations were not enforced, when the rule or regulation was not enforced, how non-enforcement impacted plaintiff, and what constitutional violation resulted”).

⁷² *See* text at notes 51-52 *supra*.

⁷³ *Robb v. Conn. Bd. of Veterinary Medicine*, 157 F. Supp. 3d 130, 143 (D. Conn. 2016).

⁷⁴ *Id.* at 144.

⁷⁵ 2019 WL 1098949 (E.D. Pa. Mar. 8, 2019).

Pennsylvania Casinos, **acting in concert with one another** are not boycotting plaintiff from being able to promote his mixed martial arts events at all of their casinos ...”⁷⁶

In the absence of supporting factual allegations, the court ruled, such an allegation of conspiracy is not entitled to the assumption of truth.⁷⁷

In a very different factual context, the *Estate of Binn*⁷⁸ court similarly found a non-specific allegation of conspiracy inadequate: “Plaintiff alleges Defendants concerted and conspired ‘by failing to conduct a proper investigation.’ There are no allegations regarding communications between Defendants, underlying agreements reached, or specific action in concert. Simply put, such conclusory allegations, with no factual support, are insufficient to state a claim.”⁷⁹

In *Pagliaroli v. Ahsan*,⁸⁰ a prisoner sued numerous defendants on claims related to the denial of medical care for his neck and back problems. Among other things, the complaint asserted that eight named defendants as well as John Doe defendants conspired to deny him proper medical care. The court found the complaint “devoid of any facts to suggest a conspiracy amongst the Defendants. Instead, Plaintiff merely states these individuals conspired in a conclusory manner, which is insufficient to state a claim for conspiracy.”⁸¹

In the context of a plaintiff’s allegation of conspiracy to establish state action for a section 1983 claim, the court in *Lentz v. Taylor*⁸² explained the complaint’s insufficiency with regard to one of the defendants:

Plaintiff fails to plausibly allege that [Defendant DFDR Consulting] engaged in a conspiracy. Most obviously, the Amended Complaint offers but a series of vague conclusions. For example, in her claim of a conspiracy between DFDR and the Cape May County Prosecutor, Plaintiff provides no specific factual allegations against DFDR. Instead, DFDR is lumped under the amorphous umbrella of “Defendants,” who “act[ed] in concert and conspiracy ...”⁸³

The court concluded that the complaint offered “merely a conclusory allegation of agreement at some unspecified point, which does not supply adequate facts to show illegality.”⁸⁴ As to another set of defendants, the court similarly found the allegation of conspiracy to be conclusory, noting that the defendants were “impermissibly

⁷⁶ *Id.* at *5 (emphases in original).

⁷⁷ *Id.*

⁷⁸ See text at notes 61-66 *supra*.

⁷⁹ *Estate of Binn v. Adamsville*, 2019 WL 968904 (Feb. 28, 2019), at *10.

⁸⁰ 2019 WL 979244 (D.N.J. Feb. 28, 2019).

⁸¹ *Id.* at *5.

⁸² 2019 WL 1091392 (D.N.J. Mar. 8, 2019).

⁸³ *Id.* at *5.

⁸⁴ *Id.* (quoting *Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 179 (3d Cir. 2010) (quoting *Twombly*, 550 U.S. at 557)).

lumped together” and “Plaintiff alleges no facts to support any meeting of the minds.”⁸⁵

D. Cases Regarding State of Mind

In many cases, judges treat state-of-mind allegations as conclusions that are not entitled to an assumption of truth. Some of these cases resemble *Iqbal* in that they involve various forms of discriminatory intent. Other cases involve other states of mind, such as deliberate indifference and bad faith. That state-of-mind allegations are a leading application of *Twombly* and *Iqbal* is ironic, as others have noted,⁸⁶ in light of Rule 9(b)’s explicit instruction that “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”⁸⁷ But perhaps it is unsurprising, inasmuch as the application to state-of-mind allegations hews close to *Iqbal* itself.

In *Guy v. Wilmington*,⁸⁸ the court refused to accord the assumption of truth to the complaint’s allegation that the defendant had intentionally divided funds unequally:

Even accepting *arguendo*, that Guy was treated differently than others similarly situated, he has further failed to state a plausible claim that Defendant’s separate treatment of him was intentional. Plaintiff’s equal protection claim simply states “[t]he discretionary funds were intentionally divided unequally.” As stated in *Iqbal*, “[a] pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” The Amended Complaint’s allegation of intentional discrimination is purely conclusory and insufficient to support a class of one theory for an equal protection clause violation.⁸⁹

In *Carson v. Wetzel*,⁹⁰ the complaint alleged that prison medical personnel “deliberately treated Plaintiff differently because of his mental instability, race and weight,”⁹¹ and the court found this “conclusory averment” insufficient to state a claim. The court explained, “Plaintiff has not pleaded any facts to support this averment; indeed, he has failed to even articulate his race, weight, or the name or nature of the mental impairment that he allegedly suffers from.”⁹²

Some cases apply *Iqbal*’s conclusion-fact distinction to allegations of “deliberate indifference,” holding that the conclusion of deliberate indifference must be backed up by supporting allegations of facts. In *Pagliarioli*,⁹³ for example, a

⁸⁵ *Id.* at *7.

⁸⁶ *See, e.g.,* Reinert, *supra* note 22, at 7 & n.43.

⁸⁷ Fed. R. Civ. P. 9(b).

⁸⁸ 2019 WL 973579 (D. Del. Feb. 28, 2019).

⁸⁹ *Id.* at *4 (quoting *Iqbal*, 556 U.S. at 678).

⁹⁰ 2019 WL 972102 (W.D. Pa. Feb. 28, 2019).

⁹¹ *Id.* at *3.

⁹² *Id.*

⁹³ 2019 WL 979244 (D.N.J. Feb. 28, 2019). *See* text at notes 80-81 *supra*.

prisoner alleged that the defendants were deliberately indifferent to his medical needs. The court treated the allegation of deliberate indifference as a conclusion, not entitled to the assumption of truth:

Plaintiff's Complaint relies on formulaic language and does not provide sufficient facts describing the policy or procedure in effect at the time of the alleged injury or how that policy or procedure caused his constitutional injury. He generally refers to cost-saving measures, understaffing and substandard medical personnel, but with no specific facts. Nor has he provided facts to suggest Defendant Johnson was deliberately indifferent to the risk presented by the policy in effect at the time of his alleged injury; instead, again, he merely states in a conclusory manner that Defendant Johnson was deliberately indifferent.⁹⁴

⁹⁴ *Id.* at *4. Similarly, in *Williams v. Ellerbe*, 317 F. Supp. 3d 144 (D.D.C. 2018), a case involving an Eighth Amendment claim by an inmate allegedly beaten by officers, the court treated the complaint's allegation of "deliberate indifference" by the District of Columbia as a mere conclusion:

To begin, the Court may not credit legal conclusions that are not supported by factual allegations. The allegations of fact raised in the amended complaint, however, establish only that the District had knowledge after the fact that two of its employees beat Williams. Those allegations do not address what the District knew or should have known *before* the alleged attack, and they do not support a claim that the District's deliberate indifference *caused* or *failed to prevent* the incident.

Id. at 149 (citing *Iqbal*). And in *Erdreich v. City of Philadelphia*, 2019 WL 1060051 (E.D. Pa. Mar. 6, 2019), the court declined to accept as true the complaint's general allegations that the city was "deliberately indifferent and reckless with respect to Mr. Erdreich's need for medical attention." *Id.* at *3.

[T]he allegations advanced by Plaintiff in this case simply paraphrase the legal standard for a deliberate indifference claim. While a court at the motion to dismiss stage is required to accept as true all of the allegations in the complaint, it "need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss."

Id. at *9. The court noted that Erdreich failed to allege any facts to establish that the commissioner was on notice of any problem in training or supervision that caused his injuries. *Id.* at *10. *See also* *Korth v. Hoover*, 190 F. Supp. 3d 394, 405 (M.D. Pa. 2016) (treating complaint's many allegations of "deliberate indifference" as conclusions not entitled to assumption of truth).

Other cases use the *Iqbal* conclusion-fact distinction to reject allegations of various other states of mind, including retaliatory intent,⁹⁵ intentional distortion,⁹⁶ and bad faith.⁹⁷

What these cases have in common is that, notwithstanding Rule 9(b), these district judges seem to consider it too easy for plaintiffs to allege what is in someone else's head. These judges therefore used *Iqbal* to require that a complaint do more than recite the formulaic words (discriminatory intent, deliberate indifference, bad faith); the complaint must recite observable facts to support the inference.⁹⁸

V. *Conclusion (if I may say so)*

District judges use *Iqbal*'s conclusion-fact distinction to disregard plaintiffs' allegations in a variety of situations where a particular element of a civil claim is easy to allege in general terms even if it may not be supportable. Recurrent scenarios involve allegations of conspiracy, discriminatory intent, deliberate indifference, participation of an entire group of individuals, and existence of an unofficial policy. What comes through in these cases is skepticism on the part of the district court judges about whether the plaintiffs have facts to back up their general allegations. In this way, a kind of plausibility analysis infuses the first step of the *Iqbal* test. That is, district judges disregard allegations where, because of the nature of the allegation and the level of generality at which the allegation is made,⁹⁹ the judge questions whether the plaintiff has any factual basis to satisfy an element of a claim.

Twombly and *Iqbal*, as a matter of procedural policy, pit the value of court access against the value of weeding out potentially non-meritorious claims. While both of these functions have value, other devices such as summary judgment can carry much of the weight on the latter function, and my own view is that *Twombly* and *Iqbal* have made it too easy for judges to throw out claims before plaintiffs have obtained discovery and before defendants have had to admit or deny plaintiffs' allegations.¹⁰⁰ But if one takes the Supreme Court's policy choice as a given, one can ask another question: whether the Court's chosen mechanism—a distinction between conclusions and other factual allegations—can be applied coherently. My skepticism on this front has given way to grudging acknowledgement that, at least in several large categories of cases, judges can draw the distinction.

⁹⁵ See *Hyberg v. Enslow*, 2019 WL 979026 (D. Colo. 2019), at *10 ("Mr. Hyberg's allegations concerning Mr. Quinn's anger over the cost of rebuilding the strip out area are conclusory and devoid of 'sufficient factual matter ...'").

⁹⁶ See *Estate of Binn v. Adamsville*, 2019 WL 968904 (N.D. Ala. 2019).

⁹⁷ See *Sgrillo v. GEICO*, 323 F. Supp. 3d 1167 (D. Nev. 2018).

⁹⁸ Again, this application of *Iqbal* is jarring in light of Rule 9(b)'s provision that states of mind may be averred generally, but it is nonetheless an application that hews close to the *Iqbal* decision itself.

⁹⁹ See *Bone*, *supra* note 21. The way plausibility analysis informs the conclusion-fact distinction matches *Bone*'s explanation of *Iqbal*. See text at notes 31-33 *supra*.

¹⁰⁰ For an early and powerful articulation of this view, see A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431 (2008).

The first step to understanding the distinction is to disregard the Supreme Court's misleading language about "legal conclusions." Looking at what the Court actually did in *Twombly* and *Iqbal* shows that the conclusion-fact distinction does not ask judges to distinguish between law and fact, but rather to identify assertions that are to be believed, for purposes of a motion to dismiss, only if supported by other assertions. The next step is to consider the types of cases in which the distinction is regularly applied. Examination of recent cases shows that there are buckets of cases in which district judges distinguish allegations of conclusions from allegations of supporting facts in a reasonably straightforward manner.

Perhaps it is damning with faint praise to say of a Supreme Court case that its central lesson, while troubling as a matter of access to justice, is not completely incoherent. But that captures where this proceduralist finds himself on *Iqbal*, ten years later.

8/1/19