RESTORING FAIR NOTICE: IT IS TIME TO REVISIT ALABAMA'S PLEADING STANDARD

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I. INTRODUCTION

Liberalizing pleading requirements was an admirable goal when Alabama adopted the Alabama Rules of Civil Procedure in 1973. Alabama's historic pleading standard required that its courts construe the complaint against the plaintiff.[1] That was a tough standard in a time when witnesses and documents were not readily accessible through telephone or internet. Notice pleading's concept—that a complaint must only give a defendant fair notice of the plaintiff's claims—seems fair on its face. As does the concept that a motion to dismiss is only proper when a plaintiff can prove no set of facts which entitle it to relief. But over the years, the cry of "Alabama is a notice pleading state!" led Alabama's courts astray from requiring allegations that give a defendant fair notice. Instead, the barest allegations gained courts' imprimatur. The same drift washed away the concept that a complaint must actually contain facts that support the claims and replaced it with the notion that a court can support an opinion denying a motion to dismiss by speculating "conceivable facts" not actually alleged in the complaint.[2]

Legal practice and technology have changed since the Supreme Court of the United States promulgated the "no set of facts" standard in *Conley v. Gibson*.[3] Today, research no longer requires hardback books. Land records, newspapers, legal reporters, and public records are almost always available online. A digital paper trail accompanies most transactions. Almost everyone has a camera in their pocket that contemporaneously preserves evidence. Access to information is not the same barrier that it was fifty years ago. A modern plaintiff investigating its claims can more easily plead facts because more information is readily available with less effort.

After decades of criticism, the Supreme Court abrogated *Conley*'s no set of facts standard when it promulgated *Bell Atlantic Corp. v.*

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[1] *See* Bowling v. Pow, 301 So. 2d 55, 62–63 (Ala. 1974); *see also Ex parte* Grimmett, 358 So. 3d 391, 397 (Ala. 2022) (discussing the level of factual detail that equity procedure required in a pleading).

[2] *See infra* Part III, Section A.

[3] 355 U.S. 41, 45–46 (1957).

Twombly's fact-based pleading standard.[4] The Supreme Court acknowledged "that *Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough."[5] Those criticisms are readily available, and this Article will not repeat them. Instead, this Article will focus on Alabama-specific problems under the no set of facts standard.

Anecdotally, Alabama courts and practitioners have shied away from *Twombly* as an impossible and heightened pleading standard.[6] Over sixteen years in federal courts, *Twombly* has demonstrated that it is no such beast. *Twombly* simply requires facts—a plaintiff must plead facts, not labels or legal conclusions, that plausibly establish its claim.[7] *Twombly* uses a two-pronged approach that evaluates whether a complaint satisfies Federal Rule of Civil Procedure 8.[8] First, a court must "identify[] the allegations in the complaint that are not entitled to the assumption of truth."[9] This simply requires separating the factual allegations from labels and legal conclusions.[10] Second, a court evaluates the factual allegations to determine whether "they plausibly suggest an entitlement to relief."[11]

Twombly's requirement that a complaint must plead facts that plausibly establish the plaintiff's claim is an important threshold that precludes claims lacking factual merit from proceeding to costly discovery.[12] The United States Supreme Court aptly acknowledged that *Conley's* "'no set of facts' language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings."[13] And "[o]n such a focused and literal reading of *Conley*'s 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that

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[4] 550 U.S. 544, 556 (2007).

[5] *Id.* at 562.

[6] *See infra* Part III, Section B.2.

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

[8] *See id.* at 555–557; Ashcroft v. Iqbal, 556 U.S. 662, 680–81 (2009).

[9] *Iqbal*, 556 U.S. at 680.

[10] Morton v. Arnold, 618 F. App'x 136, 139 (3d Cir. 2015) ("First, we separate the factual and legal elements of a claim, accepting all well-pleaded facts as true, but disregarding any legal conclusions."); *see Iqbal*, 556 U.S. at 678–79.

[11] *Iqbal*, 556 U.S. at 681.

[12] Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1368 (11th Cir. 1997) ("If the [trial] court dismisses a nonmeritorious claim before discovery has begun, unnecessary costs to the litigants and to the court system can be avoided.").

[13] *Twombly*, 550 U.S. at 561.

a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery."[14]

That focused and literal reading has lingered and often prevails in Alabama state court. Some prongs of Alabama case law allow a factually deficient complaint to proceed with discovery to fill in the factual voids—without considering whether facts actually exist to fill those voids.[15] This deprives a defendant of due process.[16] Modern discovery is time consuming and costly. A motion to dismiss, under Rule 12(b)(6), plays a vital role in providing due process by ensuring only meritorious claims unlock the doors to discovery.[17] Alabama's "no set of facts" standard has eroded this due process protection. Adopting the *Twombly* standard would restore the concept of fair notice to notice pleading and ensure that some factual basis exists to proceed with discovery.

Alabama's reluctance to retire *Conley*'s no set of facts standard creates a more fundamental problem. The Supreme Court of the United States believes that *Conley* does not give a defendant fair notice.[18] But most Alabama courts have not acknowledged a fair notice issue with Alabama's purported "notice pleading" standard. Alabama is a mirror rule state that largely mirrors the Alabama Rules of Civil Procedure to the corresponding Federal Rules of Civil Procedure.[19] Rule 8 of the Alabama Rules of Civil Procedure is a mirror rule.[20] Basic concepts of due process and fair notice should not vary depending upon the

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[14] *Id.* (alteration in original) (citation omitted).

[15] *See* McKelvin v. Smith, 85 So. 3d 386, 389 (Ala. Civ. App. 2010) (explaining that Ala. R. Civ. P 8(a) is complied with even when the complaint merely pleads legal conclusions, because the "discovery process bears the burden of filling in the factual details").

[16] U.S. CONST. amends. V, XIV; *see infra* Part III, Section B.1.

[17] *See* United States v. Cuya, 964 F.3d 969, 973 (11th Cir. 2020).

[18] *Twombly*, 550 U.S. at 555 n.3 ("Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests.").

[19] *Ex parte* Full Circle Distrib., L.L.C., 883 So. 2d 638, 642 (Ala. 2003) ("Alabama adopted the Alabama Rules of Civil Procedure, which were modeled after the Federal Rules of Civil Procedure."); *see, e.g.*, ALA. R. CIV. P. 8 committee's comments on 1973 adoption; ALA. R. CIV. P. 26 committee's comments to amendment to Rule 26 effective February 1, 2010 ("The 2006 amendments to the Federal Rules of Civil Procedure ("FRCP") and the FRCP Advisory Committee Notes served as the Committee's benchmark . . . . These Committee Comments quote many of the Federal Advisory Committee Notes to the 2006 amendments to the FRCP at length, but there are additional Federal Advisory Committee Notes, not quoted here, that should also be consulted.").

[20] U.S. Fid. & Guar. Co. v. Warwick Dev. Co., 446 So. 2d 1021, 1024 (Ala. 1984) ("Rule 8 is identical in relevant aspects to the corresponding Federal Rule of Civil Procedure.").

venue.[21] The conflict between the Supreme Court of the United States and the Supreme Court of Alabama undermines confidence in the judiciary.[22] Adopting *Twombly* eliminates those concerns and furthers Alabama's goal of mirroring the Federal Rules of Civil Procedure.

II. ALABAMA DERIVED ITS PLEADING STANDARD FROM A NOW-ABROGATED FEDERAL PLEADING STANDARD.

The Alabama Supreme Court adopted its "no set of facts" pleading standard[23] shortly after it modernized Alabama's courts with the merger of law and equity in 1973.[24] Prior to 1973, Alabama's pleading standard required "that a complaint challenged by demurrer should be construed against the plaintiff."[25] In cases at equity, the "bill," the pre-merger equivalent of a complaint, "had to 'contain averment of every fact which . . . [would] enable the [trial] court to arrive at a proper settlement of the issues.'"[26] Specifically, the plaintiff had to plead "every material averment of fact necessary to [the] complainant's right of recovery."[27] Any fact that the plaintiff did not plead was "deemed not to exist."[28]

In 1973, Alabama merged law and equity when it adopted the Alabama Rules of Civil Procedure.[29] The Alabama Rules of Civil Procedure abolished the former pleading practices,[30] which resulted in the Alabama Supreme Court adopting a new pleading standard that a

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[21] *See, e.g.*, Jackson v. Bank of Am., N.A., 898 F.3d 1348, 1360 (11th Cir. 2018) ("After acknowledging that shotgun pleadings are 'an issue in federal court,' [plaintiff's counsel] stated, as an excuse for his behavior, that his use of shotgun pleadings had 'never been an issue before' and that 'they are not disfavored in Alabama courts.' In other words, Alabama's state courts readily accept the sort of pleadings he files. This is no excuse here.").

[22] *See infra* Part III, Section C.

[23] *See* Bowling v. Pow, 301 So. 2d 55, 62–63 (Ala. 1974).

[24] *Ex parte* Grimmett, 358 So. 3d 391, 397 (Ala. 2022) (discussing distinctions between Alabama cases in equity versus cases at law before and after the merger of law and equity in 1973); *see generally* T. DYLAN REEVES, TILLEY'S ALABAMA EQUITY § 1:0.50 (6th ed. 2023) (discussing how Alabama's merger of law and equity changed court procedure).

[25] *Bowling*, 301 So. 2d at 62–63.

[26] *Ex parte Grimmett*, 358 So. 3d at 397 (alteration in original) (quoting JOHN SHIPLEY TILLEY, TILLEY'S ALABAMA EQUITY § 48 (1st ed. 1954)).

[27] *Id.* (quoting McDonald v. Mobile Life Ins. Co., 56 Ala. 468, 470 (1876)).

[28] *Id.* (quoting JOHN SHIPLEY TILLEY, TILLEY'S ALABAMA EQUITY § 50 (1st ed. 1954)); *see* Cullman Prop. Co. v. H.H. Hitt Lumber Co., 77 So. 574, 578 (Ala. 1917) ("Bills are construed against the pleader, and facts not averred are deemed not to exist.").

[29] *Ex parte Grimmett*, 358 So. 3d at 397; T. DYLAN REEVES, TILLEY'S ALABAMA EQUITY § 1:0.50 (6th ed. 2023).

[30] *Ex parte Grimmett*, 358 So. 3d at 397 (citing ALA. R. CIV. P. 2 (1995) committee's comments on 1973 adoption).

complaint must meet to survive a motion to dismiss under Rule 12(b)(6).[31] Alabama's pleading standard originated when the Alabama Supreme Court applied the "no set of facts" standard from *Conley v. Gibson*[32] because Alabama's newly adopted Ala. R. Civ. P. 8 was similar to Fed. R. Civ. P. 8.[33] Quoting *Conley*, the *Bowling* court stated: "In appraising the sufficiency of the complaint we follow . . . the accepted rule that a complaint should not be dismissed 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."[34]

It is not surprising that Alabama adopted its pleading standard from federal case law.[35] Alabama patterned Rule 8 after the federal rule (except for averring jurisdiction).[36] Alabama's appellate courts deem cases interpreting the federal rules as persuasive authority when the Alabama rule is patterned after the federal rule.[37] As a mirror rule state, it is logical for Alabama courts to follow the prevailing Supreme Court standard interpreting the federal rule that Alabama's rule mirrors. But now a problem arises. *Conley* is no longer good law.[38]

In *Bell Atlantic Corp. v. Twombly*, the United States Supreme Court abrogated *Conley*'s "no set of facts" rule.[39] The *Twombly* court wrote that "*Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough" and that "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[40] What a complaint needs, in the *Twombly* Court's view, is facts.[41] As a general rule, "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations."[42]

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[31] Bowling v. Pow, 301 So. 2d 55, 62–63 (Ala. 1974) ("The adoption of the Alabama Rules of Civil Procedure precludes us from testing the sufficiency of the complaint by a rule that formerly governed, that a complaint challenged by demurrer should be construed against the plaintiff, if the complaint is reasonably subject to such a construction.").

[32] 355 U.S. 41, 45–46 (1957).

[33] *See Bowling*, 301 So. 2d at 62–63.

[34] *Id.* at 63 (alteration in original) (internal quotation marks omitted) (quoting *Conley*, 355 U.S. at 45).

[35] *See id.*

[36] ALA. R. CIV. P. 8 committee's comments on 1973 adoption; U.S. Fid. & Guar. Co. v. Warwick Dev. Co., 446 So. 2d 1021, 1024 (Ala. 1984).

[37] Hilb, Rogal & Hamilton Co. v. Beiersdoerfer, 989 So. 2d 1045, 1056 n.3 (Ala. 2007).

[38] *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007).

[39] *Id.* at 561–63.

[40] *Id.* at 562–63.

[41] *Id.* at 548–49.

[42] *Id.* at 555.

However, "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."[43] "Factual allegations must be enough to raise a right to relief above the speculative level . . . ."[44] Even under Rule 8(a), there must be a "statement of circumstances, occurrences, and events in support of the claim presented" and not "a pleader's 'bare averment that he wants relief and is entitled to it.'"[45] "Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests."[46]

Because Alabama's rule is "the same in all material respects as" the federal rule,[47] the Alabama Supreme Court should overrule the *Conley* standard and adopt the current federal rule in *Twombly*. Alabama's failure to adopt *Twombly* raises serious constitutional questions concerning what constitutes fair notice. The United States Supreme Court concluded that the *Conley* standard did not provide fair notice to a defendant because fair notice requires factual allegations in the complaint that rise above the speculative level.[48] But under Alabama's "no set of facts" standard, courts often hold that a complaint lacking facts or merely reciting the elements does provide fair notice.[49]

As a mirror rule state, Alabama should not maintain a conflicting position with the Supreme Court's interpretation of an identical rule. When the Supreme Court of Colorado adopted *Twombly*, it stated that "disagreeing with the Supreme Court [of the United States] about the meaning of the same or similar provisions appearing in both federal and state law risks undermining confidence in the judicial process and the objective interpretation of codified law."[50] Allowing Alabama's "no set of facts" standard to remain, therefore, undermines whether a defendant in Alabama state court receives fair notice and due process protections.

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[43] *Id.* (alteration in original) (citation omitted).

[44] *Twombly*, 550 U.S. at 555.

[45] *Id.* at 555 n.3 (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004)).

[46] *Id.* (quoting WRIGHT & MILLER, *supra* note 45).

[47] Bowling v. Pow, 301 So. 2d 55, 62 (Ala. 1974).

[48] *Twombly*, 550 U.S. at 555 n.3.

[49] *See, e.g.*, McKelvin v. Smith, 85 So. 3d 386, 390–91 (Ala. Civ. App. 2010) (explaining that plaintiff's complaint was sufficient despite its "brevity," "plainness," and lack of detailed factual allegations).

[50] Warne v. Hall, 373 P.3d 588, 592, 595 (Colo. 2016).

III. ALABAMA'S PLEADING STANDARD IS PROBLEMATIC.

A. Alabama's Pleading Standard Is a Moving Target.

While the "no set of facts" standard seems like a concrete principle, Alabama courts have permitted pleadings that do not give fair notice by inconsistently applying the *Conley* standard. Sometimes Alabama state courts require facts;[51] sometimes they do not.[52] Sometimes Alabama state courts require that the plaintiff plead all of the claim's essential elements;[53] sometimes they do not.[54]

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[51] *See, e.g.*, *Ex parte* Gilland, 274 So. 3d 976, 985 n.3 (Ala. 2018) ("Although we are required to accept McCain's *factual* allegations as true at this stage of the proceedings, we are not required to accept her *conclusory* allegations that Gilland acted willfully, maliciously, fraudulently, or in bad faith. Rather, to survive Gilland's motion to dismiss, McCain was required to plead *facts* that would support those conclusory allegations."); Ohio Valley Conf. v. Jones, No. SC-2022-0930, 2023 WL 3559583, at *18 (Ala. May 19, 2023) (citing *Gilland*, 274 So. 3d at 985 n.3) (upholding the dismissal of plaintiff's complaint for failing to supply sufficient factual allegations); Fan v. Qualitest Pharms., 120 So. 3d 1076, 1081 (Ala. Civ. App. 2013) (per curiam) ("Although this state permits notice pleading, it does not permit pleadings that lack any factual basis upon which a claim could rest to state a cause of action."); Duran v. Buckner, 157 So. 3d 956, 968 (Ala. Civ. App. 2014) ("[I]t is not enough [for the pleading] to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining [of], and can see that there is some legal basis for recovery." (alteration in original) (quoting Lloyd v. Cmty. Hosp. of Andalusia, 421 So. 2d 112, 113 (Ala. 1982))); *Ex parte* Reindel, 963 So. 2d 614, 623 (Ala. 2007) ("[A]verments in the complaint must exceed 'bald speculation' and mere conclusory assertions." (quoting *Ex parte* McInnis, 820 So. 2d 795, 806 (Ala. 2001))); *Ex parte* Marshall, 323 So. 3d 1188, 1200 n.3 (Ala. 2020) (per curiam) ("[T]he effects that the respondents allege the FJA will have on the substance of their Rule 32 claims and upon the rulings of the petitioner circuit judges are legal allegations that carry no such presumption.").

[52] *See, e.g.*, *McKelvin*, 85 So. 3d at 390 ("Although the complaint did not state in detail the alleged facts upon which the Mckelvins based their claims against Smith, it did provide Smith with sufficient notice of those claims."); Simpson v. Jones, 460 So. 2d 1282, 1285 (Ala. 1984) ("[T]he dismissal of a complaint is not proper if the pleading contains 'even a generalized statement of facts which will support a claim for relief under ARCP 8.'" (quoting Dunson v. Friedlander Realty, 369 So. 2d 792, 796 (Ala. 1979))); Mitchell v. Mitchell, 506 So. 2d 1009, 1010 (Ala. Civ. App. 1987) (holding that a complaint lacking factual detail satisfied Rule 8 and noting that the "pleading of legal conclusions is not prohibited"); Barlow v. Piggly Wiggly Dixieland, 680 So. 2d 297, 302 (Ala. Civ. App. 1996) (holding that Rule 8 was satisfied based on inference despite failure to plead material fact).

[53] *See Lloyd*, 421 So. 2d at 113 ("[W]hen the complaint is devoid of averments of the requisite elements of any legal claim upon which plaintiff might be entitled to relief, the motion is to be granted.").

[54] *See* Knight v. Burns, Kirkley & Williams Constr. Co., 331 So. 2d 651, 654–55 (Ala. 1976) (holding that a complaint of negligence was not subject to Rule 12(b)(6) dismissal despite "no specific allegation of a duty owed"); Fraternal Order of Police, Strawberry Lodge No. 40 v. Entrekin, 314 So. 2d 663, 672 (Ala. 1975) ("[T]he complaint need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided."); Beavers v. Hadden, 528 So. 2d 333, 335

Alabama courts are not at fault for the inconsistency because the *Conley* standard contains an inherent conflict.[55] Specifically:

> On the one hand, *Conley* embraced the notion of liberality in pleading rules, declaring that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." On the other hand, elsewhere in the *Conley* opinion the Court indicated that some facts must indeed be pleaded.[56]

Due to these "conflicting guideposts," Alabama state courts have broadened the "no set of facts" standard to such a liberal standard that courts interpret it as no "conceivable facts" instead of facts actually pleaded in the complaint.[57]

Alabama is not alone in this problem.[58] Determining what is "conceivable" under the "no set of facts" standard results in courts exploring hypothetical situations that are not found within the four corners of the complaint, which the United States Supreme Court criticized:

> This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings . . . . On such a focused and literal reading of *Conley*'s "no set of facts," a wholly conclusory statement of claim would survive a motion to

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(Ala. Civ. App. 1988) ("While it would have been best for the plaintiff to allege that duty and a breach thereof in the language of the above-cited code sections, we are of the opinion that the allegations of the complaint adequately comply with the requirements of Rule 8(a), Alabama Rules of Civil Procedure, since the plaintiff's complaint gives to the sheriff fair notice of the plaintiff's claim and the grounds upon which it rests.").

[55] *See, e.g.*, Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989) (noting that *Conley* "unfortunately provided conflicting guideposts").

[56] *Id.* (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)).

[57] *E.g.*, *Knight*, 331 So. 2d at 655 ("[P]laintiffs have been given no opportunity to present facts other than those alleged in the complaint. But, there are conceivable facts which, if proven, would entitle plaintiffs to relief."); Patton v. Black, 646 So. 2d 8, 10 (Ala. 1994) ("It is conceivable that the plaintiff could prove a set of facts that would show that Black was performing a ministerial function as opposed to a discretionary one."); *Ex parte* Haralson, 853 So. 2d 928, 933 (Ala. 2003) ("It is conceivable that Griffith could prove facts that would show that at the time of the accident Deputy Haralson was on a personal errand or otherwise had departed from the line and scope of his employment.").

There are examples, however, of Alabama courts applying a narrower standard more akin to *Twombly*. For instance, the Alabama Court of Civil Appeals explained in *Duran*: "[I]t is not enough [for the pleading] to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining [of], and can see that there is some legal basis for recovery." 157 So. 3d at 968 (alteration in original) (quoting *Lloyd*, 421 So. 2d at 113); *see Ex parte* Gilland, 274 So. 3d 976, 985 n.3 (Ala. 2018).

[58] *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 463–65 (1986) (noting tension between *Conley* and subsequent understanding of pleading practices in other jurisdictions).

> dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery.[59]

Ultimately, a court improperly advocates or develops legal arguments for the plaintiff when it denies a Rule 12(b)(6) motion on "conceivable facts" instead of facts actually pleaded in the complaint.[60]

The *Twombly* standard avoids these concerns because a complaint must state the facts it relies upon and a plaintiff cannot rely on a "formulaic recitation of the elements" or mere labels and conclusions.[61] Courts applying the *Twombly* standard adhere to the well-established rule that courts cannot go beyond the pleadings—such as "conceiving" facts not pleaded in the complaint—to decide Rule 12(b)(6) motions.[62] *Twombly*'s two-pronged analysis would resolve Alabama's inconsistent application of *Conley*'s "no set of facts" standard and ensure that the complaint actually provides the defendant fair notice.

B. Twombly Ensures Due Process.

1. Under *Twombly*, a Rule 12(b)(6) Motion Ensures Due Process Against Property Deprivation.

Alabama's notice pleading standard lacks due process protection because the parties can proceed immediately to discovery to fill a defective complaint's void. Litigation fees and costs are a property deprivation that needs due process protection under the United States Constitution's Fifth and Fourteenth Amendments. Rule 12(b)(6) provides the requisite procedural due process before depriving a defendant of property through an expensive discovery process.[63] This is of particular concern given that Alabama's trial courts are generally reluctant to shift discovery costs to burdensome or unsuccessful litigants and discovery disputes are too often perceived as nuisances. Only in rare circumstances may a prevailing defendant recover all of its fees and

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[59] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561 (2007) (alteration in original) (citation and footnote omitted).

[60] *See* Colony Homes, LLC v. Acme Brick Tile & Stone, Inc., 243 So. 3d 278, 283 (Ala. Civ. App. 2017) ("[I]t is not the function of this court to advocate a position on behalf of an appellant or to create a legal argument for the appellant." (citations omitted) (internal quotation marks omitted) (quoting Schiesz v. Schiesz, 941 So. 2d 279, 289 (Ala. Civ. App. 2006))).

[61] *Twombly*, 550 U.S. at 555.

[62] *See, e.g.*, Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 887–90 (Mass. 2008) (adopting the *Twombly* standard and finding that the complaint did not contain sufficient factual allegations).

[63] ALA. R. CIV. P. 12(b)(6).

costs.[64] Similarly, under Alabama's discovery rules, the responding party typically bears the cost of responding to discovery.[65] Alabama's rules effectively require that a defendant subsidize the plaintiff's litigation costs.[66] Unless there is a plausible basis to assert that a defendant is liable, however, courts should not require that a defendant subsidize the plaintiff's discovery.[67]

Alabama's *Conley* pleading standard has a disparate impact on a defendant's discovery costs when claims lack merit. This is evident when contrasting the role of pleadings and entitlement to discovery under the *Conley* and *Twombly* standards. The *Twombly* standard ensures that a complaint has a plausible basis in fact before subjecting a defendant to unnecessary discovery costs, but the *Conley* standard allows a plaintiff to file a complaint lacking facts, rely upon any set of conceivable facts, and proceed to discovery.[68]

In federal courts applying the *Twombly* pleading standard, only a well-pleaded complaint unlocks the doors to discovery.[69] Under *Twombly*, "a party is not entitled to discovery before an action is brought—indeed, he may not seek discovery until after he has not only filed a complaint, but a well-pleaded one."[70] The reason for this rule is that:

> If the district court dismisses a nonmeritorious claim before discovery has begun, unnecessary costs to the litigants and to the court system can be avoided. Conversely, delaying ruling on a motion to dismiss such a claim until after the parties complete discovery encourages

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[64] *See* Schweiger v. Town of Hurtsboro, 68 So. 3d 181, 184 (Ala. Civ. App. 2011) ("In Alabama, attorneys' fees are recoverable only where authorized by statute, when provided in a contract, [] by special equity . . . [or] as a sanction.").

[65] *See* ALA. R. CIV. P 26(b)(2)(A) (discussing that even when the responding party makes a showing of "undue burden or cost," a court may compel discovery if the "requesting party shows good cause for compelling discovery").

[66] *See* Martin H. Redish, *Discovery Cost Allocation, Due Process, and the Constitution's Role in Civil Litigation*, 71 VAND. L. REV. 1847, 1861–63 (2019) (describing a defendant's subsidization of a plaintiff's discovery costs as a deprivation of property that violates due process).

[67] *Id.* at 1862–63 ("Unless there exists a provable basis for concluding that the defendant is somehow at fault, however, no rational basis exists for requiring that the defendant subsidize discovery costs properly seen as the plaintiff-requestor's.").

[68] *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561–62 (2007) (criticizing the ease of proceeding to expensive discovery under the *Conley* standard).

[69] *E.g.*, United States v. Cuya, 964 F.3d 969, 973 (11th Cir. 2020) ("'[T]he doors of discovery' do not unlock 'for a plaintiff armed with nothing more than conclusions,' so if a complaint does not 'state[] a plausible claim for relief,' the plaintiff 'is not entitled to discovery.'" (second alteration in original) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009))).

[70] *Id.* (citing *Iqbal*, 556 U.S. at 678–79, 686).

> abusive discovery and, if the court ultimately dismisses the claim, imposes unnecessary costs.[71]

But in Alabama state courts applying the *Conley* standard, a bare bones recitation of the elements can proceed to uncontrolled and overly broad discovery. In overlooking pleading deficiencies, Alabama's state courts have stated that "the pleadings, in and of themselves, are considered relatively unimportant because cases are to be decided on the merits."[72] Alabama state courts have interpreted this concept to allow discovery to fill a bare bones complaint's deficiencies. When faced with a "relatively unimportant" fact deficient pleading, "[t]he discovery process bears the burden of filling in the factual details."[73]

The *Conley* standard defeats due process because it allows a complaint lacking factual merit to defeat a Rule 12(b)(6) motion based on conceivable facts and requires discovery to fill in the factual details—or, even more concerning, elucidate the lack of factual merit—before a defendant can secure dismissal with a motion for summary judgment. By requiring a complaint to be "well-pleaded" before surviving a Rule 12(b)(6) motion and unlocking discovery, the *Twombly* standard ensures due process. In the fifty years since Alabama adopted the *Conley* standard, discovery has become more complex and exponentially more expensive.[74] In the Committee Comments, the Alabama Rules of Civil Procedure acknowledge that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression."[75] Alabama amended Ala. R. Civ. P. 26 to address these issues,[76] and the rule has mostly mirrored the Federal

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[71] Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1368 (11th Cir. 1997); *see also* Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998) ("If a claimant can proceed to discovery without any legally relevant allegations at all, then the plaintiff's pleading sets no standard of relevance to control the scope of discovery.").

[72] Johnson v. City of Mobile, 475 So. 2d 517, 519 (Ala. 1985).

[73] McKelvin v. Smith, 85 So. 3d 386, 389 (Ala. Civ. App. 2010) (quoting Mitchell v. Mitchell, 506 So. 2d 1009, 1010 (Ala. Civ. App. 1987)).

[74] For example, Alabama amended Rule 26 to address the discovery of electronically stored information ("ESI"), which is a costly concept that did not exist when Alabama adopted the *Conley* standard. ALA. R. CIV. P. 26 committee's comments to amendment to Rule 26 effective February 1, 2010. In 2018, it amended Rule 26 to adopt the federal proportionality standard into the scope of discovery to address discovery costs. ALA. R. CIV. P. 26 committee's comments to Rule 26(b)(1) and Rule 26(b)(2) effective December 21, 2018.

[75] *Id.*

[76] *See id.*; ALA. R. CIV. P. 26 committee's comments to amendment to Rule 26 effective February 1, 2010.

Rules of Civil Procedure.[77] The Committee Comments explicitly stated that "the Committee expects that caselaw interpreting those factors in the federal rule will be helpful in construing our rule."[78] Although Alabama has attempted to limit the cost and scope of discovery by amending the Alabama Rules to mirror amendments to the Federal Rules, it has not mirrored the federal courts' adoption of *Twombly* to ensure that only meritorious, well-pleaded complaints subject a defendant to discovery. Given that Alabama looks to the federal rules in almost every other respect, adopting the *Twombly* standard is a natural and logical step to address due process concerns with discovery.

2. *Twombly* Restores "Notice" to the Notice Pleading Standard.

Twombly is not a heightened pleading standard.[79] And notice pleading still lives. Shortly after the Supreme Court decided *Twombly*, it stated, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[80] The Tenth Circuit described *Twombly* as "a middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action, which the Court stated will not do."[81]

What *Twombly* actually did was restore the "notice" to notice pleading. Under the guise of notice pleadings, courts applying *Conley*

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[77] ALA. R. CIV. P. 26 committee's comments to amendment to Rule 26 effective February 1, 2010 ("The 2006 amendments to the Federal Rules of Civil Procedure ("FRCP") and the FRCP Advisory Committee Notes served as the Committee's benchmark . . . . These Committee Comments quote many of the Federal Advisory Committee Notes to the 2006 amendments to the FRCP at length, but there are additional Federal Advisory Committee Notes, not quoted here, that should also be consulted."); ALA. R. CIV. P. 26 committee's comments to amendment to Rule 26(b)(1) and Rule 26(b)(2) effective December 21, 2018 (stating that Alabama's amendments to ALA. R. CIV. P. 26(b)(1) and ALA. R. CIV. P. 26(b)(2)(B) "are now identical to those in Rule 26, Federal Rules of Civil Procedure").

[78] ALA. R. CIV. P. 26 committee's comments to amendment to Rule 26(b)(1) and Rule 26(b)(2) effective December 21, 2018

[79] Bell Atl. Corp v. Twombly, 550 U.S. 544, 569 n.14 (2007) ("In reaching this conclusion, we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished 'by the process of amending the Federal Rules, and not by judicial interpretation.'" (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002))); s*ee* Arista Records, LLC v. Doe 3, 604 F.3d 110, 119–20 (2d Cir. 2010); Tamayo v. Blagojevich, 526 F.3d 1074, 1083 (7th Cir. 2008).

[80] Erickson v. Pardus, 551 U.S. 89, 93 (2007) (alteration in original) (quoting *Twombly*, 550 U.S. at 555).

[81] Khalik v. United Air Lines, 671 F.3d 1188, 1191 (10th Cir. 2012) (internal quotation marks omitted) (quoting Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008)).

focused on what was conceivable—or what a plaintiff could possibly say under any set of imagined facts—rather than what the pleading actually communicated to the defendant (thus, giving the defendant fair notice).[82] This resulted in the "bare bones" notice and not fair notice.[83] *Twombly* ensures fair notice by eliminating the "no set of facts" speculation and requiring the plaintiffs to "nudge[] their claims across the line from conceivable to plausible . . . ."[84] This requires that "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all of the complaint's allegations are true . . . ."[85]

Pleading facts does not unduly burden a plaintiff. A plaintiff should possess enough facts to plead more than a mere recitation of the elements. Ala. R. Civ. P. 11 charges counsel with an affirmative duty to investigate law and fact before filing a lawsuit.[86] A plaintiff's attorney should already be aware of some facts and have an idea of what facts discovery may possibly reveal before filing the complaint.[87]

For example, a plaintiff pleading a breach of an express contract should know whether an express contract actually exists. If an express contract does not exist, the rules should not allow a plaintiff to survive a motion to dismiss by pleading a "formulaic recitation of the elements"[88] of a breach of contract claim. The judicial system and a defendant's right to due process would benefit by weeding out a "conceivable claim" and only allowing plausible claims to proceed to discovery. The *Twombly* standard does exactly that. Returning to the express contract example, pleading facts that establish the breach of a contract should require the plaintiff to state which specific contractual provision a defendant allegedly breached rather than requiring the

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[82] *See* Robin J. Effron, *Putting the "Notice" Back into Pleading*, 41 CARDOZO L. REV. 981, 996–98, 1000 (2020) (discussing the lack of notice under the "no set of facts" standard).

[83] *Id.* at 993–998 (explaining that the courts began using the terms "mere," "bare," and "simple" when describing the "notice pleading" standard and citing to those cases).

[84] *Twombly*, 550 U.S. at 570. This is significant because, as previously discussed, Alabama permits a plaintiff and the court to speculate "conceivable" facts under the "no set of facts" standard. *See supra* Part III, Section A.

[85] *Twombly*, 550 U.S. at 555.

[86] *See* ALA. R. CIV. P. 11(a). Similarly, the Alabama Litigation Accountability Act requires that a party and attorney have "substantial justification" before filing an action. *See* ALA. CODE § 12-19-272(a) (1975). The Act states that a claim, defense, or appeal is "without substantial justification" when "such action, claim, defense or appeal (including any motion) is frivolous, groundless in fact or in law, or vexatious, or interposed for any improper purpose, including without limitation, to cause unnecessary delay or needless increase in the cost of litigation, as determined by the court." *Id.* § 12-19-271(1).

[87] *See* ALA. R. CIV. P. 11(a).

[88] *Twombly*, 550 U.S. at 555.

defendant to conduct discovery to obtain notice of the provision it allegedly breached. By restoring "notice" to notice pleading, the *Twombly* standard will reduce the discovery burden upon the parties.

C. Contradicting the Supreme Court of the United States Undermines Confidence in the Judiciary.

Ultimately, a pleading standard is about providing due process. The United States Supreme Court has addressed due process concerns and revised its pleading standard because "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests."[89] What constitutes fair notice and satisfies due process should not vary depending upon venue.[90] By applying different pleading standards, Alabama courts and the United States Supreme Court disagree about what constitutes fair notice.[91] In adopting the *Twombly* standard, the Colorado Supreme Court addressed this concern when it stated that "simply disagreeing with the Supreme Court [of the United States] about the meaning of the same or similar provisions appearing in both federal and state law risks undermining confidence in the judicial process and the objective interpretation of codified law."[92]

Given the constitutional rights that must be protected and the importance of judicial uniformity on what constitutes fair notice, it is imperative that the Alabama Supreme Court revisit Alabama's pleading standard. Other states with rules that mirror the federal rules have done so and have found persuasive reasons for adopting the *Twombly*

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[89] *Id.* at 555 n.3.

[90] *See, e.g.*, Jackson v. Bank of Am., N.A., 898 F.3d 1348, 1360 (11th Cir. 2018) ("After acknowledging that shotgun pleadings are 'an issue in federal court,' [plaintiff's lawyer] stated, as an excuse for his behavior, that his use of shotgun pleadings had 'never been an issue before' and that 'they are not disfavored in Alabama courts.' In other words, Alabama's state courts readily accept the sort of pleadings he files. This is no excuse here.").

[91] *See supra* Part III, Section A.

[92] Warne v. Hall, 373 P.3d 588, 592 (Colo. 2016).

standard.[93] Because Alabama is a mirror rule state,[94] it should adopt *Twombly* for the benefits of mirroring the federal rules, maintaining procedural uniformity, and reducing litigation costs.

IV. CONCLUSION

The *Twombly* pleading standard is not inconsistent with the Alabama Rules of Civil Procedure's liberalized pleading goal. It does not return Alabama to the days of construing a complaint against the plaintiff. *Twombly* still requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," but it requires the plaintiff to do so with facts.[95] True, the *Twombly* standard asks more of plaintiffs than Alabama's current pleading standard, which allows bare bone recitations of some of the elements. But it is not insurmountably or unduly burdensome. Although the *Twombly* standard may result in more dismissals in the early litigation stages, that is a good result when the claims weeded out are those that rely on hypothetical situations that the trial court conceives instead of facts subject to Rule 11. Alabama should not limit good lawyering under *Twombly* to a plaintiff's complaint. Courts should hold a defendant's affirmative defenses to the same standard. Fewer meritless lawsuits will subject fewer litigants to significant discovery costs and relieve Alabama's overcrowded dockets at a time when Alabama is searching for a way to increase the number of judgeships due to the size of its trial court dockets. The *Twombly* standard will better serve the interests of Alabama and its citizens.

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[93] *See, e.g.*, *id.* at 595; Bean v. Cummings, 939 A.2d 676, 680–81 (Me. 2008); Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008); Bahr v. Capella Univ., 788 N.W.2d 76, 80 (Minn. 2010); Doe v. Bd. of Regents, 788 N.W.2d 264, 278 (Neb. 2010); Parsons v. Greater Cleveland Reg'l Transit Auth., No. 93523, 2010 WL 323420, at *3 (Ohio Ct. App. Jan, 28, 2010); Sisney v. Best Inc., 754 N.W.2d 804, 808–09 (S.D. 2008); Potomac Dev. Corp. v. District of Columbia, 28 A.3d 531, 543–44 (D.C. 2011); Durrett v. IKO Indus., Inc., No. 2019-CA-001307-MR, 2020 WL 4917915, at *2 (Ky. Ct. App. Aug. 21, 2020); GoDaddy.com, LLC v. Hollie Toups, 429 S.W.3d 752, 754 (Tex. App. 2014); Data Key Partners v. Permira Advisers LLC, 849 N.W.2d 693, 701 (Wis. 2014).

[94] *Ex parte* Full Circle Distrib., L.L.C., 883 So. 2d 638, 642 (Ala. 2003) ("Alabama adopted the Alabama Rules of Civil Procedure, which were modeled after the Federal Rules of Civil Procedure."); U.S. Fid. & Guar. Co. v. Warwick Dev. Co., 446 So. 2d at 1024 ("Rule 8 is identical in relevant aspects to the corresponding Federal Rule of Civil Procedure."); *see also* ALA. R. CIV. P. 8 committee's comments on 1973 adoption.

[95] Bell Atl. Corp v. Twombly, 550 U.S. 544, 555 (2007).