

# Down Go the Forms: The Abrogation of Rule 84 and the Official Forms of the Federal Rules of Civil Procedure

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## I. INTRODUCTION

The goal of the Federal Rules of Civil Procedure (the Rules) has been, since its inception in 1938, to administer “the just, speedy, and inexpensive determination of every action and proceeding.”<sup>1</sup> In an effort to further the purpose of the Rules and simplify access to the federal courts, Rule 84 was promulgated in 1938 as part of the original Rules to have Official Forms in the Appendix (the Forms) to illustrate the simplicity and brevity the Rules contemplate.<sup>2</sup> Over time, through amendments to Rule 84, the Forms became authoritative illustrations for guaranteed sufficiency under the Rules.<sup>3</sup> However, in response to the growing complexity of litigation and the change to the pleading standards from notice pleading to plausibility pleading announced by the Supreme Court in *Bell Atlantic Corp. v. Twombly*<sup>4</sup> and *Ashcroft v. Iqbal*<sup>5</sup> (commonly referred to as *Twiqbal*), the Judicial Conference recommended in September 2014 that Rule 84 and the Official Forms be abrogated through the Rules Enabling Act<sup>6</sup> and the

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1. FED. R. CIV. P. 1.

2. FED. R. CIV. P. 84 (1938) (amended 1946).

3. FED. R. CIV. P. 84 practice commentary (“Rule 84 clarifies that each [F]orm is sufficient, meaning that a paper that follows a [F]orm will meet the requirements of the corresponding rule. Of course, Rule 84 speaks to procedural sufficiency, not substantive sufficiency; a paper that follows the [F]orm ‘to the letter’ may still be defective in its substance.”).

4. 550 U.S. 544 (2007).

5. 556 U.S. 662 (2009).

6. See *infra* text accompanying notes 37–51 (explaining the Rules Enabling Act process). First, the Advisory Committee recommended the proposal to abrogate Rule 84. Upon recommendation of the Advisory Committee, the Standing Committee passed the proposal in May 2014. *CCL’s Nannery Attends Meeting of Committee on Rules of Practice & Procedure*, CTR. FOR CONSTITUTIONAL LITIG. (June 2, 2014), <http://www.cclfirm.com/blog/category/1092/>. The Judicial Conference of the United States then approved the amendment to abrogate in September 2014. *Proposed Amendments to the Federal Rules of Civil Procedure 2014–2015*, U.S. COURTS 49–50 (2014) [hereinafter *Proposed Amendments 2014–2015*], [325](http://lawprofessors.typepad.com/files/frcp-</a></p></div><div data-bbox=)

Supreme Court approved in April 2015.<sup>7</sup> After serving as an illustration of sufficiency under the Rules for seventy-six years, the Forms and Rule 84 could be gone on December 1, 2015, if Congress does not intervene and stop abrogation during the remaining step of the Rules Enabling Act process.<sup>8</sup> Because of the magnitude of the amendments Rule 84 was considered alongside,<sup>9</sup> the Rule 84 abrogation proposal received relatively little attention during the Rules Enabling Act mandated public comment period in August 2013.<sup>10</sup>

Although this is a seemingly simplistic change, this Comment will address how the abrogation of Rule 84 will have profound effects on civil litigation despite many of the arguments the Judicial Conference, the Committee on Rules of Practice and Procedure (Standing Committee), the Advisory Committee on Rules of Civil Procedure (Advisory Committee), and the Rule 84 Subcommittee have cited in favor of abrogation during the Rules Enabling Process. This Comment will argue that abrogation of Rule 84 will have a negative practical effect on the bench, the bar, and pro se litigants. The only group that truly benefits from the abrogation of Rule 84 is the Committees in the Rules Enabling Act Process who will no longer have the responsibility to modify the Forms to reflect the needs of modern

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amendments—redline-committee-notes.pdf; David Sellers, *Judicial Conference Receives Budget Update, Forwards Rules Package to Supreme Court*, U.S. COURTS (Sept. 16, 2014), <http://www.uscourts.gov/news/2014/09/16/judicial-conference-receives-budget-update-forwards-rules-package-supreme-court>.

7. The Supreme Court approved of the abrogation of Rule 84 and the Forms on April 29, 2015. *Federal Rules of Civil Procedure Supreme Court Order*, SUPREME COURT OF THE UNITED STATES (Apr. 29, 2015) [hereinafter *2015 Supreme Court Order*], [http://www.supremecourt.gov/orders/courtorders/frcv15\(update\)\\_1823.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf). The abrogation of Rule 84 and the Forms is now submitted to Congress, and it will be effectively abrogated unless Congress intervenes prior to December 1, 2015. See 28 U.S.C. § 2074 (2012).

8. “The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.” 28 U.S.C. § 2074(a); see also *Proposed Amendments 2014–2015*, *supra* note 7, at 49–50; *2015 Supreme Court Order*, *supra* note 7, at 31–32.

9. The amendment to abrogate Rule 84 and the Forms was considered alongside Rule 37(e) regarding spoliation of electronically stored information and the Duke Rules Package amending Rules 1, 4, 16, 26, 27, 30, 31, and 34 to make the disposition of civil actions more efficient. See *infra* text accompanying notes 219–22 (describing the effect on Rule 84 and the Forms proposed amendment when considered alongside such other amendments); *Committee on Rules of Practice and Procedure*, U.S. COURTS (May 29–30, 2014) [hereinafter *May 2014 Standing Committee Meeting*], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf>.

10. 28 U.S.C. §§ 2071–77 (2012); see also *May 2014 Standing Committee Meeting*, *supra* note 9, at 421–25; *Report to the Judicial Conference*, U.S. COURTS 16 (Sept. 1, 2014) [hereinafter *2014 Judicial Conference*], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014.pdf>.

litigation. More importantly, the abrogation of Rule 84 implicitly heightens the pleading standards despite the Supreme Court's admonishment of *Twiqbal* as requiring heightened pleading.<sup>11</sup> The Forms should be modified, rather than abrogated, to continue to serve as sufficient under Rule 84 because of the negative effects abrogation will have on civil litigation and the heightened pleading standard that will inevitably result.

Part II of this Comment provides a brief background on Rule 84 and the Forms as well as the recent split in the federal courts regarding the validity of Rule 84 and the Forms following *Twiqbal*. Next, Part II will present the different options considered by the Committees in the Rules Enabling Act process to address the concerns surrounding Rule 84 and the Forms. Part II concludes with the ultimate decision of the Advisory Committee, the Standing Committee, the Judicial Conference, and the Supreme Court to abrogate Rule 84 and the Forms.<sup>12</sup>

Part III first explores the seven reasons cited throughout the Rules Enabling Act process in favor of abrogation of Rule 84 and the Forms in detail.<sup>13</sup> Part III addresses the seven reasons in favor of abrogation ultimately as two overarching motivations for abrogation—(1) the Forms and Rule 84 creating tension with *Twiqbal* and (2) the Forms simply not being useful in modern litigation.<sup>14</sup> First, this Comment will argue in Part III that despite the Advisory Committee's statement that abrogation of Rule 84 and the Forms does not "bear[] on the evolution of pleading standards,"<sup>15</sup> the abrogation impliedly endorses *Twiqbal* as incompatible with Form pleading and directs the standard as heightened going forward.<sup>16</sup> Secondly, this Comment will address in Part III how the Forms remain useful in modern litigation and the negative effects of abrogation on the bench, the bar, and pro se litigants.<sup>17</sup> Part III concludes that the Forms should be modified to serve modern litigation needs as opposed to abrogated as the Judicial Conference, Standing Committee, and Advisory Committee have proposed.<sup>18</sup> This Comment, ultimately, suggests that a subcommittee of the Advisory Committee charged with modifying the current Forms, creating

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11. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) ("Here, . . . we do not require heightened fact pleading of specifics . . .").

12. See discussion *infra* Parts II.A–E.

13. See discussion *infra* Part III.A.

14. See discussion *infra* Parts III.B–C.

15. *Advisory Committee on Civil Rules*, U.S. COURTS 410 (Nov. 1–2, 2012) [hereinafter *November 2012 Advisory Committee Meeting*], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-10.pdf>.

16. See discussion *infra* Part III.B.

17. See discussion *infra* Part III.C.

18. See discussion *infra* Part III.D.

new Forms, and maintaining the Forms in the future could solve many of the concerns about the Forms.

## II. BACKGROUND

This section will first address the reason for adoption of Rule 84 and the changes made to Rule 84. Secondly, the section will introduce the Forms and their evolution over time. Thirdly, the section will present the split in the federal courts regarding the sufficiency of the Forms following *Twiqbal*.<sup>19</sup> Fourthly, the Advisory Committee concluded Rule 84 and the Forms needed change, so this section will introduce the options the Advisory Committee offered to address Rule 84 and the Forms. Lastly, this section will present the Advisory Committee's decision ultimately to abrogate Rule 84 and the Forms.

### A. *The Adoption and Amendments of Rule 84*

Rule 84 was included in the original Rules adopted in 1938.<sup>20</sup> At the time of original promulgation, the Advisory Committee noted that a number of state codes used forms to guide pleading.<sup>21</sup> Therefore, during adoption, the original drafters of the Rules made provisions for a limited number of Official Forms to "serve as guides in pleading."<sup>22</sup> The original Rule 84 (then Rule 86) stated the Forms attached in an Appendix to the Rules were "intended to indicate . . . the simplicity and brevity of statement which the [R]ules contemplate."<sup>23</sup> However, it was unclear whether the Forms merely acted as illustrations or sufficed to withstand attacks for compliance with the requirements of the Rules.<sup>24</sup> Courts determined that use of the Forms was discretionary and not mandatory.<sup>25</sup> A number of the courts upheld the use of the Forms as sufficient for withstanding attack under the Rules,<sup>26</sup> while

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19. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

20. FED. R. CIV. P. 84 (1938) (amended 1946).

21. *See, e.g.*, MASS. GEN. LAWS ch. 231, § 147 (1932) (repealed 1975).

22. FED. R. CIV. P. 84 advisory committee's note to 1937 amendment (amended 1946).

23. *Sierocinski v. E.I. Du Pont De Nemours & Co.*, 103 F.2d 843, 844 (3d Cir. 1939) (quoting FED. R. CIV. P. 84 (1938)).

24. *See, e.g.*, *Washburn v. Moorman Mfg. Co.*, 25 F. Supp. 546, 546 (S.D. Cal. 1938) (explaining that the Forms of complaint given under the Rules merely "indicate the simplicity and brevity" of the statement of the Rules which they contemplate; even if copied, this does not bar dismissal for failure to state sufficient facts); *but see Green v. McGaughy*, 1 F.R.D. 604, 605 (E.D. Tenn. 1940) (explaining that the Forms of complaints are sufficient under the Rules).

25. *See, e.g.*, *Fahs v. Merrill*, 142 F.2d 651, 652 (5th Cir. 1944) ("[T]he Forms are not mandatory.").

26. *See, e.g.*, *Swift & Co. v. Young*, 107 F.2d 170, 171 (4th Cir. 1939); *Ramsouer v. Midland*

others saw the Forms merely as suggestive.<sup>27</sup>

In 1946, Rule 84 was amended to resolve the split in the courts on the purpose of the Forms.<sup>28</sup> The amendment provided that “the [F]orms contained in the Appendix of Forms are *sufficient* under the [R]ules and are intended to indicate the simplicity and brevity of statement which the [R]ules contemplate.”<sup>29</sup> The Advisory Committee Note for the 1946 amendment confirmed that the Forms contained in the Appendix of Forms were “sufficient to withstand attack under the Rules under which they are drawn, and that the practitioner using them may rely on them to that extent.”<sup>30</sup> Thus, the insertion of the words “sufficient under the [R]ules” strengthened Rule 84; to the extent that when the Forms were properly used, they were “invulnerable to attack under the [R]ules.”<sup>31</sup>

Between 1946 and 2007, the Advisory Committee proposed only one amendment to Rule 84 in 1989.<sup>32</sup> The proposed 1989 amendment would have substituted a practice manual for the Appendix of Forms.<sup>33</sup> Like Rule 84 and the Appendix of Forms, the proposed practice manual would have been “sufficient under these [R]ules and any local district court rules and [were] intended to indicate the simplicity and brevity of statement that these [R]ules contemplate.”<sup>34</sup> It was proposed that the Judicial Conference could amend the practice manual on recommendation of the Standing Committee to expedite the amendment process.<sup>35</sup> Thus, the proposed process would circumvent the formalities of the lengthy Rules Enabling Act process.<sup>36</sup>

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Valley R.R. Co., 135 F.2d 101, 107 (8th Cir. 1943) (“Rule 84 of the Rules of Civil Procedure provides for an [A]ppendix of [F]orms intended to indicate ‘the simplicity and brevity of statement which the rules contemplate.’ Form 9 sets out a general allegation of negligence as sufficient. Plaintiff’s complaint contains such a general allegation of negligence.”); Sparks v. England, 113 F.2d 579, 581 (8th Cir. 1940) (“The [A]ppendix of [F]orms accompanying the rules illustrates how simply a claim may be pleaded and with how few factual averments.”); *Sierocinski*, 103 F.2d at 844 (reversing defendant’s motion to strike an amended complaint concisely alleging negligence).

27. See *Washburn*, 25 F. Supp. at 546 (sustaining a motion to dismiss for insufficiency of facts stated when the plaintiff claimed to have copied the Forms); see also *Emp’rs’ Mut. Liab. Ins. Co. of Wis. v. Blue Line Transfer Co.*, 2 F.R.D. 121, 123 (W.D. Mo. 1941).

28. FED. R. CIV. P. 84 (1946) (amended 2007).

29. *Id.* (emphasis added).

30. FED. R. CIV. P. 84 advisory committee’s note to 1946 amendment (amended 2007).

31. *Van Horn v. Chi. Roller Skate Co.*, 15 F.R.D. 22, 23 (N.D. Ill. 1953); see also *Kurtz v. Draur*, 434 F. Supp. 958, 960–61 (E.D. Pa. 1977) (holding that a jurisdictional statement modeled after Form 2(a) in the Appendix of Forms was adequate and was not subject to dismissal).

32. *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, U.S. COURTS 47 (March 1989) [hereinafter *1989 Standing Committee Meeting*], <http://www.uscourts.gov/uscourts/RulesandPolicies/rules/Reports/ST03-1989.pdf>.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*; see also *Federal Rules of Practice & Procedure*, ADMIN. OFFICE OF THE U.S. COURTS,

The Rules Enabling Act is the rulemaking process through which the Rules and the Forms are adopted, amended, and abrogated.<sup>37</sup> The Rules Enabling Act states that “[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . .”<sup>38</sup> The work and oversight of the process the Supreme Court delegated to the Judicial Conference, which is the “principal policy-making body of the U.S. Courts.”<sup>39</sup> The Judicial Conference consists of the Chief Justice, the chief judge of each circuit, the chief judge of the Court of International Trade and one district judge from each judicial circuit.<sup>40</sup> The Judicial Conference has allocated to the Standing Committee the responsibility to “carry on a continuous study of the operation and effect” of the Rules.<sup>41</sup> Underneath the Standing Committee, the Advisory Committee on Civil Rules is the initial evaluating body of all of the proposals for the civil rules.<sup>42</sup> The Standing Committee then reviews the findings of the Advisory Committee, and the Standing Committee recommends the change to the Judicial Conference.<sup>43</sup> Following recommendation by the Judicial Conference, the Supreme Court considers the proposals and officially promulgates the Rules.<sup>44</sup> The Supreme Court must transmit a proposed rule of practice and procedure to Congress by May 1 of the year in which the rule is to take effect.<sup>45</sup> Congress has retained power to review any proposed rule of practice and procedure.<sup>46</sup> Congress may object to the proposed Rule or do nothing, and the proposed Rule will take effect.<sup>47</sup> The proposed Rule takes effect no earlier than December 1 of the year of its transmission to Congress.<sup>48</sup> The Rules Enabling Act process can take two to three years,<sup>49</sup> so any Rule needing constant updating is

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<http://www.uscourts.gov/RulesAndPolicies/rules.aspx> (last visited Sept. 8, 2015).

37. *How the Rulemaking Process Works*, ADMIN. OFFICE OF THE U.S. COURTS, [hereinafter *Rulemaking Process*], <http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx> (last visited Sept. 8, 2015).

38. 28 U.S.C. § 2072 (2012).

39. *Rulemaking Process*, *supra* note 37.

40. 28 U.S.C. § 331.

41. *Rulemaking Process*, *supra* note 37 (quoting 28 U.S.C. § 331).

42. *Id.*

43. *Id.*

44. *Id.*

45. 28 U.S.C. § 2074.

46. *Rulemaking Process*, *supra* note 37.

47. *Id.*

48. *Id.*; *see also* 28 U.S.C. § 2074. The abrogation of Rule 84 is in this part of the Rules Enabling Act process. The Supreme Court has submitted the abrogation of Rule 84 to Congress. It will become effective unless Congress intervenes prior to December 1. *2015 Supreme Court Order*, *supra* note 7, at 31–32.

49. *About the Rulemaking Process*, ADMIN. OFFICE OF THE U.S. COURTS,

difficult. Although the 1989 practice manual was an attempt to have the ability to constantly update the Forms, there was concern that the 1989 practice manual granted power to the Judicial Conference that it did not possess in the Rules Enabling Act because the Forms were never sent to the Supreme Court or Congress for approval.<sup>50</sup> For that reason, the amendment for the practice manual was never adopted.<sup>51</sup>

Rule 84 went sixty-one years untouched before it was amended a second time in 2007.<sup>52</sup> This amendment, which brought Rule 84 into active voice, was part of a general restyling of the “Rules to make them more easily understood” and consistent.<sup>53</sup> The amendment did not have any substantive impact on the Rule as it now reads, “[t]he [F]orms in the Appendix *suffice* under these [R]ules and illustrate the simplicity and brevity that these [R]ules contemplate.”<sup>54</sup> This is now the current version of Rule 84.<sup>55</sup>

### B. *The Forms*

Since the adoption of the Rules in 1938, a number of Forms have been appended to the Rules to indicate the simplicity and brevity of the statement that the Rules contemplate.<sup>56</sup> Charles Clark, a judge on the United States Court of Appeals for the Second Circuit and chief drafter of the Rules in 1938,<sup>57</sup> explained the purpose of the Forms:

We do not require detail. We require a general statement. How much? Well, the answer is made in what I think is probably the most important part of the [R]ules so far as this particular topic is concerned, namely, the Forms. These are important because when you can't define you can at least draw pictures to show your meaning.<sup>58</sup>

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<http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking.aspx> (last visited Sept. 8, 2015).

50. Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's* “Substance” and “Procedure” in the Rules Enabling Act, 1989 DUKE L.J. 1012, 1040 n.182 (1989) (“[T]he proposed rule would partially supersede § 2072, substituting the Conference for the Court, and § 2074, dispensing with submission to Congress. . . . I have serious doubts whether such a grant of rulemaking power can be accomplished by Federal Rule.”).

51. See 1989 *Standing Committee Meeting*, *supra* note 32, at 47.

52. FED. R. CIV. P. 84.

53. FED. R. CIV. P. 84 advisory committee's note to 2007 amendment.

54. FED. R. CIV. P. 84 (emphasis added).

55. FED. R. CIV. P. 84.

56. See FED. R. CIV. P. Forms.

57. PENINAH R.Y. PETRUCK, JUDGE CHARLES EDWARD CLARK 115 (1991) (naming Clark as the “prime instigator and architect” of the Federal Rules).

58. Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L. REV. 177, 181 (1957–58).

Originally, there were 27 Forms.<sup>59</sup> To date, there are 36 Forms total—12 of which are pleading Forms and 24 of which are Forms other than for pleading.<sup>60</sup> The pleading Forms have drawn the most attention over the history of the Rules. The twelve pleading Forms set forth complaints for a variety of circumstances.<sup>61</sup> The modern illustrative pleading Forms, for example, demonstrate a complaint for negligence,<sup>62</sup> a complaint for conversion,<sup>63</sup> and a complaint for patent pleading.<sup>64</sup> The pleading Forms particularly came under increased scrutiny following the decisions in *Twiqbal*,<sup>65</sup> which changed the pleading standards from notice pleading to plausibility pleading.<sup>66</sup> There are also Forms that set forth examples of

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59. FED. R. CIV. P. 84 (1938) (amended 1946) (including only 27 Forms in total). It is unclear how many of the 1938 Forms were pleading forms. Form 9 was a complaint for negligence in the 1938 version of the Rules. *See, e.g.,* *Watson v. World of Mirth Shows*, 4 F.R.D. 31, 32 (S.D. Ga. 1944) (“According to the illustrative form of a Complaint for Negligence, . . . it is only necessary to allege that defendant acted negligently and as a result the plaintiff was injured.”); *Wild v. Knudsen*, 1 F.R.D. 646, 647 (E.D. Tenn. 1941); *Kriesak v. Crowe*, 36 F. Supp. 127, 130 (M.D. Pa. 1940). Form 10 was a complaint for negligence where the plaintiff did not know which of two people were negligent. *Fowler v. Baker*, 32 F. Supp. 783, 784 (M.D. Pa. 1940). Form 2 in the 1938 Rules was used as a statement of jurisdiction. *See, e.g., Conn. Gen. Life Ins. v. Cohen*, 27 F.Supp. 735, 736 (E.D.N.Y. 1939). Form 27 was a notice for appeal. *See, e.g., Fahs v. Merrill*, 142 F.2d 651, 652 (5th Cir. 1944).

60. FED. R. CIV. P. 84.

61. FED. R. CIV. P. Forms 10–21.

62. FED. R. CIV. P. Form 11.

63. FED. R. CIV. P. Form 15.

64. FED. R. CIV. P. Form 18.

65. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

66. James A. Fee, *The Lost Horizon in Pleading Under the Federal Rules*, 48 COLUM. L. REV. 491, 491–92 (1948). Pleading under the Rules (also known as “notice pleading”) and the pleading Forms were a response to the failures of prior pleading systems. *See, e.g.,* Peter Julian, Comment, *Charles E. Clark and Simple Pleading: Against a “Formalism of Generality”*, 104 NW. U. L. REV. 1179, 1183–84 (2010). Prior to the Rules, there were historically two systems of pleading—English common law pleading and code pleading. *Id.* at 1184. First, common law pleading was the era of “special pleading,” which was “stiff and complex pleading . . . which prevented many plaintiffs from ever having their day in court.” *Id.* The writ system and issue pleading exemplify the special pleading system of the common law. *Id.* The writ system “required a plaintiff to bring his suit under a single correct form of action or have his case dismissed,” which was difficult because writs “overlapped” and the plaintiff could only plead one writ on a “borderline” case. *Id.* “Issue pleading required parties to work through pretrial averments and denials until they had narrowed the case to a single disputed issue of law or fact.” *Id.* The rigid common law pleading system “led to a popular call for reform by citizens who recognized that procedural obstacles denied people access to the courts, and thus worked against fundamental fairness.” *Id.* at 1185. Second, following the common law pleading system, pleading was statutorily reformed to a system called code pleading. *Id.* at 1186. “Code pleading replaced issue pleading with fact pleading, and replaced the writ system with a single form of action - the civil action.” *Id.* Fact pleading in the code system required that “the parties stated the facts and the court applied the law.” *Id.* An example of the code pleading system is:

[T]he law might provide the major premise that all people who ride horses in an unreasonable manner are negligent. The complaint could allege the minor premise that a



various stages of litigation including summons, motion to dismiss, and motion to bring in a third-party defendant.<sup>67</sup>

Early in the Forms' existence, critics were concerned that the Forms would make pleadings become "skeletonized" with a complete lack of facts.<sup>68</sup> One concern was that the Forms, including motions, complaints, answers, depositions, and affidavits, did not advise the court, lawyers, and

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person had ridden a horse blindfolded and run over a child. The court could then apply the alleged facts to the law and deduce that the plaintiff had a negligence claim against the rider.

*Id.* The problem with code pleading came from "requiring plaintiffs to state only 'ultimate facts' unadulterated by legal conclusions or evidence . . . . [N]o bright line exist[ed] between different types of facts. For example, a person's marital status and ownership of property are facts that can be essential to a complaint but are also legal conclusions." *Id.* at 1187. Both systems proved to be too complex and rigid, so Charles Clark developed pleading standards under the Rules.

67. See FED. R. CIV. P. Forms 3, 40, 41. Another example of a non-pleading Form included in the Rules is Form 6, which is a waiver of the service of summons. It states:

I have received your request to waive service of a summons in this action along with a copy of the complaint . . . . I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case . . . . I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

FED. R. CIV. P. Form 6. The Appendix of Forms also includes a statement of jurisdiction. FED. R. CIV. P. Form 7. It gives an example of how to state subject matter jurisdiction. FED. R. CIV. P. Form 7. For diversity of citizenship jurisdiction, Form 7 states:

The plaintiff is [a citizen of State A] [a corporation incorporated under the laws of State A with its principal place of business in State A]. The defendant is [a citizen of State B] [a corporation incorporated under the laws of State B with its principal place of business in State B]. The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332.

*Id.* (emphasis omitted). For federal question jurisdiction, the Form states, "This action arises under [the United States Constitution; specify the article or amendment and the section] [a United States treaty; specify] [a federal statute, \_\_\_ U.S.C. § \_\_\_]." *Id.* (emphasis omitted). A final example of a Form other than a pleading Form is Form 80, which is notice of a magistrate judge's availability. FED. R. CIV. P. Form 80. Form 80 states:

A magistrate judge is available under title 28 U.S.C. § 636(c) to conduct the proceedings in this case, including a jury or nonjury trial and the entry of final judgment. But a magistrate judge can be assigned only if all parties voluntarily consent. . . . You may withhold your consent without adverse substantive consequences. The identity of any party consenting or withholding consent will not be disclosed to the judge to whom the case is assigned or to any magistrate judge. . . . If a magistrate judge does hear your case, you may appeal directly to a United States court of appeals as you would if a district judge heard it.

*Id.* This Form is used to ensure parties have notice of the opportunity to consent to trial before a magistrate judge. It also informs the parties that consent may be withheld without adverse consequences. *Id.* Form 80 may be used in concert with "[a] [F]orm called Consent to an Assignment to a United States Magistrate Judge [ ] available from the court clerk's office." *Id.* (emphasis omitted). In total, there are 24 non-pleading Forms. See FED. R. CIV. P. Form 80.

68. 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3161 (2d ed. 1997).

parties prior to trial what questions were to be decided.<sup>69</sup> The second concern critics expressed was that it would be easy for the Forms to mislead counsel because they concerned exceedingly simple factual situations.<sup>70</sup> Where more facts were involved, many critiqued that the Forms discouraged pleading “at greater length and with greater particularity.”<sup>71</sup> The third concern expressed was that the Forms might cause unnecessary and burdensome discovery because the Forms could leave uncertainty as to the issues.<sup>72</sup> The fourth and final concern was that the minimal requirements of the Forms would spark unfounded litigation.<sup>73</sup> History has proven these apprehensions were generally unfounded.<sup>74</sup>

Over the seventy-six year history of the Forms, there have been an estimated thirty modifications since their original promulgation.<sup>75</sup> Modifications include amendments to existing Forms, additions of new Forms, and deletions of unnecessary Forms.<sup>76</sup> Changes to the Forms are almost always made in conjunction with the corresponding Rule they illustrate.<sup>77</sup> Therefore, most changes to the Forms have generally been gradual.

### C. *Plausibility Pleading, Modern Litigation, and the Official Forms*

Opposition to the Forms following the decisions of *Bell Atlantic Corp.*

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69. Elwood Hutcheson, *The New Federal Rules of Civil Procedure*, 13 WASH. L. REV. 198, 206 (1938).

70. *Id.*

71. *Id.*

72. Claim or Cause of Action, 13 F.R.D. 253, 255 (9th Cir. 1952).

73. *Id.*

74. 12 WRIGHT ET AL., *supra* note 68, § 3161 (“Although concern has grown about abuse of litigation, early apprehensions that the pleadings might become too skeletonized have been proven largely unjustified.”).

75. Brooke D. Coleman, *Abrogation Magic: The Rules Enabling Act Process, Civil Rule 84, and the Forms* 5 n.39 (Seattle Univ. Sch. of Law Research Paper No. 14-09, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2375042](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2375042)

(citing the difficulty in determining the exact number of modifications because the Forms were renumbered and changed significantly in the 2007 restyling).

76. *Id.* at 5–8.

77. For example, Form 22-A (now Form 4) was intended to serve as a summons and complaint against a third-party defendant. FED. R. CIV. P. Form 4. Under the amendment of Rule 14(a) for third-party practice, a defendant who filed a third-party complaint not later than ten days after serving his answer did not have to obtain leave of the court to bring in a third-party defendant under Rule 4. *Id.* To reflect an earlier amendment to Rule 14(a) making it permissive, rather than mandatory to answer the plaintiff’s complaint, Form 22-A was amended to delete the words “and an answer to the complaint of the plaintiff, a copy of which is herewith served upon you.” *Report of the Committee on Rules of Practice and Procedure*, U.S. COURTS 81 (Sept. 1, 1962), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-1962.pdf>.

*v. Twombly*<sup>78</sup> and *Ashcroft v. Iqbal*<sup>79</sup> has played out in the federal courts specifically with disagreement on whether the Forms can be reconciled with *Twiqbal* plausibility pleading. Some commentators have argued that the debate should be resolved in favor of the Forms because the legislative history and the plain text of Rule 84 support sufficiency for pleadings pled consistently with the Forms.<sup>80</sup> The federal courts, however, are split on whether the plausibility pleading standard has rendered the Forms unusable.<sup>81</sup> Surprisingly, the Supreme Court itself in *Twombly* accepted the sufficiency of Form 9, which has since been modified and renumbered as Form 11, for pleading negligence as giving the proper notice required by Rule 8(a)(2)<sup>82</sup> even under the newly espoused plausibility standard.<sup>83</sup> Clearly, the Supreme Court believed that the Forms and plausibility pleading could coexist.

At least three circuit courts have found that *Twiqbal* does not undermine the viability of the Forms.<sup>84</sup> First, in *K-Tech Telecommunications, Inc. v.*

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78. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (stating a claim must be plausible on its face and “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . .”).

79. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (creating a two-step process for determining the sufficiency of a complaint). First, the court need not accept as true any allegations contained in the complaint that are merely legal conclusions. Second, the complaint must state a plausible claim for relief on its face. *Id.* at 678–79.

80. See Rex Mann, *What the Federal Rules of Civil Procedure Forms Say about Twombly and Iqbal: Implications of the Forms on the Supreme Court’s Standard*, 41 U. MEM. L. REV. 501, 510–11 (2011) (arguing that the legislative history and plain text of Rule 84 support the conclusion that the Forms provide sufficiency if pleadings are pled consistently with the Forms, regardless of the Supreme Court’s interpretation).

81. See cases cited *infra* notes 84–128 and accompanying text.

82. FED. R. CIV. P. 8(a)(2) (“A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . .”).

83. *Twombly*, 550 U.S. at 565 n.10 (noting that the pleading was insufficient for not mentioning the time, place or people involved in the alleged conspiracy in sharp contrast with the model form for pleading negligence, Form 9). The Court indicated in *Twombly* that the Forms still sufficed under the newly espoused pleading standards, which rejected “conclusory allegations.” *Id.* The Court supported Form 9 by stating “[a] defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer . . .” *Id.*

84. See cases cited *infra* notes 85–112. Beyond the three circuits (Federal Circuit, Eighth Circuit, and First Circuit) mentioned below, the Second Circuit in *Johnson v. American Towers, LLC* briefly cited Form 11 with approval in post-*Twiqbal* pleading. 781 F.3d 693 (2d Cir. 2015). The court was determining the sufficiency of a pleading alleging “an inmate at the prison using a cellphone ordered a co-conspirator outside of the prison to kill Captain Johnson.” *Id.* at 709. The court cited Form 11’s requirement of “date” and “place” in the model complaint form for negligence as requiring more detail in the Johnsons’ claim. *Id.* The court ultimately dismissed the complaint because the wireless service provider would be unable to determine whether it carried the alleged call without further factual pleading. *Id.* Although there was no explicit discussion of whether the Forms are compliant with *Twiqbal*, the court implicitly cited such a proposition with approval by analyzing the pleading under the requirements of the Forms and *Twombly*. This indicates the Second

*Time Warner Cable, Inc.*,<sup>85</sup> a case analyzing Form 18 patent pleading, the Federal Circuit made clear that the Forms reign supreme if any conflict existed between *Twiqbal* and the Forms.<sup>86</sup> The court contended, however, that because “Form 18 would control in the event of a conflict between the [F]orm and *Twombly* and *Iqbal* does not suggest . . . that we should seek to create conflict where none exists.”<sup>87</sup> Judge Evan Wallach in concurrence believed any conflict between Rule 8(a)(2) and the adequacy of the Forms under Rule 84 could be reconciled through *Twombly*.<sup>88</sup> *Twombly* expressly recognized the adequacy of the former Form 9 for pleading negligence under Rule 8(a)(2).<sup>89</sup> Although *Twombly* addressed the adequacy of Form 9 and not Form 18, the Federal Circuit concluded that because Form 9 and Form 18 are parallel in alleging as much “factual matter” and “conclusory allegations” as the other,<sup>90</sup> both Forms, therefore, satisfy Rule 8(a)(2). Thus, not only are the Forms controlling, the Forms also are reconcilable and adequate to satisfy the requisite *Twiqbal* standard.<sup>91</sup>

Secondly, the Eighth Circuit recognized *Twiqbal* as reconcilable with Rule 84 because where courts have found incompatibility, there is an “unwarranted extension of the pleading standards.”<sup>92</sup> In *Hamilton v. Palm*,<sup>93</sup> the court considered the sufficiency of Form 13 (“Complaint for Negligence Under the Federal Employers’ Liability Act”) and how the general principles of *Twiqbal* applied to the pleading of a recurring common law issue of a party alleging he or she was an employee at the time of the claim.<sup>94</sup> The defendant moved to dismiss for failure to satisfy Rule 8(a)(2) based on a failure to adequately plead an employee-employer relationship necessary to establish liability.<sup>95</sup> The plaintiff had merely pled the defendant “employed” him.<sup>96</sup> The District Court for the Eastern District of Missouri dismissed the complaint because Hamilton “merely allege[d] generally that he was Defendants’ employee and ha[d] not alleged facts to plausibly support such a

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Circuit reasoned plausibility pleading and the Forms can coexist.

85. *K-Tech Telecomm. Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277 (Fed. Cir. 2013).

86. *Id.* at 1283.

87. *Id.* at 1284.

88. *Id.* at 1287–88 (Wallach, J., concurring).

89. *Id.* at 1288.

90. *Id.* at 1287–88.

91. *Id.*

92. *Hamilton v. Palm*, 621 F.3d 816, 817–18 (8th Cir. 2010).

93. *Id.* at 816.

94. *Id.* at 818.

95. *Id.* at 817.

96. *Id.*

conclusion.”<sup>97</sup> The Eighth Circuit reversed the motion to dismiss because “Form 13 makes clear that an allegation in *any* negligence claim that defendant acted as plaintiff’s ‘employer’ satisfies Rule 8(a)(2)’s notice pleading requirement.”<sup>98</sup> As consistent with the Supreme Court’s charge in *Iqbal*,<sup>99</sup> the court noted practically that “[c]ommon sense and judicial experience counsel that pleading this issue does not require great detail or recitation of all potentially relevant facts in order to put the defendant on notice of a plausible claim.”<sup>100</sup> Thus, the Eighth Circuit explained that because employee status is a frequently litigated issue, this was a plausibly alleged claim.<sup>101</sup> The Eighth Circuit interpreted *Twiqbal* as not necessarily departing from notice pleading where judicial experience and common sense dictate the level of specificity required.<sup>102</sup>

Third, where the complaint is plainly modeled on the Forms, there are sufficient facts alleged in the complaint to make the claim plausible because *Twiqbal* recognized the latitude required in applying the plausibility standard.<sup>103</sup> In *García-Catalán v. United States*,<sup>104</sup> the First Circuit reversed the District Court for the District of Puerto Rico’s dismissal of the plaintiff’s complaint.<sup>105</sup> This was a slip-and-fall case where the plaintiff pled that she “slipped and fell on liquid then existing there” and “[n]o sign warned that the floor was wet.”<sup>106</sup> “Under Puerto Rico law, a business invitee [had to] prove that the owner . . . of premises had actual or constructive notice of a dangerous condition in order to recover for injuries.”<sup>107</sup> The defendant argued that the plaintiff’s pleading had failed to allege that the defendant had actual or constructive knowledge of the dangerous condition that allegedly existed.<sup>108</sup> The First Circuit reversed the dismissal after noting that the complaint was plainly modeled on Form 11, which disclosed the date, place, and time of the alleged tort as well as delineating the nature of the dangerous

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97. *Id.* (quoting *Hamilton v. Palm*, No. 4:09CV1341MLM, 2009 WL 3617489, at \*3 (E.D. Mo. Oct. 28, 2009)).

98. *Id.* at 818–19.

99. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”).

100. *Hamilton*, 621 F.3d at 819.

101. *Id.*

102. *Id.*

103. *García-Catalán v. United States*, 734 F.3d 100, 104 (1st Cir. 2013).

104. *Id.* at 100.

105. *Id.* at 105.

106. *Id.* at 101–02.

107. *Id.* at 102.

108. *Id.*

condition and the injuries sustained.<sup>109</sup> The First Circuit stated that plausibility pleading “properly takes into account whether discovery can reasonably be expected to fill any holes in the pleader’s case.”<sup>110</sup> This is consistent with *Twombly*’s statement that the hallmark of plausibility is when a complaint contains “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence.”<sup>111</sup> Where the defendant controls a material part of the information, then it is unreasonable to expect that plaintiff would have the information without discovery.<sup>112</sup>

Some courts have recognized that the Forms suffice for simpler claims, but they are insufficient under *Twiqbal* with respect to more complex matters.<sup>113</sup> In *Limestone Development Corp. v. Village of Lemont, Illinois*,<sup>114</sup> the Seventh Circuit recognized that all claims—including claims with potentially complex or costly litigation—must have some degree of plausibility to survive dismissal.<sup>115</sup> The Seventh Circuit’s view that the Forms were insufficient stated:

[H]ow many facts are enough will depend on the type of case. In a complex antitrust or RICO case a fuller set of factual allegations than found in the sample complaints in the [C]ivil [R]ules’ Appendix of Forms may be necessary to show that the plaintiff’s claim is not “largely groundless.”<sup>116</sup>

The Seventh Circuit expressed concern that with cases like RICO or antitrust violations (“big” cases both monetarily and in terms of time), the defendant should not be put to the expense of discovery on the basis of a “threadbare claim.”<sup>117</sup> Thus, because of the complexity and cost of modern litigation, the Forms are only useful in certain simpler claims.<sup>118</sup>

Other courts have explicitly rejected the use of the Forms in light of *Twiqbal*.<sup>119</sup> Recently, in *Macronix International Co. v. Spansion Inc.*,<sup>120</sup> the District Court for the Eastern District of Virginia held that the Appendix of

109. *Id.* at 104–05.

110. *Id.* at 104.

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

112. *García-Catalán*, 734 F.3d at 104. The consumer plaintiffs in *Twombly* brought a class action alleging an antitrust conspiracy in violation of the Sherman Act. *Twombly*, 550 U.S. at 550. Ironically, the plaintiffs in that case undoubtedly could not have had facts regarding the conspiracy at the pleading stage. However, the Court found the consumers’ allegations of “parallel conduct” were insufficient to state a plausible claim. *Id.* at 564.

113. *See, e.g.*, *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 803 (7th Cir. 2008).

114. *Id.* at 797.

115. *Id.* at 803.

116. *Id.* (quoting *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 231–32 (3d Cir. 2008)).

117. *Id.*

118. *See id.*

119. *See cases cited infra* notes 120–30.

120. 4 F. Supp. 3d 797 (E.D. Va. 2014).

Forms, specifically Form 18 for patent pleading, will not suffice as a short and plain statement of a claim that the pleader is entitled to relief under the pleading standards announced in *Twiqbal*.<sup>121</sup> Despite the plaintiff's argument that the Forms take precedence over the Supreme Court decisions, the court reasoned that the Supreme Court decisions on how to apply pleading standards are controlling and those decisions make the Forms no longer viable.<sup>122</sup> Thus, *Macronix* called into doubt the validity of the Forms and Rule 84 in the wake of *Twiqbal*.

Courts have recognized the tension between the Forms and *Twiqbal* outside of the patent pleading context as well.<sup>123</sup> In *McCauley v. City of Chicago*,<sup>124</sup> a case alleging equal protection violations against the City of Chicago, the Seventh Circuit dismissed the complaint for not plausibly stating a policy-or-practice equal protection claim and only containing generalized allegations.<sup>125</sup> The complaint lacked plausibility despite its compliance with the Forms, and both the majority and dissenting opinions discussed at length the insufficiency of the Forms.<sup>126</sup> Judge David Hamilton, who dissented in part, stated “*Iqbal* conflicts with the [F]orm complaints approved by the Supreme Court.”<sup>127</sup> Judge Hamilton further reasoned the Forms “require virtually no explanation of the underlying facts as long as the defendant is informed of the event or transaction that gave rise to the claim.”<sup>128</sup> However, the tension lies in the fact that the Forms are sufficient under the Rules but are “remarkably ‘conclusory,’” which violates *Iqbal*.<sup>129</sup> Judge Hamilton, thus, recognized that unless there was an explanation of how to reconcile the tension between *Iqbal*, Rule 9(b), and the Form complaints, then “*Iqbal* conflicts with the Rules Enabling Act . . . and the prescribed process for amending the Federal Rules of Civil Procedure.”<sup>130</sup> Courts have found strong tension that is moving toward incompatibility between the plausibility pleading standards in *Twiqbal* and Rule 84 and the Forms.

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121. *See id.* at 801.

122. *Id.* at 801–02.

123. *E.g.*, *McCauley v. City of Chi.*, 671 F.3d 611, 623–24 (7th Cir. 2011) (Hamilton, J., dissenting in part).

124. *Id.* at 611 (majority opinion).

125. *Id.* at 613.

126. *Id.* at 622–23 (Hamilton, J., dissenting in part). In the dissenting opinion, Judge Hamilton reasoned that the “[F]orms simply conflict with *Iqbal*.” *Id.* at 622.

127. *Id.* at 623.

128. *Id.* at 624.

129. *Id.* (quoting part of the standard promulgated in *Iqbal*).

130. *Id.* (citation omitted); *see also* *Hill v. McDonough*, 547 U.S. 573, 582 (2006) (“Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts.”).

*D. The Different Options to Address Rule 84*

In November 2011, the Advisory Committee established a Rule 84 Subcommittee led by Judge Gene Pratter of the U.S. District Court for the Eastern District of Pennsylvania to “consider the current [F]orms and the process of their revision” following concerns surrounding *Twiqbal*.<sup>131</sup> The Rule 84 Subcommittee developed a list of four different options to address Rule 84 and the Forms.<sup>132</sup> The Rule 84 Subcommittee suggested: (1) do nothing;<sup>133</sup> (2) perform a full-scale review of the Forms improving some of the current Forms and considering additions of new Forms;<sup>134</sup> (3) retain Rule 84 Forms, but leave initial responsibilities to the Administrative Office of the United States Courts;<sup>135</sup> or (4) follow one of the three Rule 84 sketches proposed.<sup>136</sup> This Comment will address each suggestion in turn.

The first suggestion from the Rule 84 Subcommittee was to do nothing and allow the Forms to continue being authoritative illustrations of guaranteed sufficiency under the Rules.<sup>137</sup> The Subcommittee admitted “[t]he [F]orms do not appear to be a source of any stress or difficulty, apart from the [F]orm complaints.”<sup>138</sup> After acknowledging that the Forms had gone unmodified and neglected for years with no real consequences, the Advisory Committee stated that the Forms could be left alone and only amended if pressing circumstances occurred.<sup>139</sup> Also, while discussing this suggestion, the Subcommittee considered abandoning the Form complaints while maintaining the remaining Forms.<sup>140</sup> Given that Rule 8(a)(2) and *Twiqbal* have been difficult for both the federal courts and practitioners to interpret, it seems counterintuitive to abandon the complaint Forms that could serve as illustrations of sufficiency.

The second suggestion from the Rule 84 Subcommittee was to completely overhaul the Forms.<sup>141</sup> The Advisory Committee considered “improving . . . the current [F]orms and considering the addition of new

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131. 2014 Judicial Conference, *supra* note 10, at app. B-19.

132. November 2012 Advisory Committee Meeting, *supra* note 15, at 409–11.

133. See *infra* notes 137–40 and accompanying text.

134. See *infra* notes 141–44 and accompanying text.

135. See *infra* notes 145–49 and accompanying text.

136. See *infra* notes 150–61. November 2012 Advisory Committee Meeting, *supra* note 15, at 409–11.

137. November 2012 Advisory Committee Meeting, *supra* note 15, at 409.

138. *Id.*

139. *Id.* at 408. See also *infra* text accompanying notes 186–94 (explaining that the Forms had not been systematically reviewed for many years and did not cover many areas of litigation).

140. November 2012 Advisory Committee Meeting, *supra* note 15, at 408–09.

141. *Id.* at 409.



[F]orms . . . .”<sup>142</sup> This would be the most burdensome option for the Advisory Committee given the number of Forms and the lack of modification over the recent history of the Forms. The Advisory Committee stated, “This approach would require a heavy commitment of Enabling Act resources, particularly by the Advisory Committee. It may be difficult to anticipate benefits commensurate with the costs.”<sup>143</sup> The Rule 84 Subcommittee suggested that the new Forms address the most frequently encountered Rules that a Form does not yet supplement.<sup>144</sup> Given that the Forms have been generally untouched for decades, this was an alternative that would have made them more useful to the modern practitioner in modern litigation.

The third suggestion was to retain the Forms but to delegate the modification of the Forms to the Administrative Office of the United States Courts.<sup>145</sup> The advice of the Administrative Office, which currently has its own set of forms, would be used in creating the Forms.<sup>146</sup> Delegating the responsibility for the Forms to the Administrative Office would take a substantial burden off the Advisory Committee.<sup>147</sup> However, the Advisory Committee expressed concern that a group outside the authority of the Rules Enabling Act process modifying the Forms was not legal.<sup>148</sup> It is unclear whether using the Administrative Office to create the Forms would be within the scope of the Rules Enabling Act, but it seems that the same concerns as

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142. *Id.* The Rule 84 Subcommittee did not make clear what specific plans it had to modernize certain Forms, especially the Form complaints. *See id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* The Administrative Office forms are located on the United States Courts’ website. *Civil Forms*, ADMIN. OFFICE OF THE U.S. COURTS, [hereinafter *Administrative Office Forms*], <http://www.uscourts.gov/forms/civil-forms> (last visited Oct. 2, 2015). There are seventeen forms, which include forms for civil cover sheets; applications to proceed in district court without prepaying fees or costs; an order to proceed without prepaying fees or courts; subpoenas to appear and testify at a hearing or trial, to testify at a deposition, and to produce documents; notice of a lawsuit and request to waive service of a summons; waiver of the service of summons; summons in a civil action; summons on a third-party complaint; judgment in a civil case; clerk’s certification of a judgment to be a registered in another district; notice and consent of a civil action to a magistrate judge; notice and consent of a dispositive motion to a magistrate judge; and warrant for the arrest of a witness in a civil case. *Id.* Several of the Administrative Office forms overlap with the Forms in the Rules, including the summons in a civil action, summons on a third-party complaint, waivers of summons, and notice and consent of a civil action to a magistrate judge. The Administrative Office forms do not cover as much of the litigation process as the Official Forms. *Compare id.* (maintaining only seventeen forms), *with* FED. R. CIV. P. Forms (maintaining thirty-six forms). The Administrative Office forms also do not have the guarantee of sufficiency Rule 84 provides the Official Forms. FED. R. CIV. P. 84 advisory committee’s note to 1946 amendment (amended 2007) (explaining the Forms are sufficient under the Rules).

147. *November 2012 Advisory Committee Meeting*, *supra* note 15, at 409.

148. *Id.*

the 1989 practice manual proposal spoken about above may reoccur.<sup>149</sup>

The fourth and final suggestion from the Rule 84 Subcommittee was to implement one of three sketches of Rule 84 drawn by the Rule 84 Subcommittee.<sup>150</sup> The three sketches drawn by the Rule 84 Subcommittee were variations of the Rule 84 language meant to retract the statement that the Forms suffice.<sup>151</sup> The first proposed sketch of Rule 84 was abrogation, which proposed to delete the entirety of Rule 84 and the Forms.<sup>152</sup> Thus, the illustration read:

Rule 84. ~~Forms~~ [Abrogated (mo., day, yr., eff. mo., day, yr.).]

~~The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.~~<sup>153</sup>

The second proposed sketch of Rule 84 was to delete “suffice.”<sup>154</sup> The illustration, in this sketch, read:

Rule 84. Forms.

The forms in the Appendix ~~suffice under these rules and~~ illustrate the simplicity and brevity that these rules contemplate.<sup>155</sup>

The second sketch was a return to the 1938 version of Rule 84 where the Forms were merely illustrations as opposed to sufficient to withstand attack under the Rules.<sup>156</sup> This version was considered to have “defanged” Rule 84 by withdrawing the 1946 language about sufficiency.<sup>157</sup> The Subcommittee expressed concern that:

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149. See *supra* notes 32–36, 50–51 and accompanying text (discussing 1989 proposed amendment that would have substituted a practice manual for the Appendix of Forms; it was proposed that the Judicial Conference could amend the practice manual without the formalities of the Rules Enabling Act process).

150. *November 2012 Advisory Committee Meeting, supra* note 15, at 410.

151. *Id.*

152. *Id.* at 410–11.

153. *Id.*

154. *Id.* at 411.

155. *Id.*

156. Rule 84, in 1938, read the Forms were intended “to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate.” FED. R. CIV. P. 84 (1938) (amended 1946). The Rule was merely intended to supply an illustration, but nothing was said of the “sufficiency” of the forms to withstand attack under the rules. *Sierocinski v. E.I. Du Pont De Nemours & Co.*, 103 F.2d 843, 844 (3d Cir. 1939) (construing the 1938 version of FED. R. CIV. P. 84).

157. *November 2012 Advisory Committee Meeting, supra* note 15, at 410.

The [F]orms would remain as mere illustrations of simplicity and brevity. The line between illustration and implicit endorsement, however, is thin, and likely would become invisible to all but a few blessed to carry the memory of the current version.<sup>158</sup>

The Subcommittee did not want to revert to the problems experienced pre-1946 amendment, when it was unclear whether the Forms were sufficient to withstand attack under the Rules.<sup>159</sup>

The third proposed sketch of Rule 84 was aspirational.<sup>160</sup> The final sketch read:

Rule 84. Forms.

~~The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that t~~ These rules contemplate simplicity and brevity of form.<sup>161</sup>

The Rule 84 aspirational version was proposed to be a declarative statement of the purpose of the Rules rather than a Rule itself.<sup>162</sup> The Rule 84 Subcommittee noted that the wish for simplicity and brevity remaining in the Rules when “stripped of its present function, is too far back in the rules for this purpose.”<sup>163</sup>

The Rule 84 Subcommittee, after considering all four options, ultimately recommended abrogation.<sup>164</sup> Specifically, the Rule 84 Subcommittee stated that “[a]brogating the pleading [F]orms recognizes that litigation, pleading, and discovery have evolved in many ways since 1937 and 1946, and continue to evolve.”<sup>165</sup> The abrogation would open the way for the Administrative Office of the United States Courts, which is a support entity for the United States Federal Judicial Branch, to disseminate forms in lieu of any Official Forms.<sup>166</sup> The Subcommittee stated the recommendation was made “with some lingering regrets . . . [and] the time ha[d] come to withdraw promulgation of ‘[O]fficial’ [F]orms from the Enabling Act

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158. *Id.*

159. *See id.*

160. *Id.* at 411.

161. *Id.* (footnote omitted).

162. *See id.*

163. *Id.* at 411 n.2.

164. *Id.* at 407.

165. *Id.* at 411–12.

166. *See 2014 Judicial Conference, supra* note 10, at 16; *November 2012 Advisory Committee Meeting, supra* note 15, at 412; *see discussion supra* note 146 (describing the Administrative office forms); *Services & Forms*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/services-forms> (last visited Sept. 10, 2015).

process.”<sup>167</sup>

### *E. The Decision to Abrogate Rule 84*

In September 2014, the Judicial Conference of the United States, following the public comment period and upon recommendation of the Standing Committee and the Advisory Committee, officially approved the amendment to abrogate Rule 84 and the Appendix of Forms.<sup>168</sup> The Judicial Conference approved Rule 84 abrogation for reasons substantially similar to the Standing Committee, the Advisory Committee, and the Rule 84 Subcommittee.<sup>169</sup> The proposal to abrogate Rule 84 and the Forms was then approved by the Supreme Court in April 2015, and it has been submitted to Congress where it will become effective on December 1, 2015, without Congressional action.<sup>170</sup>

The Judicial Conference elected to keep Form 5, the request to waive service of summons,<sup>171</sup> and Form 6, a waiver of service of summons.<sup>172</sup> Because Rule 4(d)(1)(D) reads that a request to waive service of the summons “inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service,”<sup>173</sup> the abrogation of Rule 84 and the Forms mandated a way to address Rule 4(d)(1)(D).<sup>174</sup> Rule 4(d)(1)(D) does not require the Form 6 waiver of service of summons, but it is closely tied to and considered alongside Form 5.<sup>175</sup> Ultimately, the only remaining remnants of the Forms, pending the submission period to Congress, will be Forms 5 and 6, which will be preserved by amending Rule

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167. *November 2012 Advisory Committee Meeting*, *supra* note 15, at 407.

168. *Sellers*, *supra* note 6; *see also 2014 Judicial Conference*, *supra* note 10, at 16–17.

169. *See Sellers*, *supra* note 6.

170. *2015 Supreme Court Order*, *supra* note 7, at 31–32. Congress has until December 1, 2015 to intervene and stop abrogation or the change will become effective. *See* 28 U.S.C. § 2074 (2012).

171. FED. R. CIV. P. Form 5.

172. FED. R. CIV. P. Form 6.

173. FED. R. CIV. P. 4(d)(1)(D) (2007) (amended Dec. 1, 2015, absent contrary Congressional action). The amended rule (effective Dec. 1, 2015) will read: “The notice and request must: . . . inform the defendant, using the form appended to this Rule 4, of the consequences of waiving and not waiving service.” *Id.*

174. *Advisory Committee on Civil Rules*, U.S. COURTS 417 (Apr. 11–12, 2013) [hereinafter *April 2013 Advisory Committee Meeting*], <http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2013>.

175. *2014 Judicial Conference*, *supra* note 10, at 16. The Advisory Committee considered a range of approaches including: (1) continuing Rule 84 and Forms 5 and 6 only; (2) striking from Rule 4(d)(1)(D) any requirement that a Form be used; (3) revising Forms 5 and 6 to become Rule 4 Forms attached at the end of the Rule; (4) expanding the Rule 4(d)(1)(D) text to add more detail about the elements necessary for a request; or (5) using Rule 4(d)(1)(D) to mandate use of any Form for request and waiver that is approved by the Judicial Conference. *See April 2013 Advisory Committee Meeting*, *supra* note 174, at 220.

4(d)(1)(D) to attach them to Rule 4.<sup>176</sup>

### III. ANALYSIS

Given that the Judicial Conference and the Supreme Court have recommended abrogation, this section will initially present the seven reasons articulated throughout the Rules Enabling Act process in favor of abrogation of Rule 84 and the Forms. Although the arguments cited in favor of abrogation are many, they ultimately fall into two overarching categories: (1) the tension that exists between the Forms and *Twiqbal* cannot be permitted to remain; and (2) the Forms are not useful in modern litigation to judges, practitioners, or pro se litigants. Upon further scrutiny, this section will argue these two reasons do not support abrogation. Abrogation of the Forms and Rule 84 will only lead to further confusion—the solution should be to retain Rule 84 and amend the Forms instead of abrogate because modern litigation and the pleading standards will benefit if the Forms remain.

#### A. *The Reasoning for Abrogating Rule 84*

In August 2013, the Advisory Committee published its proposal for public comment to abrogate Rule 84 and eliminate the Forms appended to the Rules.<sup>177</sup> The Advisory Committee summarized its decision to abrogate Rule 84 and eliminate the Forms in the official note following the proposal, which stated:

Rule 84 was adopted when the Civil Rules were established in 1938 “to indicate, subject to the provisions of these [R]ules, the simplicity and brevity of statement which the [R]ules contemplate.” The purpose of providing illustrations for the [R]ules, although useful when the [R]ules were adopted, has been fulfilled. Accordingly, recognizing that there are many alternative sources for forms, including the website of the Administrative Office of the United States Courts, the website of many district courts and local law libraries that contain many commercially published forms, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated. The abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.<sup>178</sup>

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176. 2014 Judicial Conference, *supra* note 10, at 16.

177. *Id.* at app. B-19; *Proposed Amendments 2014–2015*, *supra* note 6, at 49.

178. FED. R. CIV. P. 84 advisory committee’s note to 2015 amendment; *2015 Rules Transmittal Package*, U.S. COURTS (Apr. 29, 2015) [hereinafter *2015 Rules Package*], <http://www.uscourts.gov/rules-policies/pending-rules-amendments>. The Advisory Committee Note

Throughout the Rules Enabling process, a number of reasons, both explicit and implicit, have been advanced in favor of abrogation. Specifically, the seven reasons clearly cited throughout the process in favor of abrogation were: (1) the Forms are out of date;<sup>179</sup> (2) amendment to the Forms would be cumbersome, resource consuming, and time consuming;<sup>180</sup> (3) lawyers rarely use the Forms;<sup>181</sup> (4) pro se litigants rarely use the Forms;<sup>182</sup> (5) there are alternative sources of civil forms;<sup>183</sup> (6) the purpose for which the Forms were adopted has been fulfilled;<sup>184</sup> and (7) the Forms are inconsistent with *Twiqbal*.<sup>185</sup>

The first reason cited for abrogation was that the Forms were out of date. The Forms have “languished in benign neglect, not because of indifference but because of competing demands on resources.”<sup>186</sup> The Advisory Committee had not done a systematic review of the Forms for many years.<sup>187</sup> Although the Forms were part of the 2007 overhaul of the Rules, the changes were only stylistic and did not address changes to the Rule’s text.<sup>188</sup> These oversights have rendered the Forms somewhat antiquated in modern litigation. For example, discovery is illustrated by three Forms: Forms 50, 51, and 52, which cover “a request to produce under Rule 34, a request for admissions under Rule 36, and the report of the Rule 26(f) planning conference.”<sup>189</sup> However, discovery is a much larger part of litigation than is demonstrated through these three simple forms—discovery is covered in Rules 26 to 37.<sup>190</sup> The Advisory Committee noted that, “[a] quick review of Rule 26 will suggest many other important discovery issues

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was changed to reflect requests by the Supreme Court on April 2, 2015. *Id.* at 129 (subscribing changes to the comment in a letter from James C. Duff, the director of the Administrative Office of the U.S. Courts, to Scott S. Harris, the Clerk of the Supreme Court of the United States). The Court requested that the Advisory Committee Note reflect that “the abrogation of Rule 84 does not alter existing pleading standards and [] identify other sources for civil procedure forms.” *Id.* To view the originally proposed Advisory Committee Note, see *Proposed Amendments 2014–2015, supra* note 6, at 49.

179. *November 2012 Advisory Committee Meeting, supra* note 15, at 408.

180. *Id.* at 409.

181. *Id.* at 408.

182. *Id.*

183. *Id.*

184. *Id.* at 411.

185. *Id.* at 407.

186. *Id.* at 412.

187. *Id.* at 408 (noting that the only Form the Advisory Committee had knowledge on was Form 5, which was “carefully crafted with the adoption of the Rule 4(d) provisions for waiving service of process”).

188. *Id.*

189. *Id.*

190. See FED. R. CIV. P. 26–37.

that might benefit from guidance in a form,”<sup>191</sup> including a Rule 26(b)(3)(C) request for a witness statement and Rule 26(b)(5)(A) creating a privilege log.<sup>192</sup> Discovery is not the only area missing coverage in the full set of the Rules.<sup>193</sup> Thus, the Advisory Committee concluded, “[T]he entire set of [F]orms is episodic. Some might be tempted to find it almost eccentric. Yet no thought has been given to filling out the set.”<sup>194</sup>

The second reason cited in favor of abrogation was that updating the Forms would be cumbersome and that time would be better spent elsewhere.<sup>195</sup> The Rule 84 Subcommittee’s main concern was with the Rules Enabling Act process.<sup>196</sup> As discussed earlier in this Comment, proposals through the Rules Enabling Act process can take up to three years before passage because the process is rather arduous with numerous, lengthy steps.<sup>197</sup> First, the Advisory Committee drafts changes and submits a proposal to the Standing Committee.<sup>198</sup> If the Standing Committee passes the proposal, it goes to a six-month public comment period.<sup>199</sup> Any changes must be re-passed through the Advisory Committee, then the Standing Committee, then the Judicial Conference, then the Supreme Court, and finally through Congress.<sup>200</sup> A common concern with the Forms is that the Rules Enabling Act process is “not nimble enough to keep the Forms current,” so the solution imposed was to “extricate[] [the Forms] from this process” entirely.<sup>201</sup>

Opponents of the Forms argue that constantly updating the Forms through the Rules Enabling Act would come at the expense of and draw public attention away from more important projects.<sup>202</sup> Some other pending projects the Advisory Committee cited include ongoing changes to

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191. *November 2012 Advisory Committee Meeting*, *supra* note 15, at 408.

192. *Id.*

193. *Id.* (“Discovery is not alone in suggesting gaps in coverage. In comparison to the full set of Civil Rules, the entire set of forms is episodic. . . . Yet no thought has been given to filling out the set.”).

194. *Id.*

195. *2014 Judicial Conference*, *supra* note 10, at 94 (concluding “the Committee can better use its time addressing more relevant issues in the rules”).

196. *Rulemaking Process*, *supra* note 37; *see* discussion *supra* notes 37–51 and accompanying text (explaining the Rules Enabling Act process).

197. *2014 Judicial Conference*, *supra* note 10, at 93 (“The [Rules Enabling] process ordinarily takes at least three years.”); *Rulemaking Process*, *supra* note 37. *See also* discussion *supra* notes 37–49 and accompanying text (explaining the Rules Enabling Act process).

198. The Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–77 (2012)).

199. *Id.*

200. *Id.*

201. *November 2012 Advisory Committee Meeting*, *supra* note 15, at 421.

202. *Id.* at 409.

discovery, pleading, and class actions.<sup>203</sup> The Advisory Committee stated discovery reform is the most pressing.<sup>204</sup> According to the Advisory Committee, the projects that might be brought in the Rules Enabling Act process must be carefully chosen because of the length of time, amount of labor, and money spent on the Enabling Act process.<sup>205</sup> It was concluded that “[d]evoting scarce Committee resources to sustained ongoing work on the [F]orms would come at a high cost.”<sup>206</sup> The Advisory Committee also expressed concern that updating the Forms would divert the important resource of public engagement from the Rules to the Forms.<sup>207</sup> The Rules Enabling Act process includes a six-month public comment period where the public is invited to engage with the proposed amendments to the Rules and create suggestions for new amendments.<sup>208</sup> The Advisory Committee, despite having concluded that few members of the public commented or cared about the Forms, worried that changes to the Forms would “detract from the attention devoted to changes in the [R]ules themselves.”<sup>209</sup> This is seemingly ironic given that one of the reasons cited for abrogation is that no one seemed to notice or care about the Forms during the August 2013 public comment period.<sup>210</sup>

The third and fourth reasons for abrogation of Rule 84 and the Forms are that lawyers and pro se litigants rarely use the Forms.<sup>211</sup> The Advisory Committee ended its inquiry into practitioner usage with the statement that “many lawyers rely on alternative sources of [F]orms.”<sup>212</sup> There is no indication where this information came from. With regard to pro se litigants, the Advisory Committee admitted that the Forms would be helpful but concluded that pro se parties likely did not know how to access or use the Forms.<sup>213</sup> Like the lack of practitioner usage, it is once again unclear where this information came from other than a statement made during a Rule

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203. *Id.* at 408–09.

204. *Id.* at 409 (noting that “[d]iscovery is not likely to move off the agenda in the foreseeable future—the question tends to be which discovery issues press most urgently for attention, not whether discovery can be put aside for a while”).

205. *Id.* at 408–09.

206. *Id.* at 409.

207. *Id.*

208. 28 U.S.C. § 2071(b) (2012) (“Any rule prescribed by a court . . . shall be prescribed only after giving appropriate public notice and an opportunity for comment.”).

209. *November 2012 Advisory Committee Meeting, supra* note 15, at 409.

210. *See* discussion *infra* text accompanying notes 217–28 (explaining that the August 2013 public comment period had few comments regarding the abrogation of Rule 84 and the Forms, and it was inferred from the lack of comments that few cared or used the Forms).

211. *November 2012 Advisory Committee Meeting, supra* note 15, at 408.

212. *Id.*

213. *Id.* at 421, 425.



84 Subcommittee meeting that “there seems to be little indication that pro se parties” use the forms.<sup>214</sup> The Advisory Committee ultimately concluded that pro se litigants, like lawyers, could rely on other sources of forms that are more helpful than the Forms.<sup>215</sup> For example, the Advisory Committee noted that even prison libraries provide forms.<sup>216</sup>

No formal empirical study was ever conducted to determine whether practitioners or pro se litigants use the Forms.<sup>217</sup> The only research done to explore practitioner and pro se usage was informal inquiries made by the Rule 84 Subcommittee in 2012.<sup>218</sup> Based on limited inquiries to select clerk’s offices, pro se clerks, magistrate judges, and some lawyers, the Rule 84 Subcommittee determined that Administrative Office forms were frequently used and the Official Forms were seldom used.<sup>219</sup> Participants in the informal inquiries, however, attested that the Forms were useful for “young lawyers, and remain useful to ‘verify that pleadings are sufficient.’”<sup>220</sup> The Rule 84 Subcommittee concluded, following the informal investigation, that even exploring more formal empirical research to determine true usage of the Forms would be a waste of time for the “crowded agenda of Federal Judicial Center projects.”<sup>221</sup> Instead of formal empirical research, the Advisory Committee suggested that the public comment period on abrogation of Rule 84 and the Forms should act as an indicator of the usage of the Forms.<sup>222</sup> If the abrogation of Rule 84 and the Forms received a lot of attention and comments, then this would prove the Forms were used, according to the Advisory Committee.<sup>223</sup>

During the public comment period, Rule 84 was published alongside

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214. *April 2013 Advisory Committee Meeting*, *supra* note 174, at 42.

215. *November 2012 Advisory Committee Meeting*, *supra* note 15, at 421–22.

216. *Id.* at 422.

217. *Id.* at 410 (“Many projects benefit from formal empirical research before going forward. The essentially uniform responses to informal inquiries by Subcommittee members, however, support the belief that there is little need to seek a place for Rule 84 [in a formal federal survey].”).

218. *Id.* The Rule 84 Subcommittee cites that an informal survey on usage of the Forms was conducted with the clerk’s offices in the U.S. District Court for the District of Arizona and the U.S. District Court for the Northern District of Ohio, as well as with lawyers in Iowa. *Id.* at 425. The District of Arizona had used some of the Forms, including the Forms for summonses, waivers of service, judgment, and notice of magistrate judge availability. *Id.* The Northern District of Ohio used local forms and Administrative Office forms. *Id.* Beyond these three jurisdictions, there was no further inquiry other than a general reference to a survey of “some district clerks, pro se clerks, and others in like positions.” *Id.* It was never mentioned how many clerks were surveyed and where the clerks served.

219. *Id.* at 425.

220. *Id.*

221. *Id.* at 410.

222. *Id.* (“The public comment process is a reliable check.”).

223. *See id.*

two major projects: Rule 37(e) regarding spoliation of electronically stored information and the Duke Rules Package amending Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37 to make the disposition of civil actions more efficient.<sup>224</sup> The Judicial Conference Committee cited that there was only one commenter who stated he or she “had ever actually used the Forms.”<sup>225</sup> There were 29 total comments on Rule 84 with some comments having multiple signers.<sup>226</sup> Because of the limited, informal inquiries and the lack of response in the public comment period, the Advisory Committee concluded “there is little need to [keep] Rule 84.”<sup>227</sup> The Advisory Committee inferred that lack of response to the abrogation proposal implied approval.<sup>228</sup> The Advisory Committee, through their superficial inquiry, was convinced that its premonition that few used the Forms was correct.

Fifth, the Advisory Committee cited alternative sources for forms as a reason to abrogate Rule 84.<sup>229</sup> The alternative forms include forms created by private publishing companies and other non-pleading forms created and maintained by the Forms Working Group at the Administrative Office of the United States Courts.<sup>230</sup> The Advisory Committee stated that abrogation would “open[] the way for continuing, prompt, and flexible development and dissemination of forms by the Administrative Office.”<sup>231</sup> To address the concerns about national uniformity, the Advisory Committee suggested the Administrative Office coordinate with district clerks’ offices.<sup>232</sup> The Advisory Committee claimed that practitioners use “their own forms, their firms’ forms, Administrative Office forms, local forms, forms provided by treatises, and forms from like sources” in lieu of the Official Forms.<sup>233</sup> However, the Advisory Committee failed to explain how outside third party forms help to address uniformity of access, substance, and usage in litigation. Most importantly, the Advisory Committee failed to acknowledge that the unofficial forms are not authoritative by design like the Forms.<sup>234</sup>

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224. *May 2014 Standing Committee Meeting*, *supra* note 9, at 63, 306.

225. *2014 Judicial Conference*, *supra* note 10, at 94.

226. *May 2014 Standing Committee Meeting*, *supra* note 9, at 421–25.

227. *November 2012 Advisory Committee Meeting*, *supra* note 15, at 410.

228. *2014 Judicial Conference*, *supra* note 10, at 94 (“The general lack of response to the Rule 84 proposal reinforced the Committee’s view that the [F]orms are seldom used.”).

229. *Proposed Amendments 2014–2015*, *supra* note 6, at 49.

230. The Working Group at the Administrative Office of the United States Courts consists of six federal judges and six clerks of the court, and they, in consultation with various rules committees, create forms that can be downloaded online. *2014 Judicial Conference*, *supra* note 10, at 93; *see also supra* note 146 (discussing the Administrative Office website and online forms).

231. *November 2012 Advisory Committee Meeting*, *supra* note 15, at 412.

232. *Id.*

233. *April 2013 Advisory Committee Meeting*, *supra* note 174, at 42.

234. Only the Official Forms are authoritative illustrations of sufficiency. *See* FED. R. CIV. P.

Sixth, according to the Advisory Committee, Rule 84 should be abrogated because “[t]he purpose of providing illustrations for the [R]ules, although useful when the [R]ules were adopted, has been fulfilled.”<sup>235</sup> Part of the Forms’ purpose for adoption in 1938 was to support the change from code pleading.<sup>236</sup> Rule 8 was a “cultural shift” to notice pleading, so the Forms were used to support the change.<sup>237</sup> However, in modern litigation, many argue that the Forms are “no longer needed to encourage simple pleading.”<sup>238</sup> The Advisory Committee stated lawyers “do not do Rule 8 pleading, not before the decisions in *Twombly* and *Iqbal*, and not since.”<sup>239</sup> Many lawyers go beyond the minimum and support their claims with facts for advocacy purposes, according to the Advisory Committee.<sup>240</sup> The Advisory Committee did not address the fact that there are a number of forms that act as illustrations of the Rules other than pleading, where illustrations are necessary and desirable for uniformity.<sup>241</sup>

Seventh, the Advisory Committee acknowledged that Rule 84 ultimately has garnered attention primarily because of the difficulty in reconciling the pleading Forms and *Twiqbal*.<sup>242</sup> The pleading Forms “embod[ie]d stark illustrations of the ‘simplicity and brevity’ contemplated by the original proponents,” which has been “entrenched in practice.”<sup>243</sup> According to the Advisory Committee, the Forms had led an “untroubled life” in practice, but *Twiqbal* demonstrated the Supreme Court’s “exposition of pleading standards inconsistent with the pleading [F]orms.”<sup>244</sup> *Twiqbal* is an interpretation of Rule 8.<sup>245</sup> Following *Twiqbal*, the Supreme Court stated the circumstances under which a court may dismiss a complaint as: “whether, assuming the factual allegations are true, the plaintiff has stated a

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84. See also A. Benjamin Spencer, *The Forms Had a Function* 27 (Va. Pub. Law & Legal Theory Research Paper, Paper No. 2014-44, 2014), [hereinafter Spencer, *The Forms*] <http://ssrn.com/abstract=2472083> (“[T]he principal function of the Official Forms throughout their history has been as an *authoritative guarantor* of a proper interpretation and application of the Federal Rules.”) (emphasis added).

235. *Proposed Amendments 2014–2015*, *supra* note 6, at 49.

236. *April 2013 Advisory Committee Meeting*, *supra* note 174, at 219; see also *supra* note 66 (describing code pleading).

237. *April 2013 Advisory Committee Meeting*, *supra* note 174, at 219; see also *supra* note 66 (explaining notice pleading and code pleading).

238. *April 2013 Advisory Committee Meeting*, *supra* note 174, at 219.

239. *Id.*

240. *Id.*

241. See *supra* note 67 and accompanying text (providing examples of non-pleading Forms).

242. *November 2012 Advisory Committee Meeting*, *supra* note 15, at 407.

243. *Id.*

244. *Id.*

245. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009).

ground for relief that is *plausible*.<sup>246</sup> The Supreme Court also stated that although the court must “accept as true all of the allegations contained in a complaint,” the rule is “inapplicable to legal conclusions” and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”<sup>247</sup> Prior to *Twiqbal*, the standard for dismissal of a federal complaint was set forth in *Conley v. Gibson*, which stated “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.”<sup>248</sup> Nevertheless, in *Twombly*, the Court made clear that *Conley*’s “no set of facts” language was abrogated and had “earned its retirement.”<sup>249</sup>

Commentators following *Twiqbal* have argued that the plausibility pleading standard is an unwarranted interpretation of Rule 8(a)(2) that heightens pleading standards to “frustrate the efforts of plaintiffs with valid claims to get into court.”<sup>250</sup> Commentators also noted that although the Supreme Court stated it is not “apply[ing] any ‘heightened’ pleading standard,”<sup>251</sup> plausibility pleading “requires different levels of factual detail depending upon substantive context,” which ultimately makes the standard heightened and unclear.<sup>252</sup> Thus, following all the criticism of *Twiqbal*, there was even an effort to introduce legislation in Congress to restore *Conley*.<sup>253</sup>

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246. *Iqbal*, 556 U.S. at 696 (emphasis added).

247. *Id.* at 678.

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

249. *Twombly*, 550 U.S. at 562–63.

250. See, e.g., A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431–33 (2008) [hereinafter Spencer, *Plausibility Pleading*] (“The Court’s new understanding of civil pleading obligations does not merely represent an insufficiently justified break with precedent and with the intent of the drafters of Rule 8. It is motivated by policy concerns more properly vindicated through the rule amendment process, it places an undue burden on plaintiffs, and it will permit courts to throw out claims before they can determine their merit. Ultimately, the imposition of plausibility pleading further contributes to the civil system’s long slide away from its original liberal ethos towards an ethos of restrictiveness more concerned with efficiency and judicial administration than with access to justice.”).

251. *Twombly*, 550 U.S. at 469–70 n.14.

252. See, e.g., Spencer, *Plausibility Pleading*, *supra* note 250, at 459.

253. Notice Pleading Restoration Act, S. 1504, 111th Cong. (2009). The bill’s stated purpose was: “To provide that Federal courts shall not dismiss complaints under [R]ule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).” *Id.* (italics added). The bill was ultimately never enacted. Other proposals were made in various academic articles to avoid plausibility pleading. See, e.g., Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 854–56 (2010) (“The first possibility would be to revise Rule 9 [for Pleading Special Matters] to include more classes of cases, while abrogating *Twombly* and *Iqbal* as a general rule. . . . A second, more elaborate way to preserve the new gatekeeping function in a fair

*Twiqbal* immediately drew attention to the Forms because the Forms endorse the use of conclusory legal language like “owes,”<sup>254</sup> “negligently,”<sup>255</sup> “willfully,”<sup>256</sup> and “recklessly.”<sup>257</sup> There was uncertainty about whether *Twiqbal* made the Forms obsolete, which led the Advisory Committee to consider all the broader questions about the necessity of the Forms.<sup>258</sup> Although the Advisory Committee insists that the decision to abrogate did not rest on incompatibility with *Twiqbal* and should not bear on the pleading standards,<sup>259</sup> the *Twiqbal* pleading standards were the catalyst for the Rule 84 discussion.<sup>260</sup> *Twiqbal* was undoubtedly a major factor in the decision to abrogate, which sends an implicit message that the Forms simply are not consistent with the *Twiqbal* pleading standards.

*B. Abrogating Rule 84 is an Unwarranted and Implicit Endorsement of Twiqbal as a Heightened Pleading Standard Going Forward*

The first overarching reason cited for abrogation is the tension that exists between *Twiqbal* and the pleading Forms, which should not support abrogation upon further inquiry.<sup>261</sup> Despite the Supreme Court never having found that the plausibility standard is incompatible with the Forms,<sup>262</sup> the

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fashion . . . civil rulemakers might require as the price of admission to discovery—imposed if the opposing party has successfully met the standard for dismissal under *Twombly-Iqbal*—that the claimant demonstrate something like probable cause to believe that allowing discovery before dismissal would yield significant pertinent evidence.”); Michael C. Dorf, *Should Congress Change the Standard for Dismissing a Federal Lawsuit?*, FINDLAW (July 29, 2009), <http://writ.news.findlaw.com/dorf/20090729.html> (rejecting that the Notice Pleading Restoration Act as the best course of action). Dorf suggested that the Congressional bill should instead read:

Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not deem a pleading inadequate under [R]ule 8(a)(2) or [R]ule 8(b)(1)(A) of the Federal Rules of Civil Procedure, on the ground that such pleading is conclusory or implausible, except that a court may take judicial notice of the implausibility of a factual allegation. So long as the pleaded claim or defense provides fair notice of the nature of the claim or defense, and the allegations, if taken to be true, would support a legally sufficient claim or defense, a pleading satisfies the requirements of [R]ule 8.

Michael C. Dorf, *An Alternative to Senator Specter’s Notice Pleading Bill*, DORF ON LAW (July 29, 2009), [http://www.dorfonlaw.org/2009/07/alternative-to-senator-specters-notice\\_28.html](http://www.dorfonlaw.org/2009/07/alternative-to-senator-specters-notice_28.html).

254. FED. R. CIV. P. Form 10.

255. FED. R. CIV. P. Forms 11, 12.

256. FED. R. CIV. P. Form 12.

257. FED. R. CIV. P. Form 12; Spencer, *Plausibility Pleading*, *supra* note 250, at 472.

258. *April 2013 Advisory Committee Meeting*, *supra* note 174, at 223–24.

259. *November 2012 Advisory Committee Meeting*, *supra* note 15, at 412.

260. *Id.*

261. See discussion *supra* Part II.C.

262. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 n.10 (2007).

Advisory Committee has come to its own implicit conclusion that Form pleading simply cannot exist post-*Twiqbal*.<sup>263</sup> Each Committee in the Rules Enabling Process has disavowed any connection between *Twiqbal* and the abrogation of Rule 84 and the Forms, yet *Twiqbal* has always been at the forefront of the abrogation debate.<sup>264</sup> Given the timing and amount of discussion surrounding *Twiqbal* during the Rules Enabling Process, it will be difficult to argue that the abrogation of Rule 84 and the Forms has nothing to do with *Twiqbal*, and therefore, this abrogation has no effect on the pleading standards. Because Congress will most certainly not intervene to block the abrogation of Rule 84 and the Forms, this abrogation would undoubtedly be an implicit endorsement of *Twiqbal* as a heightened pleading standard<sup>265</sup> requiring greater particularity than the Forms provide going forward.

Initially, the primary argument and the spark that started the abrogation discussion in 2009 in the Standing Committee and Advisory Committee was the alleged tension that exists between *Twiqbal* and the Forms.<sup>266</sup> The discussion of abrogation of Rule 84 began in October 2009, which was only five months after the Supreme Court decided *Iqbal*.<sup>267</sup> From the beginning of the process, the Advisory Committee itself noted the danger of abrogating Rule 84 for the stance it takes on *Twiqbal*.<sup>268</sup> The Advisory Committee recognized that abrogation of Rule 84 and the Forms would undoubtedly “generate a perception that the Forms were being abrogated because the pleading forms, sufficient under notice pleading as it had been understood up to 2007, no longer suffice under *Twombly* and *Iqbal*.”<sup>269</sup> Even if this was factually incorrect and the Forms are in fact intended to be sufficient, the Advisory Committee noted that nothing could defeat the perception that inconsistency with *Twiqbal* was the reason for abrogation.<sup>270</sup> The Advisory

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263. See *November 2012 Advisory Committee Meeting*, *supra* note 15, at 407 (detailing the Forms’ existence following the decisions in *Twiqbal*).

264. See *supra* notes 242–60 and accompanying text (discussing *Twiqbal* as a reason favoring abrogation).

265. The Supreme Court held in *Twombly* that pleading “do[es] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570.

266. *Minutes of Civil Rules Advisory Committee*, U.S. COURTS 14–16 (Oct. 8–9, 2009) [hereinafter *October 2009 Advisory Committee Meeting*], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV10-2009-min.pdf>.

267. *Iqbal* was decided in May 2009. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The initial meeting discussing Rule 84 was held in October 2009. See *October 2009 Advisory Committee Meeting*, *supra* note 266, at 16.

268. *Id.*

269. *Id.* (noting that the implication that abrogation was because the Forms were no longer sufficient immediately following *Twiqbal* was a “serious reason to hold off”).

270. *Id.*

Committee even reached the conclusion that Congress might feel the need to intervene and pass legislation to re-institute notice pleading if passed when the Advisory Committee first considered abrogating Rule 84.<sup>271</sup>

Even during 2013, almost four years after discussions of abrogation first began, the implied endorsement of *Twiqbal* as a heightened standard as a result of abrogation continued to be a point of concern.<sup>272</sup> The Rule 84 Subcommittee sought legal counsel to conduct extensive research on the validity of the Forms under *Twiqbal*.<sup>273</sup> Further, during an Advisory Committee meeting in 2013, members again expressed concern that abandoning the Forms even four years after *Twiqbal* might be too rushed and an unwarranted decision that the Forms are inconsistent with *Twiqbal*.<sup>274</sup> Thus, the Advisory Committee predicted that the abrogation of Rule 84 would “reflect[] a judgment that [the Forms] departed from the original meaning of Rule 8.”<sup>275</sup> If Form pleading does not meet the standards of Rule 8(a)(2) as interpreted by the Supreme Court in *Twiqbal*, then this impliedly shifts the standard to something greater than what is found in the Forms.<sup>276</sup>

In response to the apprehension that the abrogation was taking a particular stance on *Twiqbal*, the Advisory Committee suggested that the concern could be dispelled with a clear explanation that Rule 84 and the Forms are being abandoned for other reasons—particularly that the Forms are no longer used in modern litigation.<sup>277</sup> However, the Advisory Committee in a memorandum submitted to the Judicial Conference, Standing Committee, and Supreme Court only said that it would “continue[] to review the effects of [*Twiqbal*].”<sup>278</sup> With the memorandum, the proposed amendments included an Advisory Committee Note that did not mention

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271. *Id.* (“It is even possible that Congress might take proposed abrogation as a sign that legislation is needed to revivify notice pleading.”). Legislation was presented to re-implement notice pleading in 2009, which was never enacted. *See supra* note 253 (describing the Notice Pleading Restoration Act).

272. *See April 2013 Advisory Committee Meeting, supra* note 174, at 229–47.

273. *Id.* at 229–47. *See* discussion *infra* Part III.C.3 (describing the findings of legal counsel commissioned by Rule 84 Subcommittee on the validity of the Forms and *Twiqbal*).

274. *April 2013 Advisory Committee Meeting, supra* note 174, at 219 (“Concern was expressed . . . that abandoning the forms might seem an implied rebuke of the *Twombly* and *Iqbal* decisions, reflecting a judgment that they departed from the original meaning of Rule 8.”).

275. *Id.*

276. Coleman, *supra* note 75, at 18 (“With Rule 8, it provides the baseline for pleading doctrine. If Form 11 is eliminated, Rule 8 will have necessarily been changed.”)

277. *See 2014 Judicial Conference, supra* note 10, at 16; *but see October 2009 Advisory Committee Meeting, supra* note 266, at 16 (explaining that nothing could defeat the perception that inconsistency with *Twiqbal* was the reason for abrogation).

278. *Id.* at 94.

pleading standards at all.<sup>279</sup> When the abrogation of Rule 84 (including the Advisory Committee Note) was submitted to the Supreme Court, the suggestion of the Advisory Committee to make it clear that Rule 84 is being abrogated for reasons other than to endorse *Twiqbal* as a heightened pleading standard was ignored.<sup>280</sup>

It was only upon the Supreme Court's request in April 2015, when Rule 84 and the Forms had almost completed the Rules Enabling Act process, that the Advisory Committee included in the Advisory Committee Note to the proposed abrogation that "abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8."<sup>281</sup> However, arguably, even if it is strenuously and explicitly claimed that abrogation of Rule 84 does not imply any position on the sufficiency of the Forms under *Twiqbal*, there is still likely an implicit endorsement of a heightened pleading standard given how much of the debate has surrounded *Twiqbal*. Given the mixed messages sent throughout the Rules Enabling Act process regarding reconciliation of *Twiqbal* and the pleading Forms, the minimal coverage of the pleading standards in the Advisory Committee Note will not likely be enough to overcome the statement abrogation is making on pleading.

Legal academics from around the country have also recognized the danger of abrogating Rule 84 because it would essentially be blessing the pleading standard in *Twiqbal* as heightened without writing and passing an amended Rule as required in the Rules Enabling Act process.<sup>282</sup> During the public comment period in August 2013 on the possible abrogation of Rule 84 and the Forms, a number of law professors submitted comments opposing the abrogation.<sup>283</sup> The academic community expressed concern that publishing a proposal to abrogate Rule 84 and the Forms did not satisfy the Rules Enabling Act process.<sup>284</sup> The scholars explained,

[S]triking the Form Complaints commits the Committee to a position

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279. *Proposed Amendments 2014–2015*, *supra* note 6, at 49; *see also 2014 Judicial Conference*, *supra* note 10, at 143.

280. *2015 Rules Package*, *supra* note 178, at 132, 139.

281. *2015 Rules Package*, *supra* note 178, at 132, 139.

282. *See, e.g.*, Letter from Helen Hershkoff, Lonny Hoffman, Alexander Reinert, Elizabeth Schneider, David Shapiro, and Adam Steinman, to Committee on Rules of Practice and Procedure (Feb. 5, 2014) [hereinafter *Scholar Letter*], <http://www.afj.org/wp-content/uploads/2014/02/Professors-Joint-Comment.pdf> (signed also by Letter from 171 Law Professors, to Committee on Rules of Practice and Procedure (Feb. 18, 2014) <http://www.afj.org/wp-content/uploads/2014/02/FRCF-letter-with-signatures.pdf>); Coleman, *supra* note 75, at 1; Spencer, *The Forms*, *supra* note 234, at 26.

283. *Scholar Letter*, *supra* note 282, at 16.

284. *Id.* *See also* Coleman, *supra* note 75, at 12–18.



that implicitly adopts plausibility pleading as the standard going forward. This is all the more troubling given that one trenchant criticism of *Iqbal* and *Twombly* is that the Court abandoned its previously stated commitment to modifying the Federal Rules through the rulemaking process rather than through case adjudication.<sup>285</sup>

If the abrogation of Rule 84 and the Forms made it through the Rules Enabling Process, the scholars were concerned that “the door [to debating on the pleading standards] [would] be effectively shut and the pleading rules will have been altered without any of the participatory deliberation that legitimizes the Federal Rules.”<sup>286</sup> In response to the concerns of the academic community about the abrogation of the Forms also requiring amendment to the Rule it illustrates, the Advisory Committee merely stated it “considered this perspective but unanimously determined that the publication process and the opportunity to comment on the proposal fully satisfie[d] the Rules Enabling Act.”<sup>287</sup> However, the Advisory Committee never explicitly responded to and explained whether this was in fact the endorsement of *Twiqbal* as a heightened pleading standard that would violate the Rules Enabling Act process as the academic community claimed beyond the conclusory statement that the concern had been addressed and the Rules Enabling Act satisfied.<sup>288</sup>

Despite the various Committees’ claims that the Forms constrain plausibility pleading and should be abrogated for that reason, there is no evidence that *Twiqbal* plausibility pleading has had a great impact on pleading practice up to this point.<sup>289</sup> The Forms are not actually causing the pressing conflict the Advisory Committee cited as a main reason for abrogation,<sup>290</sup> which makes abrogation truly unwarranted. Recent studies analyzing the rates at which motions to dismiss have been granted have indicated that plausibility pleading has not taken a dramatic departure from the days of notice pleading.<sup>291</sup>

According to a Federal Judicial Center report, judges are not deciding motions to dismiss differently than they would have in the pre-*Twiqbal* era.<sup>292</sup> Motions to dismiss for failure to state a claim in 2009–10 (post-

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285. *Scholar Letter*, *supra* note 282, at 16.

286. *Id.*

287. *2014 Judicial Conference*, *supra* note 10, at 16.

288. *See id.* at 17.

289. *See* Alex D. Silagi, Comment, *Keep Calm and Plead On: Why New Empirical Evidence Should Temper Fears About Plausibility Pleading*, 44 SETON HALL L. REV. 247, 274 (2014).

290. *See id.*

291. *Id.*

292. *Id.* at 265 (citing Joe S. Cecil et al., *Motions to Dismiss for Failure to State a Claim After Iqbal: Report to Judicial Conference Advisory Committee on Civil Rules*, FED. JUD. CTR. 8 (2011),

*Twiqbal*) were filed in 6.2% of all cases in the federal courts, which was 2.2% over the filing rate for such motions in cases in 2005–06 (pre-*Twiqbal*).<sup>293</sup> There was no increase in the rate of grants of motions to dismiss without leave to amend during that time period despite the increased filing of motions to dismiss.<sup>294</sup> Courts have found most modern pleading complies with *Twiqbal* based on the Rules, the Forms, and pre-*Twiqbal* case law.<sup>295</sup> Thus, any changes up to this point have been incremental at best, “allowing the common law process to continue carving a path for ‘plausibility’ pleading.”<sup>296</sup>

The statistics suggest that there is not necessarily a pressing need for the Advisory Committee to intervene to decide how to reconcile *Twiqbal* with the Forms.<sup>297</sup> Despite the Advisory Committee Note stating that the abrogation of Rule 84 was not to have an effect on the pleading standards,<sup>298</sup> the Advisory Committee should ultimately be concerned that, by making a break with the Forms, it is still sending an unjustified message that *Twiqbal* plausibility pleading is incompatible with the Forms. This heightens the plausibility pleading standard to something more than what is illustrated in the Forms going forward. What seems like a small shift could have a particularly unsettling effect on the courts and the litigants; abrogation may result in an unwarranted denial of access to the courts because losing the Forms implicitly heightens the pleading standards to a greater, but still indeterminable level. The Forms not being squared with *Twiqbal* is an open question and given the statistics provided by the Federal Judicial Center,<sup>299</sup> abrogation prematurely addresses conflict where none may exist. The best and only solution to not implicitly heighten the pleading standards is to keep Rule 84 and the Forms during the transition into *Twiqbal* pleading.

By choosing to take an implicit stance on the pleading standards through abrogation of Rule 84 and the Forms, there is no true resolution to the alleged uncertainty and tension in *Twiqbal* pleading. Arguably, the choice to abrogate Rule 84 and the Forms leaves only further room for ambiguity in

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[http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf).

293. Joe S. Cecil et al., *Motions to Dismiss for Failure to State a Claim After Iqbal: Report to Judicial Conference Advisory Committee on Civil Rules*, FED. JUD. CTR. 8 (2011), [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf).

294. *Id.* at 13.

295. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1323 (2010) (“The upshot is that lower courts have, essentially, a duty to reconcile *Twombly* and *Iqbal* with pre-*Twombly* case law.”).

296. Silagi, *supra* note 289, at 275.

297. See discussion *supra* notes 289–96 and accompanying text.

298. *2015 Rules Package*, *supra* note 178, at 132, 139.

299. See discussion *supra* notes 289–96.

the already unclear *Twiqbal* pleading standards. The Advisory Committee stated that a primary benefit of deleting the Forms is that it would “leave[] the courts free to draw from the experience of hundreds of thousands of cases in tailoring pleading standards for all categories of claims. The lessons of the past will not be lost in this process, but [the Forms] will no longer impose awkward constraints.”<sup>300</sup> However, with the Forms gone, now there will no longer be the uniform guidance on sufficiency that the Forms have provided during the plausibility pleading transition. Judges now may merely infer from the abrogation of Rule 84 that *Twiqbal* requires something more than the Forms illustrate, which will likely lead to hundreds of different interpretations of what is sufficient pleading. Given that the pleading standard can be outcome-determinative for some litigants, it seems imperative to have guidance on sufficiency when pleading instead of leaving sufficiency open to varying interpretations. With the Forms gone, there no longer will be uniform guidance on sufficiency.

Instead of the Forms “impos[ing] awkward constraints [on pleading],”<sup>301</sup> perhaps it is the subjectivity and lack of clarity of *Twiqbal* that is causing awkward constraints on the pleading standards—thus, the Forms are not the issue. Considering academics, practitioners, and even the Advisory and Standing Committees have recognized that the decision to abrogate the Forms and Rule 84 truly centers on *Twiqbal*, there is no way to avoid the implicit statement abrogation makes about *Twiqbal* as a heightened pleading standard.<sup>302</sup> Instead of taking an explicit stance on *Twiqbal* and deciding what it takes to comply with the standard, the Advisory Committee and Standing Committee are dodging the true debate on what *Twiqbal* requires while implicitly controlling *Twiqbal*'s direction. Abrogation takes a stance on *Twiqbal* requiring something greater than the Form complaints provide going forward, but it only leads to further confusion on how much more is needed.

*C. The Courts, Practitioners, and Pro Se Litigants All Benefit From Use of the Forms as Authoritative Illustrations and Without Them, the Meaning and Interpretation of the Rules Will Become More Unclear*

The second overarching reason for abrogation of Rule 84 and the Forms is that they are not useful in modern litigation based on the Committees' arguments of the Forms being out of date, the Forms requiring too many

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300. November 2012 Advisory Committee Meeting, *supra* note 15, at 412.

301. *Id.*

302. See *supra* notes 242–57 and accompanying text (explaining the reasoning for abrogation truly centering on the incompatibility with *Twiqbal*).

resources to amend, pro se litigants and practitioners rarely using the Forms, the availability of alternative Forms, and the purpose of the Forms having been fulfilled.<sup>303</sup> This reason also does not support abrogation upon further scrutiny. After seventy-six years of operation alongside the Rules, the Forms have become an important guarantor of the Rules for different members of the legal community.<sup>304</sup> The Forms have been authoritative examples used both as an illustration of compliance during drafting and a point of argument to verify compliance for litigants who are challenged on non-compliance with the requirements of the Rules.<sup>305</sup> With the Forms abrogated, the three primary groups that will be negatively impacted are: practitioners, pro se litigants, and judges. Abrogation of Rule 84 and the Forms will only benefit the Advisory Committee and the Standing Committee who will no longer have the responsibility to maintain the Forms.

### 1. Practitioners

Practitioners are the first group negatively impacted by the abrogation of Rule 84 and the Forms. The Advisory Committee has maintained throughout the Rule 84 abrogation debate that practitioners rarely use the Forms.<sup>306</sup> The Rule 84 Subcommittee based this generalized conclusion on a canvassed group of unknown “law firms, public interest law offices, and individual lawyers.”<sup>307</sup> This limited inquiry satisfied both the Rule 84 Subcommittee and the Advisory Committee that practitioners do not use the Forms, which “confirmed the initial impressions of Subcommittee members.”<sup>308</sup> In the Advisory Committee’s report to the Judicial Conference recommending abrogation, it concluded that the Form complaints embrace too few causes of actions and illustrate too simple of pleading to be useful to practitioners in modern times given the increased “use of Rule 12(b)(6) motions to dismiss” and “the enhanced pleading

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303. See *supra* Part III.A. (describing the reasoning for abrogation).

304. See Spencer, *The Forms*, *supra* note 234, at 26.

305. See *id.*

306. See *supra* text accompanying notes 211–28 (explaining the information collected about practitioner use by the Rule 84 Subcommittee and the Advisory Committee); *2014 Judicial Conference*, *supra* note 10, at 94.

307. *2014 Judicial Conference*, *supra* note 10, at 93. It is vague as to who was included in this survey. There is little indication how many people were surveyed, from what areas of the country, and from what areas of practice. See *id.*

308. *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure*, U.S. COURTS 276 (Aug. 2013), [http://www.instituteforlegalreform.com/uploads/sites/1/Published\\_Rules\\_Package.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/Published_Rules_Package.pdf).

requirements of Rule 9 and some federal statutes.”<sup>309</sup> The complexity of modern litigation has “resulted in a detailed level of pleading that is far beyond that illustrated in the [F]orms,” according to the Advisory Committee.<sup>310</sup> However, these arguments ignore a possible use of the Forms by practitioners. While the Forms can be drafting tools for new lawyers or pro se litigants, the Forms can also be a verification tool for *all* practitioners in more complex causes of action.<sup>311</sup> The Forms serve a dual purpose: they can be an illustration, but they also can be used to verify the validity of the complaint if challenged.<sup>312</sup>

Practitioners do not have to first use the Forms when drafting to later use them when arguing sufficiency under the Rules.<sup>313</sup> As previously noted, most practitioners in modern litigation use factual detail that goes beyond the Forms,<sup>314</sup> so drafting a complaint based on the illustrations in the Forms may not be the most important use for the Forms in modern litigation. The Forms were never meant to be an all-encompassing example of every cause of action and new federal statute in existence, which is a task better left to the Administrative Office of the United States Courts or local rules that may go through a quicker amendment process.<sup>315</sup> The Advisory Committee had already considered appending a practice manual to the Rules and explicitly rejected it in 1989 because it was not allowed under the Rules Enabling Act and did not serve the purpose of the Forms.<sup>316</sup> The Forms are intended to be illustrations of sufficiency—not a manual of forms like what is put out by local courts or the Administrative Office of the United States Courts where the drafter must just fill in the blank.<sup>317</sup>

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309. 2014 Judicial Conference, *supra* note 10, at 93.

310. *Id.*

311. See Spencer, *The Forms*, *supra* note 234, at 25 (“[Litigants] certainly use [the Forms] to make arguments about the Rules and what they require. To the point that litigants do not use the forms as the model for their pleadings, such is not the purpose of the Official Forms.”).

312. See *id.* at 11–12.

313. See *supra* notes 234–39 and accompanying text (explaining that many lawyers go beyond the minimum and support their claims with facts for advocacy purposes according to the Advisory Committee).

314. See *id.*

315. The former introductory statement to the Forms stated that the Forms were never intended to be a manual of Forms. FED. R. CIV. P. app. of forms introductory statement (1946) (repealed Dec. 1, 2007); see also Spencer, *The Forms*, *supra* note 234, at 26.

316. See *supra* notes 32–36, 50–51 and accompanying text (discussing the 1989 proposed amendment that would have substituted a practice manual for the Appendix of Forms. It was proposed that the Judicial Conference could amend the practice manual without the formalities of the Rules Enabling Act process.).

317. FED. R. CIV. P. 84 advisory committee’s note to 1937 adoption (“In accordance with the practice found useful in many codes, provision is here made for a limited number of official [F]orms which may serve as guides in pleading.”).

The Forms should be used to show the amount of factual detail to include for sufficiency but not necessarily the substantive composition thereof. If challenged, practitioners can point to the Forms to show substantial compliance with the sufficiency the Form required even if it is not the exact cause of action or federal statute the Form is illustrating. For example, Form 11, which is a complaint for negligence, contains the simple statement: “[D]efendant negligently drove a motor vehicle against the plaintiff.”<sup>318</sup> Form 11 does not require parsing the negligence allegations into separate elements.<sup>319</sup> Thus, Form 11 could be used to show the sufficiency of a claim for misrepresentation where the complaint merely states that “the supposed misrepresentations were made ‘in connection with a transaction . . . in which the . . . [defendant] had a pecuniary interest.’”<sup>320</sup> The level of factual detail and particularity of Form 11 can be paralleled for other causes of action.

Similarly, a party may challenge based on substantial non-compliance with the Forms. For example, Form 6, which is a waiver of the service of summons, requires the date, the name of the plaintiff’s attorney, and the signature of the attorney.<sup>321</sup> Where the attorney does not provide the date or his or her signature, the defendant could argue that the plaintiff failed to comply with Rule 4(d)(1), which is the rule for waiving service, based on Form 6.<sup>322</sup> Conversely, if the defendant were to argue the plaintiff failed to comply with Rule 4(d)(1) because the plaintiff failed to include an expected return date on the waiver form, Form 6 could be used to show that nowhere is there a place to fill in a required return date and therefore, it is not required by the Rule.<sup>323</sup> Because this important purpose of the Forms still exists in modern litigation, modernized Forms could undoubtedly be extremely beneficial to practitioners if challenged on sufficiency under the Rules. The Advisory Committee used a very limited and narrow view of the purpose of the Forms to conclude that practitioners do not have a use for the Forms, so it hardly seems that this argument should hold weight when the purpose of the Forms is viewed more broadly.

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318. FED. R. CIV. P. Form 11.

319. *Id.*

320. *Gen. Elec. Capital Corp. v. Posey*, 415 F.3d 391, 396 (5th Cir. 2005) (holding that the plaintiff’s complaint alleging negligent misrepresentations contained minimal factual particularity, but its allegations were at least as detailed as those found in Form 9 or now Form 11 for negligence).

321. FED. R. CIV. P. Form 6.

322. FED. R. CIV. P. 4(d)(1).

323. *See AIRFX.com v. AirFX LLC*, No. CV 11-01064-PHX-FJM, 2011 WL 5007919, at \*5 (D. Ariz. Oct. 20, 2011).

## 2. Pro Se Litigants

Pro se litigants are the second group that will likely be affected by the loss of the Forms. The Rule 84 Subcommittee reported that there is “little indication that pro se parties often find the Forms, much less use them.”<sup>324</sup> It was suggested that courts instead develop local forms for common types of litigation for pro se litigants.<sup>325</sup> The Forms have furthered the purpose of the Rules to secure better access to the courts for pro se litigants by making uniform illustrations of what pleadings suffice to withstand attack under the Rules,<sup>326</sup> which local forms cannot guarantee. Given the volume of pro se litigation in the federal courts,<sup>327</sup> one would assume forms with guaranteed authority would be extremely important given pro se litigants are often without sufficient legal training.<sup>328</sup>

The critique that pro se litigants do not know where to find the Forms or how to use the Forms also seems to be unfounded given that courts have recommended the Forms to pro se litigants before.<sup>329</sup> While the Committee has noted that pro se litigants do not likely know where to find the Forms and much less how to use them, the suggested alternative was to use the forms supplied by the local rules of each court or the Administrative Office

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324. There is no real indication where the committee gathered such information. *See Committee on Rules of Practice and Procedure*, U.S. COURTS 270 (Jan. 3–4, 2013) [hereinafter *January 2013 Standing Committee Meeting*], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2013-01.pdf>.

325. *Id.*

326. *See* FED. R. CIV. P. 84 (“The [F]orms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”); *November 2012 Advisory Committee Meeting*, *supra* note 15, at 408, 412 (“[T]he [F]orms might be useful for someone . . . particularly pro se litigants. . . . Many of [the Forms] address topics where uniformity is useful.”).

327. The United States Courts releases a statistical analysis of historical caseload for the federal judiciary. *Judicial Facts and Figures*, U.S. COURTS (Sept. 30, 2012), <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2012/Table204.pdf>. The United States Courts of Appeals listed that the total number of appeals in 2012 was 57,501. *Id.* Of the 57,501 total appeals, there were 29,075 pro se cases filed with the U.S. Courts of Appeals. *Id.* Of the 29,075 pro se cases filed, there were 19,028 total civil appeals. *Id.*

328. For instance, it would likely be helpful for pro se litigants to know the pleading standards of the courts as illustrated in Form 11 or how to summon the defendant as illustrated in Form 3.

329. *See, e.g.,* Gharbi v. Flagstar, No. A-10-CA-382 LY, 2012 WL 716150, at \*2 (W.D. Tex. Mar. 5, 2012) (recommending to a pro se litigant that “[f]or examples of how to write a complaint, Plaintiffs should review the form complaints available in the Appendix to the Federal Rules of Civil Procedure.”); Weymouth v. Ariz. Dep’t of Liquor Licenses & Control, No. CV-12-979-PHX-GMS, 2012 WL 4359073, at \*3 (D. Ariz. Sept. 21, 2012) (telling the Weymouths, pro se litigants, that “[i]n preparing an amended complaint, the Weymouths should consult Federal Rule of Civil Procedure 84 and the ‘Appendix of Forms’ referenced therein because such forms ‘are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate’”).

of the United States Courts.<sup>330</sup> There is absolutely no indication, other than through assumptions made by the Advisory Committee,<sup>331</sup> that pro se litigants are more likely to find and use the forms supplied by the local rules of each court or the Administrative Office of the United States Courts. Because pro se litigants are required to comply with the Rules,<sup>332</sup> it hardly seems possible that they could not find the Forms in the Appendix.

The other issue of recommending unofficial forms to pro se litigants is that they do not serve the same purpose as the Forms because litigants do not have the guarantee that such forms will be sufficient to withstand attack under the Rules.<sup>333</sup> Rather than having unofficial forms from local courts or the Administrative Office, it seems more likely that a uniform, streamlined version of forms in a uniform location used throughout the federal court system, like those found in the Rules currently, would best serve pro se litigants. Without the Forms, it will likely hinder access for pro se litigants to the courts as early as the pleading stage.

### 3. The Federal Courts

Along with practitioners and pro se litigants losing authoritative illustrations of the Rules, the bench will have to grapple with seventy-six years of case law on the Forms and Rule 84. With the abrogation of the Forms and Rule 84, case law approving the Forms could linger and lead to confusion in the judiciary based on the plan to continue substantially similar forms through the Administrative Office of the United States Courts. When the Advisory Committee and the Rule 84 Subcommittee first considered abrogation, the Subcommittee members elected to have the chief counsel for the Standing Committee research whether the Forms' case law would have any lingering effects with Rule 84 abrogated.<sup>334</sup> Even in light of *Twiqbal*, the majority of courts have chosen to view the Forms as sufficient under the rules throughout the last seventy-six years.<sup>335</sup>

The Rule 84 Subcommittee researched case law on courts that continued

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330. *January 2013 Standing Committee Meeting*, *supra* note 324, at 270.

331. The Advisory Committee noted the "courts are making attempts to aid pro se litigants by developing local forms for common types of litigation . . ." *Id.*

332. *See, e.g.*, *Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989) (explaining that pro se litigants are "subject to the relevant law and rules of court, including the [Rules]").

333. *November 2012 Advisory Committee Meeting*, *supra* note 15, at 408 ("The Administrative Office has prepared some civil forms that are available on the web site and easily downloaded for use.").

334. *April 2013 Advisory Committee Meeting*, *supra* note 174, at 223.

335. *Id.* at 223–24. *See* discussion *supra* Part II.C. (discussing the different approaches courts have taken in harmonizing *Twiqbal* and the pleading Forms).



to follow precedent developed under abrogated or amended rules to determine whether Rule 84 and the Forms case law would be affected by past abrogation.<sup>336</sup> Based on the treatment of other abrogated and amended Rules, the Rule 84 Subcommittee concluded that the Forms and Rule 84 case law would not likely have validity following abrogation because “courts generally look[ed] at the amended [R]ule going forward and do not rely on case law under previous versions of the [R]ule.”<sup>337</sup> The case law on the Forms tended to rely on Rule 84 for authority as to the Form’s sufficiency.<sup>338</sup> Once Rule 84 was no longer in place, the Subcommittee concluded it was unlikely the Forms would suffice.<sup>339</sup> This conclusion was based on an examination of “not much case law” that rejected precedent under abrogated or amended Rules, including references to abrogated rules of the Federal Rules of Evidence, the Federal Rules of Criminal Procedure, and the Federal Rules of Appellate Procedure.<sup>340</sup>

However, the legal counsel used by the Subcommittee gave the example of Federal Rule of Civil Procedure 43(b), where the court continued following precedent after abrogation. Rule 43(b) prior to abrogation stated “[a] party may call an adverse party . . . and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party . . . .”<sup>341</sup> However, when the Federal Rules of Evidence were enacted in 1975, Rule 43(b) was abrogated and subsumed into the Federal Rules of Evidence Rules 607, 611(b) and 611(c).<sup>342</sup> Courts

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336. *April 2013 Advisory Committee Meeting, supra* note 174, at 224.

337. *Id.* The Subcommittee concluded that “where rules have been abrogated, courts will decline to look to case law under the abrogated rule.” *Id.* at 225. The only two situations where the court continued using case law for an abrogated rule were Federal Rule of Civil Procedure 43(b) and 73(d). *Id.* at 226–29.

338. *Id.*

339. *Id.* at 224 n.1.

340. *Id.* at 224–25. The Subcommittee cited the following in favor of the proposition that once a procedural rule is abrogated or amended the case law no longer has effect: *Talbot v. Vill. of Sauk Vill.*, No. 97 C 2281, 1999 WL 286089, at \*1 (N.D. Ill. Apr. 27, 1999) (rejecting a party’s suggestion to look at cases under abrogated Rule 43(b), which had been superseded by Federal Rule of Evidence 611(c), because the Civil Rule had “no current force”); *Yost v. Stout*, 607 F.3d 1239, 1244 n.6 (10th Cir. 2010) (declining to rely on precedent because it had been abrogated by revisions to the federal rules); *United States v. Rowe*, 92 F.3d 928, 933 (9th Cir. 1996) (affirming the denial of pretrial motion for leave to impeach a witness allowed by precedent, but no longer allowed under express abrogation by 1990 amendment to the Federal Rules of Evidence); *United States v. Young*, 14 F.R.D. 406, 407 (D.D.C. 1953), *rev’d*, 214 F.2d 232 (D.C. Cir. 1954) (“Even if, prior to the adoption of the Federal Rules of Criminal Procedure, . . . there existed a common law rule or a statutory provision that the name of the person who administered the oath must be stated in an indictment for perjury—which we do not decide,—this requirement must be deemed to have been abrogated by the new Rules.”). *April 2013 Advisory Committee Meeting, supra* note 174, at 225–26.

341. *Id.* at 226 (quoting FED. R. CIV. P. 43(b) (1938) (abrogated 1975)).

342. *Id.* (quoting *Patrick v. City of Detroit*, 906 F.2d 1108, 1113 (6th Cir. 1990)).

followed Rule 43(b) precedent because the right continued to exist.<sup>343</sup>

Even if the Forms are abrogated, like Rule 43(b) that continued to exist in the Federal Rules of Evidence following abrogation, the Forms could have a life in the common law to the extent the Forms or something substantially similar continue through the Administrative Office forms as the Standing Committee's note in the proposed amendment endorses.<sup>344</sup> Thus, this may lead to the Forms having at the very least persuasive authority as to the meaning of the Rules in some jurisdictions. The Rule 84 Subcommittee itself recognized that if the Forms are "still made available through the Administrative Office or otherwise, courts may find them persuasive, even if not bound to find that conforming pleadings suffice."<sup>345</sup> To the extent that the Forms will still be available through the Administrative Office, it seems likely this will lead to tension for the judiciary of whether to recognize the Forms as persuasive or ignore the existing case law from the last seventy-six years completely. Because at least arguably abrogation will heighten the pleading standards under *Twiqbal*,<sup>346</sup> different courts are free to adopt different opinions on whether the Forms still garner any authority. This can only lead to further uncertainty in the already foggy *Twiqbal* plausibility pleading.

In addition to uncertainty in case law, judges will no longer have the Forms as a guaranteed illustration of sufficiency for non-compliant parties. Judges have often used the Forms for issues of non-compliance much like the parties—as a measure of what is expected under the Rules.<sup>347</sup> In the context of pleading, as stated in *Iqbal*, judges are charged with "[d]etermining whether a complaint states a plausible claim for relief [which] will, . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."<sup>348</sup> Thus, judges have looked to the Forms to read and interpret the expectations of *Twiqbal*.

For example, the Seventh Circuit relied on Form 9 (now Form 11) in *Tamayo v. Blagojevich*<sup>349</sup> to determine whether plaintiff's allegation of sexual discrimination had met *Twiqbal*. In *Tamayo*, guided by *Twombly*'s

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343. *Id.* at 227 (quoting *Patrick*, 906 F.2d at 1113).

344. *Proposed Amendments 2014–2015*, *supra* note 6, at 49–50 ("Accordingly, recognizing that there are many excellent alternative sources for forms, including the Administrative Office of the United States Courts, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated.").

345. *April 2013 Advisory Committee Meeting*, *supra* note 174, at 224 n.1.

346. *See* discussion *supra* Part III.B.

347. *See, e.g., supra* text accompanying notes 103–112 (including examples of cases where practitioners and the judge use the Forms as a metric for sufficiency).

348. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

349. *Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008).

explicit praise of Form 9 (now Form 11),<sup>350</sup> the Seventh Circuit recognized that a complaint of negligence needed to be in compliance with Form 9.<sup>351</sup> Form 9 states the defendant on a specific date “negligently drove a motor vehicle against plaintiff who was then crossing [an identified] highway.”<sup>352</sup> Thus, in order to survive dismissal at the pleading stage, it is required that plaintiffs allege negligence.<sup>353</sup> It is not required that the party state the ways in which the defendant was negligent, like drunk driving or driving too fast, because this information was beyond what was required at the pleading stage.<sup>354</sup> Upon a mere allegation of negligence, the “defendant [has] sufficient notice to enable him to begin to investigate and prepare a defense.”<sup>355</sup> The Seventh Circuit in *Tamayo* used the Form for negligence as a metric to determine if the plaintiff had enough facts in support of her sexual discrimination claim to be sufficient.<sup>356</sup> In *Tamayo*, plaintiff’s claim of sexual discrimination avoided dismissal at the pleading stage of the proceeding because plaintiff alleged she was a female and she was paid less than other similarly situated males.<sup>357</sup> The court found that these allegations were sufficient with the requirements of Form 9 in mind.<sup>358</sup> It was never alleged that the plaintiff had drafted the complaint based on the Forms, but the Seventh Circuit chose to use Form 9 as a metric of sufficiency.<sup>359</sup> Thus, as judges are now charged with determining how to read *Twiqbal*, judges often use the Forms as metrics of sufficiency. With the Forms gone, judges will no longer have the Forms as a valuable tool.

*D. Rule 84 and the Official Forms Should Be Modified Instead of Abrogated to Continue to Serve as Authoritative Illustrations of Sufficiency Under the Rules*

The Forms coming into compliance with *Twiqbal* and modern litigation needs will be the most valuable option to address Rule 84 and the Forms in the long term for both the bench and the bar even though it will be the most

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350. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007) (noting that the pleading was insufficient for not mentioning the time, place or person involved in the alleged conspiracy in sharp contrast with the model form for pleading negligence, Form 9).

351. *Tamayo*, 526 F.3d at 1084.

352. *Id.* at 1084 (quoting *Twombly*, 550 U.S. at 576); *see also* FED. R. CIV. P. Form 11.

353. *Tamayo*, 526 F.3d at 1084–85.

354. *Id.*

355. *Id.* at 1085 (noting this may not be true for more complicated causes of actions like RICO violations).

356. *See id.* at 1084.

357. *Id.* at 1085.

358. *Id.* at 1084–85.

359. *See id.*

burdensome alternative. When it is considered that the Forms themselves are authoritative by design, it becomes clear that the Forms cannot be permitted to remain in neglect given the needs of modern litigation and the Rules themselves, particularly in the pleading context. The options to address the tension are: (1) to ignore the Forms and allow the *Twiqbal* standard to render them insufficient, (2) allow the Forms to stay as they are and remain sufficient, (3) abolish the Forms entirely, or (4) have the Forms come into compliance with modern litigation.

While abrogation of the Forms may be the easiest and simplest way to address any tension in the pleading standards and the Forms, it does not solve the root of the problem, which is that plausibility pleading is still as unclear as it was in 2009 when abrogation was first considered. Starting as early as 2009, the Advisory Committee recognized that “[a]ttempting to frame pleading forms while pleading standards remain in flux could be difficult.”<sup>360</sup> The Advisory Committee in 2009 elected to put off a decision on abrogation until the pleading standards had taken a more concrete direction nationwide.<sup>361</sup> Yet, even six years later in 2015, the same uncertainty exists as to the *Twiqbal* plausibility standards as enunciated by the Advisory Committee in 2009. The Advisory Committee in a 2014 report to the Judicial Conference stated only that it “continue[s] to review the effects of *Twombly* and *Iqbal*” in the official recommendation to abrogate Rule 84 and the Forms.<sup>362</sup> Further, in the Rule 84 Advisory Committee Note approved by the Standing Committee, Judicial Conference, and the Supreme Court during the Rules Enabling Act process, the only guidance provided on pleading was that Rule 84’s abrogation was not meant to have any effect on the pleading standards.<sup>363</sup> There still seems to be no coherent explanation of sufficiency under *Twiqbal*, and the tactic to address it seems to be avoidance.

Given the uncertainty surrounding pleading, there is no better time to have an illustration of sufficiency in the Rules. When the Forms were initially adopted in 1938, they were intended to serve as illustrations to help calm uncertainty surrounding the new Rules.<sup>364</sup> Like in 1938, the Forms could serve in modern times as an illustration to help alleviate uncertainty

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360. *October 2009 Advisory Committee Meeting*, *supra* note 266, at 14.

361. *Id.* at 16 (“But publication so soon would generate a perception that the Forms were being abrogated because the pleading forms, sufficient under notice pleading as it had been understood up to 2007, no longer suffice under *Twombly* and *Iqbal*. That is a serious reason to hold off. Nothing the Committee can say would defeat the perception.”).

362. *2014 Judicial Conference*, *supra* note 10, at 94.

363. *2015 Rules Package*, *supra* note 178, at 132, 139.

364. Clark, *supra* note 58, at 181. *See supra* note 66 (describing the transition from code pleading to notice pleading).

surrounding the expectations of *Twigbal*. The Advisory Committee has noted throughout the debate on whether to abrogate that the Rules are no longer in their “infancy” and are sufficiently developed that illustrations are no longer necessary to alleviate uncertainty.<sup>365</sup> Because the Rules are constantly being amended by the Advisory Committee and interpreted by the federal courts, it seems highly unlikely that a rule could reach such a level of maturity that it simply outgrows the need for illustration. Illustrations of the changes are arguably the best way to communicate the expectations and interpretations of amendments to the Rules. Given the split in the circuits on harmonizing *Twigbal* plausibility pleading with the Forms, the ability to illustrate sufficiency of pleading in particular is more important than it perhaps has ever been before.<sup>366</sup>

As the lack of modification in the more recent history of the Forms has come to the forefront in the Rule 84 and Forms abrogation debate, this is an opportunity to address the concern that there is no efficient way to ensure the Forms are in compliance with the Rules and modern litigation. Instead of deciding to abrogate because of the difficulty in amending through the Rules Enabling process and the increased workload to the Advisory Committee,<sup>367</sup> there can simply be a different process for creating and maintaining the Forms. One way modification of the Forms could be done is through a semi-permanent subcommittee chosen by the Advisory Committee. This addresses the concern that delegating to the Administrative Office, which the Advisory Committee has no power over, would violate the Rules Enabling process. This could be seen as a chance for groups of lawyers on all sides of litigation to create Forms that reflect shared needs. The subcommittee could be in charge of determining if the Rules could benefit from having a Form for illustration and appended. The subcommittee initially would have a large project to overhaul the entire set of Forms. However, once the initial modifications to the Forms are made, the Forms can be gradually changed and amended in coordination with changes to the Rules. By having practitioners, academics, and judges form a subcommittee dedicated to amending the Forms in concert with any amendments to the Rules, the Forms could become a more practical, modernized, and helpful practice tool.

By delegating the Forms to a subcommittee, this also could be an

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365. *October 2009 Advisory Committee Meeting, supra* note 266, at 14.

366. *See* discussion *supra* Part I.C. (discussing the different approaches courts have taken in harmonizing *Twombly* and *Iqbal* and the pleading forms). If it is found impossible to illustrate what would suffice for pleading under the *Twigbal* standard, perhaps it is the ambiguity and vagueness of the plausibility standard that should be modified instead of the Forms. However, this comment is a critique of abrogation of the Forms, not a critique of *Twigbal*.

367. *October 2009 Advisory Committee Meeting, supra* note 266, at 16.

opportunity to resolve some of the concerns about the workload of the Advisory Committee. One of the primary arguments for abrogation concerned the overloading of the Advisory Committee.<sup>368</sup> Creating a subcommittee dedicated to the Forms would take some of the workload from the Advisory Committee and the Standing Committee.<sup>369</sup> By frontloading the work on the amendments and delegating creation of the Forms to a subcommittee, the Advisory Committee could take a more hands-off approach and have the subcommittee accomplish a significant amount of the work before it even sees the amendments to the Forms. While the Advisory Committee is overloaded with major projects in other Rules,<sup>370</sup> there is no reason a subcommittee could not take on amending the Forms comprehensively and in the future amend alongside the Rules. By delegating the responsibility, the Advisory Committee would not be burdened beyond its normal role in the Rules Enabling Act when reviewing the Forms. The Forms will also have the added benefit of providing a better enforcement mechanism of the Rules amended and created by the Advisory Committee. Where the Advisory Committee feels a certain Rule amendment will be unclear or difficult to implement, a Form can be created to demonstrate sufficiency under the Rule.

If the Forms were adopted through a rigorous debate in a subcommittee comprised of experts in the field composed of both the bench and bar, the subcommittee could address the concern that the Forms are simply “not useful” in modern practice.<sup>371</sup> By modernizing the Forms for current litigation needs, practitioners would likely be much more inclined to use the Forms for two reasons. First, the subcommittee could be charged with filling some of the gaps in the Forms that the Advisory Committee has expressed concern with, particularly in the discovery Forms.<sup>372</sup> The Forms do not have to cover every subject addressed in the Rules because providing

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368. *November 2012 Advisory Committee Meeting*, *supra* note 15, at 409 (“[Amendment to the Forms] would require a heavy commitment of Enabling Act resources, particularly by the Advisory Committee.”).

369. The Advisory Committee has launched subcommittees before to take on projects. For example, the Rule 84 Subcommittee was officially launched in November 2011 to investigate a recommendation for Rule 84. *Minutes of Civil Rules Advisory Committee*, U.S. COURTS 35–36 (Nov. 7–8, 2011) [hereinafter *November 2011 Advisory Committee Meeting*], <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV11-2011-min.pdf>.

370. *November 2012 Advisory Committee Meeting*, *supra* note 15, at 408–09.

371. *See, e.g., 2014 Judicial Conference*, *supra* note 10, at 93 (“Many of the forms are out of date. . . . The increased use of Rule 12(b)(6) motions to dismiss, the enhanced pleading requirements of Rule 9 and some federal statutes, the proliferation of statutory and other causes of action, and the increased complexity of most modern cases have resulted in a detailed level of pleading that is far beyond that illustrated in the forms.”).

372. *November 2012 Advisory Committee Meeting*, *supra* note 15, at 421.

a manual of forms is not the purpose of the Appendix.<sup>373</sup> The subcommittee can take on the creation of forms where it deems uniformity important or where authoritative command may be necessary. As the Forms cover a wider scope, the Forms will be more useful to practitioners.

Second, because the Forms go through the same Rules Enabling process as the Rules, the Forms that survive will undoubtedly be worthy of authoritative command. Through the Rules Enabling process, practitioners and academics outside of the Advisory Committee and the subcommittee will have a chance to comment on the Forms and to take some ownership in the direction of the Forms. Conversely, practitioners do not have a say in the forms created through local rules, the Administrative Office for the United States Courts, or private online databases. Also, the alternative forms created through local rules or through the Administrative Office of the United States Courts do not allow for the uniformity, conformity, and sufficiency with the Rules that Rule 84 and the Official Forms provide. Furthermore, the alternatives are simply not put through the same rigorous debate and thorough review as the Forms appended to the Rules. These alternative sources of forms would provide illustrations, but they would never provide authority. Official Forms are clearly superior in this regard.

#### IV. CONCLUSION

Although the Advisory Committee cited a lack of enthusiasm for public comment on the abrogation of Rule 84 as a sign that Rule 84 should be put to rest,<sup>374</sup> this does not make this amendment any less important than an amendment that garners a lot of attention in the legal community. The conclusory reasoning for abrogation of Rule 84 cited by the Supreme Court, Judicial Conference, the Standing Committee, the Advisory Committee, and the Rule 84 Subcommittee ignores the true purpose of the Forms and the consequences of abrogation going forward. The adoption of the final sentence of the official Advisory Committee Note that the abrogation of Rule 84 and the Forms is not to have an effect on the pleading standards<sup>375</sup> will likely not be enough to defeat the view that the Forms and Rule 84 are

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373. The Forms have never been intended to be comprehensive. As the introductory statement to the Forms stated prior to repeal, “[t]he following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms.” FED. R. CIV. P. App. of Forms Introductory Statement (1946) (repealed 2007). The Advisory Committee has already spoken on the creation of a manual of forms with the rejection of the 1989 amendment proposal for a practice manual. *See supra* notes 32–36, 50–51 and accompanying text (explaining the 1989 proposal for a practice manual).

374. 2014 *Judicial Conference*, *supra* note 10, at 16.

375. 2015 *Rules Package*, *supra* note 178, at 132, 139.

being abolished because they do not comply with *Twiqbal*. The tension between the pleading standards and the pleading Forms has underlined the abrogation debate through every step of the Rules Enabling Act process. Despite any explicit statement to the contrary, abrogation is an implicit endorsement of the *Twiqbal* standard of plausibility pleading as a heightened standard going forward without expressly amending a Rule or giving the bench and bar the opportunity to discuss the changing pleading standards.<sup>376</sup> The only solution to avoid implicitly heightening the pleading standards is to keep Rule 84 and the Forms.

With the lack of acknowledgement of the change by the public, the abrogation of Rule 84 may go through the Rules Enabling Act process without notice or understanding of the true consequences. Judges, practitioners, and pro se litigants will all suffer from the loss of the Forms as authoritative illustrations of the Rules perhaps without even knowing it happened. All the negative consequences of abrogation could simply be avoided by delegating to a subcommittee the duty to update the Forms the same way the Administrative Office of the United States Courts does. Perhaps, with updated Forms, there will not be such a lack of enthusiasm as is cited in the reasoning for abrogation. This seemingly simple abrogation could have profound effects that go beyond what is imagined by the Rule 84 Subcommittee, the Advisory Committee, the Standing Committee, and the Judicial Conference because abrogation was simply not thought through. Abrogation will leave in its wake more questions than answers, including for example, what is sufficient under *Twiqbal*, and what does the legal community look to for pleading sufficiency. The clear route to avoid this is to amend the Forms instead of abrogate.

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376. Spencer, *The Forms*, *supra* note 234, at 1; *see generally* Coleman, *supra* 75, at 1.