

INSTITUTIONAL FACTS: RESPONDING TO TWOMBLY AND IQBAL IN THE DISTRICT COURTS

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More than a decade ago, the Supreme Court discarded its old notice pleading standard and replaced it with a “plausibility” standard in the landmark cases Bell Atlantic v. Twombly and Ashcroft v. Iqbal. A deluge of commentary followed, much of it critical of either the perceived informational imbalance that the standard created or the broad discretion that the decisions were understood to grant to district court judges. This Note identifies a pattern that appears to be emerging in the lower courts in which parties can satisfy their pleading burden by relying in part on “institutional facts”—that is, findings made by competent entities that implicate the factual allegations in the complaint. This Note argues that, as a matter of doctrine, this practice has yet to be recognized, but it should be applauded and encouraged as both intuitive and judicially tractable.

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INTRODUCTION

*Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*² are two of the most influential modern Supreme Court cases; despite being on the books for fewer than two decades, both cases rank in the top five most frequently cited cases that the Court has ever decided.³ *Twombly* and *Iqbal* at least purported to raise the federal pleading bar,⁴ which had been quite liberal since the advent of the Federal Rules of Civil Procedure in 1938.⁵ Throughout the so-called notice pleading regime, the lower courts repeatedly attempted to impose heightened pleading standards on civil claims⁶—a phenomenon met with powerful rebuke by the Court.⁷ The lower courts triumphed in *Twombly* and *Iqbal*, when the Court interpreted Rule 8 to require that a complaint state a “plausible” claim, abrogating its prior holding that a complaint should not be dismissed unless it was clear that there was “no set of facts” the plaintiff could prove to establish the claim.⁸

A slew of academic commentary followed *Twombly* and *Iqbal*.⁹ Some criticized the decisions for closing the courthouse door on plaintiffs or for imposing a mushy and subjective standard with insufficient guidance for lower courts to follow.¹⁰ Others praised the decisions¹¹ or argued that despite the Court’s rhetoric, the decisions made little to no difference for most prospective plaintiffs.¹² A consistent point of

¹ 550 U.S. 544 (2007).

² 556 U.S. 662 (2009).

³ See Lauren Mattiuzzo, *Most-Cited U.S. Supreme Court Cases in HeinOnline: Part III*, HEINONLINE (Sept. 26, 2018), <https://home.heinonline.org/blog/2018/09/most-cited-u-s-supreme-court-cases-in-heinonline-part-iii> [<https://perma.cc/3A4Q-ZZQE>].

⁴ See A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 4 (2009) (noting that the Court “decidedly revised its previous understanding of the nature of one’s pleading obligation under the Federal Rules” in *Twombly* and *Iqbal*).

⁵ See *id.* at 2–3 (describing the federal pleading standard as “simplified” and “liberal[]”).

⁶ *Id.* at 3–4.

⁷ See *id.* (describing the Court as “chid[ing] the lower courts for this activity”).

⁸ See *id.* at 4–5; see also *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (“[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.”).

⁹ See *infra* notes 50–56 and accompanying text.

¹⁰ See *infra* note 51.

¹¹ See Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61 (2007) (arguing that in a world of modern complex litigation, courts should be more willing to enter dispositive judgments based on the pleadings).

¹² See Colin T. Reardon, Note, *Pleading in the Information Age*, 85 N.Y.U. L. REV. 2170 (2010) (positing that historical and technological changes have increased access to information and partially mitigated the burdens that *Twombly* and *Iqbal* have on most plaintiffs).

commentary, however, was that regardless of the larger effects of the decisions, plausibility pleading left certain classes of plaintiffs who likely had meritorious claims—particularly plaintiffs bringing civil rights claims—out in the cold.¹³ Some commentators pointed out that plausibility pleading caught some litigants in a Catch-22, unable to access the facts needed to substantiate their claims without discovery, but barred from discovery because the plausibility standard required them to possess those facts at pleading.¹⁴

This Note argues that in the wake of *Twombly* and *Iqbal*, the district courts have begun to look to findings by competent entities—which I refer to as “institutional facts”—to supplement the facts in the complaint that come from the plaintiff’s personal knowledge. In allowing courts to use institutional competence as a proxy for reasonableness, institutional facts help the district courts determine whether a given complaint has a shot of success and give courts a tool to sort between “conceivable” and “plausible” claims. A court’s reliance on institutional facts is a recognition that the burden of plausibility pleading does not have to fall entirely on the plaintiff; rather, the pleading standard can be satisfied by some combination of facts available to the plaintiff and a comparable finding by a competent entity.

This Note argues that this emerging doctrine of institutional facts should be applauded and encouraged, subject to certain guiding principles. First, a court should rely on institutional facts only where the institutional fact and the complaint share a high degree of factual similarity. Second, the institutional fact should in some way signal the ultimate disposition of a key issue of law or fact in the claim, such that consideration of the institutional fact “moves the ball” in the litigation. Third, the institutional fact should come from a competent institution. This Note argues that a robust doctrine of institutional facts not only helps ameliorate the information asymmetry issues inherent in the plausibility pleading standard, but also grounds a district court’s application of its “judicial experience and common sense”¹⁵ in institutional competence. And, with the aforementioned guardrails on its application, this doctrine can achieve these ends without flooding the federal courts with meritless claims. Institutional facts are thus showing themselves to be a tool for litigants—who can expand the universe of facts for courts to consider when ruling on a motion to dismiss—and for courts, which can rely on institutional facts to assess

¹³ See, e.g., Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-D dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 87–88 (2010).

¹⁴ See *infra* note 162 and accompanying text.

¹⁵ *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

the credibility of the plaintiff's allegations when reaching a conclusion on the plausibility of a given plaintiff's claim.

This Note proceeds as follows: Part I gives an overview of the federal pleading standard and describes various analyses of the Court's decisions in *Twombly* and *Iqbal*. Part II describes the emergence of the institutional facts doctrine in three contexts: antitrust law, the Fair Debt Collection Practices Act, and the Americans with Disabilities Act. Part III further describes the guiding principles articulated above and identifies advantages of the doctrine's development.

I

AN OVERVIEW OF THE FEDERAL PLEADING STANDARD

To set the stage for the emergence of the institutional facts doctrine, this Part will briefly survey the development of pleading doctrine in the federal courts since the inception of the Federal Rules of Civil Procedure. Using the Court's decisions in *Twombly* and *Iqbal* as an inflection point in pleading doctrine, this Part concludes by exploring various scholarly analyses of these decisions.

A. Before *Twombly*

For more than fifty years, the Federal Rules of Civil Procedure were understood to embrace so-called "notice pleading."¹⁶ This liberal pleading regime—grounded in Rule 8's charge that a complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief"¹⁷—is perhaps best exemplified by Form 11, located in the Rules' appendix, which states that the following complaint is consistent with Rule 8's requirements: "On <date>, at <place>, the defendant negligently drove a motor vehicle against the plaintiff."¹⁸

¹⁶ Malveaux, *supra* note 13, at 70. For a discussion of the framers' intent that the Rules represent a departure from the previous, more complicated code pleading regime, see, for example, Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458–60 (1943) (noting that defects in the code pleading regime led to calls for reform); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 575 (2007) (Stevens, J., dissenting) (recognizing that Rule 8 represented a simplification of the pleading system intended to keep litigants in court); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990–93 (2003) (describing the Federal Rules as "essentially a reform effort designed to ensure litigants have their day in court").

¹⁷ FED. R. CIV. P. 8(a)(2).

¹⁸ FED. R. CIV. P. Form 11 ("Complaint for Negligence"), ¶ 2. This language reflects the Form as restyled in 2007. Prior to 2007, the complaint appeared as Form 9 and read as follows: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 n.4 (2002). At

The Supreme Court famously set forth the standard for notice pleading in *Conley v. Gibson*,¹⁹ a civil rights class action brought under the Railway Labor Act²⁰ by Black railroad employees alleging racial discrimination by their labor union.²¹ Holding that the complaint was sufficient, the Court 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.”²² The Court unequivocally rejected the union’s argument that the plaintiffs were required to set forth specific facts to support “general allegations of discrimination,” stating that Rule 8’s language makes clear that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”²³

For a half century, the Supreme Court reaffirmed *Conley*’s notice pleading regime in a number of cases in which the lower courts had attempted to introduce heightened pleading standards, particularly in civil rights contexts.²⁴ In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,²⁵ Chief Justice William Rehnquist, writing for a unanimous Court, held that the federal courts could not apply a heightened pleading standard—which required that plaintiffs plead with factual detail and particularity—in civil rights cases alleging municipal liability under section 1983.²⁶ In another unanimous decision, *Swierkiewicz v. Sorema N.A.*, Justice Clarence Thomas held that a complaint for employment discrimination in violation of Title VII of the Civil Rights Act of 1964²⁷ and the Age Discrimination

the recommendation of the Judicial Conference, the Supreme Court abrogated Rule 84, which originally promulgated the Forms, in 2015. See Sara Fevurly, Note, *Down Go the Forms: The Abrogation of Rule 84 and the Official Forms of the Federal Rules of Civil Procedure*, 64 KAN. L. REV. 325, 325–26 (2015).

¹⁹ 355 U.S. 41 (1957).

²⁰ 45 U.S.C. § 151 (2006).

²¹ *Conley*, 355 U.S. at 41–43.

²² *Id.* at 45–46.

²³ *Id.* at 47.

²⁴ Malveaux, *supra* note 13, at 71; see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 577 (2007) (Stevens, J., dissenting) (identifying the “dozen opinions” in which the Court cited *Conley*’s “no set of facts” standard as authoritative).

²⁵ 507 U.S. 163 (1993). *Leatherman* concerned a group of plaintiff homeowners alleging violations of the Fourth Amendment after law enforcement officers forcibly entered their homes while executing search warrants. *Id.* at 164–65.

²⁶ *Id.* at 167–68; see also 42 U.S.C. § 1983 (2006).

²⁷ 42 U.S.C. § 2000e.

in Employment Act²⁸ did not need to plead specific facts to establish a prima facie case of discrimination.²⁹

B. *Twombly and Iqbal*

Five years after *Swierkiewicz*, the Court upended *Conley*'s notice pleading standard and introduced a more stringent standard of "plausibility pleading" in *Bell Atlantic Corp. v. Twombly*.³⁰ *Twombly* was a putative class action alleging an illegal anticompetitive conspiracy by telephone service monopolies (also known as "Baby Bells" or "Incumbent Local Exchange Carriers" (ILECs)) in violation of Section 1 of the Sherman Act.³¹ In upholding the dismissal of the complaint, the Court introduced a new pleading standard: "plausibility."³² Justice David Souter, writing for the Court, stated that at the pleading stage, plaintiffs needed to set forth allegations "plausibly suggesting (not merely consistent with)" an anticompetitive agreement.³³ The Court found that the *Twombly* plaintiffs failed in this regard because the complaint, rather than pointing to direct evidence of a conspiracy, rested on parallel conduct by the Baby Bells (such as not attempting to compete in markets controlled by the other carriers), which, in the absence of an agreement not to compete, is lawful under the Sherman Act.³⁴ Because such conduct was "merely consistent with" the existence of a conspiracy, the Court said that the plaintiffs "ha[d] not nudged their claims across the line from conceivable to plausible," thus warranting dismissal.³⁵

Twombly generated debate regarding the scope and meaning of the plausibility standard.³⁶ The Court clarified the standard—at least somewhat—in its decision two years later in *Ashcroft v. Iqbal*.³⁷ *Iqbal* arose out of the detention of Muslim men in New York following the

²⁸ 29 U.S.C. § 621.

²⁹ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (applying the burden-shifting framework for intentional discrimination claims).

³⁰ 550 U.S. 544, 562, 570 (2007) (stating that to survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face").

³¹ *Id.* at 548–49. The complaint alleged that the Baby Bells conspired to restrain trade in violation of the Sherman Act by engaging in parallel conduct to inhibit the growth of startup service providers and by agreeing to refrain from competing with one another. *Id.* at 550–51. For a thorough account of *Twombly*'s backstory, see Epstein, *supra* note 11.

³² *Twombly*, 550 U.S. at 570.

³³ *Id.* at 557.

³⁴ *Id.* at 556–57.

³⁵ *Id.* at 570.

³⁶ Scott Dodson summarizes much of the academic debate regarding the scope and meaning of *Twombly* in *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 137–41 (2007); see also Scott Dodson, *Comparative Convergence in Pleading Standards*, 158 U. PA. L. REV. 441, 458–60 (2010).

³⁷ 556 U.S. 662 (2009).

terrorist attacks of September 11, 2001.³⁸ In the complaint, Javaid Iqbal alleged that he was subjected to harsh conditions of confinement because of his race, religion, or national origin in violation of his constitutional rights under the First and Fifth Amendments.³⁹ Mr. Iqbal alleged that former Attorney General John Ashcroft and FBI Director Robert Mueller were personally responsible for the unconstitutional conditions of confinement that the Muslim men experienced during their detention.⁴⁰ In *Iqbal*, the Court clarified the plausibility standard in three ways. First, the Court elaborated on the plausibility standard from *Twombly* by defining “plausible” as somewhere between “possible” and “probable.”⁴¹ Second, the Court explained that the plausibility standard applied to all civil claims governed by Rule 8, not just antitrust actions.⁴²

Finally, the *Iqbal* Court applied a two-step framework to evaluate the sufficiency of a complaint subject to a motion to dismiss.⁴³ In the first step, a district court should identify and separate “legal conclusions” from factual allegations, as the former are not entitled to the presumption of truth.⁴⁴ In the second step, the district should presume the truth of the factual allegations and “determine whether they plausibly give rise to an entitlement to relief.”⁴⁵ The Court continued:

Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint . . . has not show[n] that the pleader is entitled to relief.⁴⁶

Applying the two-pronged approach, the Court held that Iqbal had failed to state a claim.⁴⁷ First, the Court determined that Iqbal’s complaint was based on several conclusory allegations.⁴⁸ While the

³⁸ *Id.* at 666.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See id.* at 678; *see also* Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 19 (2010) (noting that the Court in *Iqbal* did not bring up notice pleading in its opinion).

⁴² *Iqbal*, 556 U.S. at 684.

⁴³ The Court stated that *Twombly* followed this “two-pronged approach.” *Id.* at 679. However, scholarly analysis tends to treat the two-step approach as a new development in *Iqbal*. *See, e.g.*, Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 579–80 (2010).

⁴⁴ *Iqbal*, 556 U.S. at 679.

⁴⁵ *Id.*

⁴⁶ *Id.* (alteration in original) (internal citations and quotation marks omitted).

⁴⁷ *Id.* at 680–83, 687.

⁴⁸ *Id.* at 680–81 (finding that the following allegations were conclusory and not entitled to the presumption of truth: that Iqbal was detained because of his religion, race, or

Court conceded that the remaining factual allegations in the complaint were “consistent with” unlawful conduct—like in *Twombly*—it found that it did not plausibly state a claim for relief because of “more likely explanations” for the facts alleged.⁴⁹ In particular, the Court opined that the facts alleged, rather than being the result of an intentionally discriminatory program crafted by Mr. Ashcroft and Mr. Mueller, were more likely the result of a neutral, “legitimate policy” that had a “disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.”⁵⁰

C. Understanding *Twombly* and *Iqbal*

A slew of critique followed *Twombly* and *Iqbal* as commentators sought to determine both the meaning and the impact of the new plausibility pleading regime. Justice Ruth Bader Ginsburg, who dissented in *Iqbal*, remarked that the Court “messed up the Federal Rules” with its decision.⁵¹ The line between “facts” and “legal conclusions”—necessary to the first step of the *Iqbal* analysis—has been a source of much of this criticism,⁵² both for its lack of

national origin; that Ashcroft was the “principal architect” of such a policy; that Mueller was “instrumental” in carrying out the policy).

⁴⁹ *Id.* at 681.

⁵⁰ *Id.* at 682. In addition to the criticism of the plausibility standard itself, discussed *infra* Section I.C, many have criticized the Court’s cursory disregard of the underlying discrimination claims and the post-9/11 detentions of immigrants at issue in *Iqbal*. For a compelling account of the story of Javaid Iqbal and a forceful challenge to the Court’s conclusion that the post-9/11 detentions of immigrants were supported by a legitimate, nondiscriminatory explanation, see generally Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379 (2017).

⁵¹ Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, Remarks for Second Circuit Judicial Conference (June 12, 2009). There is a multitude of scholarship addressing the empirical effects of *Twombly* and *Iqbal*. See generally Jonah B. Gelbach, *Can the Dark Arts of the Dismal Science Shed Light on the Empirical Reality of Civil Procedure?*, 2 STAN. J. COMPLEX LITIG. 223 (2014) (providing an overview of empirical studies of *Twombly* and *Iqbal*’s effects); David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013). For a thorough collection of the empirical studies, see Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 349 n.96 (2016). As Professor Steinman summarized, “[t]here is some disagreement among the various studies, but many found that *Twombly* and *Iqbal* increased the likelihood that motions to dismiss would be granted (at least for particular kinds of cases). There were also significant selection effects; parties were opting not to file in federal court at all” *Id.* at 349–50 (citations omitted).

⁵² See Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1633 (2011); see also Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 841 (2010) (“[E]ven though conclusoriness may be unclear and will be subjective, deciding which allegations to ignore as conclusory will do much of the critical work.”). The *Iqbal* opinion itself demonstrated the difficulty in determining whether given statements are facts or legal conclusions. Justice

clarity⁵³ and its negative effects on plaintiffs.⁵⁴ The plausibility analysis's reliance on "judicial experience and common sense" has also faced criticism for its subjectivity⁵⁵ and for impermissibly aggrandizing the power of trial court judges.⁵⁶

Numerous scholars have attempted to bring clarity to pleading doctrine in their analyses of *Twombly* and *Iqbal*. Professor David Noll has argued that *Iqbal* requires district courts to perform a "fact-screening function" at the motion to dismiss stage and police the reasonableness of inferences that plaintiffs draw from personal knowledge.⁵⁷ According to Professor Noll, this analysis is actually an application of Rule 11 of the Federal Rules of Civil Procedure, which provides in part that "by submitting a filing such as a complaint, a litigant certifies she has a reasonable, good faith belief that the factual allegations in the filing 'will likely have evidentiary support after a reasonable opportunity for further investigation or discovery,'" rather than Rule 8.⁵⁸ Once that fact-policing is complete, the court may evaluate whether the allegations in the complaint are sufficiently suggestive of wrongdoing to justify discovery—a determination that necessarily depends on the substantive law at issue.⁵⁹

One way to understand *Iqbal*, then, is that although Mr. Iqbal had personal knowledge that *low-level* officials purposefully discriminated against Muslim men, his inference—based on that knowledge alone—that Mr. Ashcroft and Mr. Mueller *themselves* engaged in such purposeful discrimination was, in the Court's view, unreasonable, at

Souter, who dissented in *Iqbal*, criticized the majority opinion for identifying certain allegations which he considered well-pleaded to be conclusory. *Iqbal*, 556 U.S. at 697–99 (Souter, J., dissenting).

⁵³ See, e.g., Miller, *supra* note 41, at 25–26 ("If nothing else, the emerging case law is revealing that, like the Emperor in the well-known fable, the fact–conclusion dichotomy has no clothes.").

⁵⁴ See, e.g., *id.* at 25 & n.89 (describing how it is "now fairly common" for courts to characterize arguably factual assertions as "formulaic, conclusory, speculative, cryptic, generalized, or bare" resulting in judges "failing to construe the complaint in favor of the pleader as prior Rule 12(b)(6) doctrine required and performing functions previously thought more appropriate for the factfinder") (internal quotation marks omitted).

⁵⁵ See, e.g., Malveaux, *supra* note 13, at 92–93 ("Where a judge has only his 'judicial experience and common sense' to guide him when determining the plausibility of an intentional discrimination claim pre-discovery, there is the risk of unpredictability, lack of uniformity, and confusion.").

⁵⁶ See, e.g., Henry S. Noyes, *The Rise of the Common Law of Federal Pleading: Iqbal, Twombly, and the Application of Judicial Experience*, 56 VILL. L. REV. 857, 897–98 (2012) (arguing that allowing judges to consider information beyond that included in the complaint is an inappropriate grant of discretion that is better left to the legislative and executive branches of government).

⁵⁷ David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 125, 128–29 (2010).

⁵⁸ *Id.* at 127 (quoting FED. R. CIV. P. 11(b)(3)).

⁵⁹ *Id.* at 126.

least given the sparse allegations in the complaint about Mr. Ashcroft and Mr. Mueller's state of mind.⁶⁰ This "unreasonable" inference, rather than crossing the line between factual and conclusory allegations, then, doomed Mr. Iqbal's claim. With the unreasonable allegation discarded, the complaint did not show a sufficient probability of entitlement to relief to justify discovery. According to Professor Noll, *Iqbal* avoids defining the line between a plausible claim and an implausible one, but it makes clear for lower courts that they must perform the fact-screening analysis.⁶¹

Professor A. Benjamin Spencer suggests a presumption-based theory of pleading. According to Professor Spencer, when a complaint states facts that independently raise a presumption of impropriety, the objective facts alone will allow the plaintiff to state a plausible claim.⁶² In contrast, for situations where the objective facts are "neutral" with respect to wrongdoing (or enjoy a presumption of propriety), the plaintiff will need to plead additional, nonspeculative facts to meet the plausibility bar.⁶³

⁶⁰ See *id.* at 127, 129.

⁶¹ See *id.* at 124–25.

⁶² Spencer, *supra* note 4, at 15. Professor Robert G. Bone advances a similar theory, arguing that plausibility pleading focuses on whether the facts alleged in the complaint describe conduct that departs from a "baseline of normality" to such an extent that there is an increased probability of wrongdoing compared to the background level. See Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 878 (2009).

⁶³ See Spencer, *supra* note 4, at 16–17. Professor Spencer offers several helpful explanations to illustrate his presumption-based theory of pleading. While a complaint alleging "*B* struck *A* with his motor vehicle and *A* suffered personal injuries as a result" would state a plausible claim, another alleging that "*B* fired *A* from her job and *A* was damaged as a result" would not. *Id.* at 15–16. The facts of the first scenario present a presumption of impropriety—because hitting someone with a motor vehicle generally suggests wrongdoing—but the facts of the second do not because firings presumptively occur for lawful reasons. *Id.* However, in order to state a plausible claim, the plaintiff in the firing scenario could not merely allege that she was fired because of her sex and race, because such a statement is a mere supposition unsupported by objective facts. See *id.* at 16. To meet the plausibility bar, then, the plaintiff could plead additional objective facts, such as a statement from the supervisor about her race or sex or an allegation that the supervisor did not terminate less-qualified employees of different races or gender identities. To discern the meaning of "supported implications," Professor Spencer gives an example from the products liability context. In a product defect action, a plaintiff would not state a plausible claim by alleging "ABC, Inc. manufactured product *X*; product *X* failed to perform properly; Plaintiff was injured and suffered damages as a result." *Id.* at 15. As Professor Spencer explains, when a product malfunctions, although "something is amiss . . . the presumption is not that the failure is attributable to the manufacturer . . ." *Id.* Rather, equally likely explanations for the malfunction may be attributable to misuse or damage by the retailer. Thus, in order to overcome the presumption of propriety resulting from plaintiff's objective facts, the plaintiff could allege details about the manufacturing process that could have led to product malfunction; he could not, however, simply claim that a general manufacturing defect caused the malfunction. See *id.* at 17–18 (providing, as

Although Professor Noll and Professor Spencer lay out their theories differently, they get at the same core ideas: first, that what constitutes a plausible claim depends heavily on the substantive law at issue;⁶⁴ second, that courts will examine with greater scrutiny any allegations in the complaint that are not based on the plaintiff's personal knowledge;⁶⁵ and third, that the analysis under the plausibility standard is often concerned with issues of efficiency.⁶⁶

Thus, under both theories, a complaint that contains facts about a car accident and alleges negligence on the part of the defendant will state a plausible claim. The facts about the accident itself are "objective" or are actually known by the plaintiff. Professor Noll would characterize the inference of negligence as reasonable, while Professor Spencer would explain that the occurrence of a car crash raises a presumption of impropriety. In contrast, a complaint containing only facts about an adverse employment decision and alleging racial discrimination would not state a plausible claim: The firing—the only fact of which the plaintiff has actual knowledge—does not have a presumption of impropriety, so the inference of discrimination is unreasonable. However, the plaintiff might be able to cross the plausibility threshold by pleading additional supportive facts that suggest wrongdoing and thus creating a reasonable inference of discrimination.

Part II of this Note will explore how plaintiffs who, after *Twombly* and *Iqbal*, may not otherwise have sufficient "objective facts" to state a plausible claim or "reasonably" allege wrongdoing can rely on findings by competent institutional actors to state plausible claims. Professor Noll has noted questions that the Court left open in *Iqbal*, two of which are relevant to this Note. First, which sources can a court consider to substantiate its "judicial experience and common sense"?⁶⁷ Second, with respect to the operation of the plausibility standard: "How confident must a court be of the plaintiff's

an example, that plaintiff could allege that the defendant's manufacturing process involves gluing two pieces of glass together so as to make it especially susceptible to shattering on contact).

⁶⁴ See Noll, *supra* note 57, at 126 (explaining that determining factual sufficiency necessarily depends on ascertaining which facts constitute a violation of the relevant substantive law); Spencer, *supra* note 4, at 32 (noting that his theory of plausibility pleading is "context-dependent").

⁶⁵ See Noll, *supra* note 57, at 128–29; see also *supra* note 62 (explaining that complaints supported by mere suppositions about facts unknown to the plaintiff, such as an employer's state of mind, will not suffice to satisfy plausibility).

⁶⁶ See Noll, *supra* note 57, at 124–25 (describing the cost-benefit analysis that courts undertake to determine whether to allow a case to proceed to discovery when evaluating a motion to dismiss); Spencer, *supra* note 4, at 25 ("[T]he Supreme Court in *Twombly* seems to have determined that efficiency is the priority.").

⁶⁷ See Noll, *supra* note 57, at 137 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

‘entitlement to relief’ to deny a motion to dismiss?”—i.e., what level of probability corresponds to the standard of proof for pleading, even after “conclusory allegations” are set aside?⁶⁸ Part II will address the first question. With these sources in mind, Part III will address the second question.

II

THE EMERGING DOCTRINE OF INSTITUTIONAL FACTS

In this Part, I argue that there is a trend of courts beginning to rely on what I call “institutional facts” to determine whether a complaint shows a plausible entitlement to relief. An institutional fact is a finding by a competent entity that in some way implicates the plausibility of the allegations contained in the complaint. For example, a nonbinding enforcement guidance document issued by an agency could be an institutional fact: If the guidance suggests that a pattern of facts similar to that alleged by a plaintiff likely constitutes a violation of a particular statute or regulation, then that would weigh in favor of the complaint’s plausibility. In this Note, I focus on “institutional facts” as findings made or patterns recognized by administrative agencies. What I find is that—whatever the exact bounds of plausibility are—courts appear to grant a measure of latitude in the plausibility analysis for parties whose claims are consistent with a pattern or finding that has been recognized by these competent entities. In this Note, I do not argue that this phenomenon has come to dominate how courts deal with the pleading question. Nor do I argue that such independent endorsement of similar facts must be a gatekeeping barrier to a plaintiff’s suit. Rather, I aim to call attention to an emerging phenomenon that, as a matter of doctrine, has yet to be recognized as such. I also hope to call attention to the utility that institutional facts can have as a tool for both litigants and courts. The rest of this Part focuses on three areas of substantive law where the doctrine of institutional facts plays out most clearly: antitrust, the Fair Debt Collection Practices Act, and the Americans with Disabilities Act.

The doctrine of institutional facts adds to the predictions outlined by Professor Noll in *The Indeterminacy of Iqbal*.⁶⁹ After *Iqbal*, some scholars worried that the language of “judicial experience and common sense” would allow judges to rely on their personal opinions to evaluate the sufficiency of the facts in a complaint.⁷⁰ While

⁶⁸ See Noll, *supra* note 57, at 134 & n.92.

⁶⁹ Noll, *supra* note 57.

⁷⁰ See, e.g., Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 31 (2010) (quoting *Iqbal*, 556 U.S. at 679).

acknowledging that a literal reading of *Iqbal* could lead to such a conclusion, Professor Noll argues that considering the phrase in the context in which it was used in *Iqbal* leads to a more constrained reading.⁷¹ Instead of allowing a judge to rely on their *own* opinions in determining the plausibility of a claim, Professor Noll argues that *Iqbal* can be read to allow a court—at most—to rely on “judgmental facts” to substantiate its judicial experience and common sense.⁷² Referencing a prominent administrative law treatise, Professor Noll describes “judgmental facts” as “in reality, value-loaded judgments about how the world operates” which “inhabit a grey area between the substantive law and propositions so obvious or widely accepted they may be judicially noticed.”⁷³ “Although judgmental facts purport to describe how the world operates, they are ‘mixed with judgment, policy ideas, opinion, discretion or philosophical preference.’”⁷⁴

Institutional facts—which this Note is the first to identify—are different from judgmental facts in two ways. First, whereas judgmental facts are “value-loaded,”⁷⁵ institutional facts are grounded in institutional expertise and the decisionmaking processes that go along with such expertise. Therefore, institutional facts derive legitimacy from the expertise of their promulgating entities and the processes by which administrative agencies make decisions, as they constitute conclusions that are not obvious enough to be judicially noticed. Second, whereas judgmental facts are presumptions that courts and judges apply *sua sponte* in evaluating the plausibility of a claim,⁷⁶ litigants themselves bring forth institutional facts to support or undermine plausibility.

⁷¹ See Noll, *supra* note 57, at 140–41 (“[I]t would be strange if courts read the Court’s reference to judicial experience and common sense in a vacuum [T]here is at least some reason to think they will be circumspect in applying ‘judicial experience and common sense’”).

⁷² *Id.* at 139.

⁷³ *Id.* (citing KENNETH CULP DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 15.10, at 178 (2d ed. 1980)).

⁷⁴ *Id.* (quoting DAVIS, *supra* note 73, at 178). Professor Noll reaches this conclusion by observing how the Court in *Twombly* and *Iqbal* relied on “essentially legal sources” to substantiate the propositions that it viewed as obvious. *Id.* at 139. In *Iqbal*, the Court presumed that Ashcroft and Mueller’s behavior was presumptively lawful, which Professor Noll characterizes as having “a long pedigree in the common law” *Id.* at 138–39. In *Twombly*, the Court cited its own previous rulings in the antitrust context and treatises on antitrust law to explain its belief that the parallel conduct of the Baby Bells did not plausibly raise an inference of an unlawful antitrust conspiracy. *See id.* at 139.

⁷⁵ *Id.*

⁷⁶ *Cf. id.* at 139–40 (“The lawfulness of official conduct, for example, is not an immutable feature of the universe. Courts nevertheless presume officials follow the law, for a variety of reasons ranging from separation of powers concerns to the necessity of maintaining reasonable limits on judicial dockets.” (emphasis added)).

A. Antitrust Law

Antitrust law provides a clear example of private plaintiffs relying on the findings of institutional actors to meet their pleading burden. As William Twombly discovered in his suit against Bell Atlantic, plaintiffs attempting to bring private antitrust actions often face significant obstacles in surviving 12(b)(6) motions in the “plausibility” world. The facts that most private plaintiffs can allege in asserting an antitrust conspiracy claim, like “noncompetition, similar pricing, or parallel behavior”⁷⁷ are often unable to “nudge[] their claims across the line from conceivable to plausible.”⁷⁸ Even in a world of increasing volumes of publicly available information,⁷⁹ private plaintiffs often will not have access to facts showing evidence of a collusive agreement at pleading.⁸⁰ However, courts often allow private plaintiffs to point to findings by the Department of Justice (DOJ) or Federal Trade Commission (FTC) antitrust investigations to bolster the plausibility of their antitrust claims.

For example, after an announcement that several television broadcast companies had entered into consent decrees with the DOJ following investigations into unlawful restraints of trade under the Sherman Act,⁸¹ plaintiffs brought follow-on litigation in federal court and noted these consent decrees in their complaints (in addition to allegations of parallel conduct).⁸² In its order denying the broadcast companies’ motion to dismiss, the district court noted the fact that the relevant government investigations “produced results, namely consent decrees and settlements,” as a factor in finding that plaintiffs had stated a plausible claim.⁸³ Similarly, in finding that a group of plaintiffs had stated a plausible antitrust conspiracy claim against banks in a foreign exchange market, the district court took judicial notice of and repeatedly mentioned fines and penalties levied by regulators following antitrust investigations.⁸⁴ The court noted that “[t]he penalties

⁷⁷ Spencer, *supra* note 4, at 33.

⁷⁸ Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

⁷⁹ See generally Reardon, *supra* note 12 (arguing that increasing availability of information due to technological advances has mitigated the effects of *Twombly* and *Iqbal* on plaintiffs).

⁸⁰ See Spencer, *supra* note 4, at 33 (“An antitrust conspiracy claim depends on the existence of an agreement to which the plaintiff was not a party. Thus, the mere assertion of an agreement will be a supposition that is not necessarily implied from the objective facts alleged.”).

⁸¹ *In re* Loc. TV Advert. Antitrust Litig., No. 18-C-6785, 2020 WL 6557665, at *3 (N.D. Ill. Nov. 6, 2020).

⁸² See *id.* at *1, *3.

⁸³ See *id.* at *9.

⁸⁴ See *In re* Foreign Exch. Benchmark Rates Antitrust Litig., 74 F. Supp. 3d 581, 592–93 (S.D.N.Y. 2015).

provide non-speculative support for the inference of conspiracy” and further explained that, in addition to the presence of penalties, “investigations into the manipulation of [foreign exchange] benchmark rates by regulators in seemingly every significant financial market in the world lends some credence to the conspiracy allegation.”⁸⁵ In a later case alleging Sherman Act violations in the financial derivatives industry, the district court noted an investigation by the Commodity Futures Trading Commission (CFTC) that resulted in a referral to the DOJ after it found evidence of criminal price fixing.⁸⁶ The district court pointed to the CFTC’s findings in holding that plaintiffs’ complaint plausibly suggested an inference of an illegal antitrust conspiracy.⁸⁷

Some courts have even held that the mere *presence* of a DOJ investigation bolsters the plausibility of antitrust allegations.⁸⁸ In holding that a group of plaintiffs had stated a plausible price-fixing conspiracy in the digital music context, the Second Circuit noted that the presence of two pending DOJ investigations helped place defendants’ parallel conduct “in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.”⁸⁹ In a putative class action alleging an illegal price-fixing conspiracy by manufacturers of the prescription drug Propranolol, the district court noted the existence of an ongoing DOJ investigation into price fixing by the same group of manufacturers in finding the plaintiffs stated a plausible claim: “The presence of an ongoing investigation into the same subject matter as alleged in the pleadings here raises an inference of conspiracy.”⁹⁰ Similarly, in private litigation following disclosure of a DOJ investigation into the packaged ice industry,⁹¹ the court denied the defendants’ motion to dismiss, noting that the investigation “bolster[ed] the plausibility analysis and heighten[ed] the Court’s expectation that ‘discovery will reveal evidence of illegal agreement.’”⁹²

⁸⁵ *Id.* at 592.

⁸⁶ *See* Alaska Elec. Pension Fund v. Bank of Am. Corp., 175 F. Supp. 3d 44, 51–52 (S.D.N.Y. 2016).

⁸⁷ *See id.* at 55 (noting in the plausibility analysis that the complaint alleged “not only that government investigations are pending, but also that those investigations have actually turned up ‘evidence of criminal behavior’”).

⁸⁸ *But see, e.g., In re Capacitors Antitrust Litig.*, 106 F. Supp. 3d 1051, 1064 (N.D. Cal. 2015) (explaining that the government investigations alleged in the complaint “carry no weight” in its analysis).

⁸⁹ *Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 323–24 (2d Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

⁹⁰ *In re Propranolol Antitrust Litig.*, 249 F. Supp. 3d 712, 723 (S.D.N.Y. 2017).

⁹¹ *See In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 998 (E.D. Mich. 2010).

⁹² *Id.* at 1009 (quoting *Twombly*, 550 U.S. at 556).

The examples here are merely illustrative, rather than exhaustive,⁹³ and courts have made clear that plaintiffs must bring their own facts to the complaint, rather than merely pointing to the existence of a consent decree or government investigation, in order to state a claim.⁹⁴ However, these cases illustrate that in certain cases, the pleading burden does not have to fall entirely on the plaintiff. Whether a consent decree raises an inference of *some* wrongdoing on the part of the defendant or the presence of a government investigation hints to a court that “at least several individuals within the governmental chain of command thought certain facts warranted further inquiry,”⁹⁵ the antitrust context reveals how courts appear to credit a plaintiff’s allegations when they are consistent with the findings of an institutional actor.

B. *Fair Debt Collection Practices Act*

The antitrust context demonstrates how plaintiffs may rely on institutional findings regarding the potential liability of a particular actor. However, courts have also allowed parties to rely on more generalized institutional facts to meet their pleading burden. The Fair Debt Collection Practices Act (FDCPA)⁹⁶ provides a particularly clear example. Under § 1692e of the FDCPA, “[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt.”⁹⁷ In actions in which

⁹³ See, e.g., *In re Generic Pharms. Pricing Antitrust Litig.*, 338 F. Supp. 3d 404, 452–53 (E.D. Pa. 2018) (finding that plaintiffs may rely on a relevant government investigation as a plus factor in support of Sherman Act claims); *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 632 (E.D. Pa. 2010) (finding that the existence of a parallel criminal investigation “demonstrate[s] that the government believes a crime may have occurred” and is enough to “raise a reasonable expectation that discovery will reveal evidence of an illegal agreement” (quoting *Twombly*, 550 U.S. at 556)); *Hinds County v. Wachovia Bank N.A.*, 700 F. Supp. 2d 378, 394–95 (S.D.N.Y. 2010) (finding that DOJ investigations into the municipal derivatives industry bolstered the plausibility of plaintiff’s Sherman Act claim); *In re Salmon*, No. 19-21551-CIV, 2021 WL 1109128, at *17 (S.D. Fla. Mar. 23, 2021) (holding that the “pendency of . . . government investigations . . . supports, albeit weakly, the plausibility of Plaintiffs’ antitrust conspiracy allegations”); *In re Auto. Parts Antitrust Litig.*, No. 2:12-cv-00101, 2013 WL 2456584, at *7 (E.D. Mich. June 6, 2013) (“The court finds [plaintiffs’] allegations of a conspiracy plausible based upon the market structure, the government investigations, and the guilty pleas.”).

⁹⁴ See, e.g., *In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d at 1009 (noting that plaintiffs’ reference to the government investigations into the industry “bolster[s] the plausibility analysis,” but would not be “determinative standing alone”).

⁹⁵ *In re Generic Pharms. Pricing Antitrust Litig.*, 338 F. Supp. 3d at 452 (quoting *In re Packaged Seafood Prod. Antitrust Litig.*, No. 15-MD-1670, 2017 WL 35571, at *8 (S.D. Cal. Jan. 3, 2017)).

⁹⁶ Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C. §§ 1692 to 1692p (2006 & Supp. IV 2010)).

⁹⁷ 15 U.S.C. § 1692e.

plaintiffs have sued debt collectors for § 1692e violations, several lower courts have turned to statements, reports, and guidance issued by the institutional actors charged with enforcing the FDCPA: the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB).

In *Delgado v. Capital Management Services*,⁹⁸ plaintiff Juanita Delgado alleged that Capital Management Services (CMS), a collection agency and debt collector, violated the FDCPA when it sent her a dunning letter⁹⁹ attempting to collect a former credit card debt and offering to settle the debt at a discount.¹⁰⁰ CMS did not inform Delgado, however, that under the Illinois statute of limitations, it was time-barred from legally enforcing the debt.¹⁰¹ Delgado, therefore, alleged the letter was misleading in violation of the FDCPA.¹⁰² In evaluating whether Delgado had stated a plausible claim under the FDCPA, the district court relied in part on two reports prepared by the FTC about communications it considered likely to be deceptive or misleading:

The FTC Report . . . notes that “most consumers do not know or understand their legal rights with respect to the collection of time-barred debt, so attempts to collect on stale debt in many circumstances may create a misleading impression that the consumer could be sued.” . . . The FTC Report further notes that nondisclosure of the fact that a debt is time-barred may be deceiving to consumers because, in many states, making a partial payment on a stale debt revives the entire debt even if the original statute of limitations has already expired.¹⁰³

After concluding that the FTC Reports were entitled to respect under *Skidmore v. Swift & Co.*,¹⁰⁴ the district court explicitly drew a connection between the FTC’s authoritative statements and the plausibility of plaintiff’s FDCPA claim: “[T]he Court finds the FTC’s position persuasive: absent disclosures to consumers as to the age of their debt, the legal enforceability of it, and the consequences of making a payment on it, it is plausible that dunning letters seeking collection on time-barred debts may mislead and deceive unsophisticated con-

⁹⁸ No. 4:12-CV-4057, 2013 WL 1194708 (C.D. Ill. Mar. 22, 2013), *aff’d sub nom.* McMahon v. LVNV Funding, LLC, 744 F.3d 1010 (7th Cir. 2014).

⁹⁹ “A dunning letter is a notification sent to a delinquent debtor demanding payment.” *Id.* at *1 n.2.

¹⁰⁰ *See id.* at *1.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at *4–5 (citing FED. TRADE COMM’N, THE STRUCTURE AND PRACTICE OF THE DEBT BUYING INDUSTRY 47 (2013)).

¹⁰⁴ 323 U.S. 134, 140 (1944) (according deference to agency interpretations proportional to their “power to persuade”).

sumers.”¹⁰⁵ In affirming the district court’s decision, the Seventh Circuit also relied on statements made by the FTC and CFPB about what consumers are likely to find misleading, stating that “[w]e are inclined to defer to the agencies’ empirical research and expertise.”¹⁰⁶

In *White v. First Step Group LLC*,¹⁰⁷ the district court took a similar approach in determining whether plaintiff Candie White had stated a plausible claim under the FDCPA. Like Juanita Delgado, White received a letter from a debt collection agency offering payment “settlements” on a time-barred debt.¹⁰⁸ Like Delgado, White alleged that the dunning letter did not disclose that the debt was time-barred nor that making any payment on the debt would revive the statute of limitations and allow her creditors to sue to collect the remainder of the debt in full.¹⁰⁹ Additionally, White alleged that the collection agency’s offer of a “settlement” implied a threat of litigation to recover the debt.¹¹⁰

The district court in *White* deferred to agency pronouncements in evaluating the plausibility of the FDCPA claim: Specifically, the FTC report cited in *Delgado* and proposed CFPB rules for FDCPA enforcement.¹¹¹ After determining that both the report and the proposed rules were entitled to respect under *Skidmore*, the district court explicitly tied the agency pronouncements to its plausibility analysis.¹¹² In a similar case in Washington, the district court quoted *White* in holding that the plaintiff in that case had also stated a plausible FDCPA claim for an allegedly misleading dunning letter.¹¹³

Finally, in *Buchanan v. Northland Group, Inc.*,¹¹⁴ the Sixth Circuit relied on pronouncements by the CFPB in reversing the district court’s dismissal of another FDCPA claim based on an allegedly misleading dunning letter. In *Buchanan*, the Sixth Circuit noted that the CFPB had posed several questions¹¹⁵ for public comment relevant

¹⁰⁵ *Delgado*, 2013 WL 1194708, at *6.

¹⁰⁶ See *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1021 (7th Cir. 2014).

¹⁰⁷ No. 2:16-CV-02439, 2017 WL 4181121 (E.D. Cal. Sept. 20, 2017).

¹⁰⁸ *Id.* at *1.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See *id.* at *4.

¹¹² See *id.* at *4–5 (“The FTC specifically finds collection letters for time-barred debts . . . may mislead many consumers in violation of the FDCPA, and the CFPB is in the process of considering proposals to require further disclosure regarding the collection attempts. . . . [T]hese interpretations . . . support the conclusion that [plaintiff’s claim] may be actionable under FDCPA.”).

¹¹³ See *Bereket v. Portfolio Recovery Assocs., LLC*, No. C-17-0812, 2017 WL 4409480, at *5–7 (W.D. Wash. Oct. 4, 2017).

¹¹⁴ 776 F.3d 393 (6th Cir. 2015).

¹¹⁵ The questions included: “What kinds of data exist with respect to consumers’ beliefs about debt collection? Has there been any consumer testing? Do debtors receiving

to the disposition of the FDCPA claim and had also stated it had plans to conduct its own research on these questions.¹¹⁶ In conducting its plausibility analysis, the Sixth Circuit took this into consideration:

At this preliminary stage of the case, it seems fair to infer that, if the agency deems these same questions worthy of further study, [the plaintiff] deserves a shot too. A contrary conclusion—that consumer confusion is not even plausible here—would amount to our own declaration that the CFPB’s efforts on this score are a waste of time. We are not prepared to say that at this stage of the case.¹¹⁷

While the Sixth Circuit did not explicitly consider whether the CFPB’s pronouncements were entitled to deference under *Skidmore*, it stated that the agency views were “instructive” and that agency views deserve “respect,” especially “when it comes to factual plausibility in a setting that may turn as much on empirical data as on anything else.”¹¹⁸

While the CFPB and FTC statements do not point to the wrongdoing of a particular actor, they represent institutional recognitions of patterns of behavior that may suggest liability under the FDCPA. Cases like *Delgado*, *White*, and *Buchanan* show how courts seem to recognize that a complaint alleging behavior consistent with these recognized patterns has stated not just a conceivable claim, but a plausible one. In a situation where the letter does not contain false statements, determining whether a given dunning letter is plausibly “misleading,” and therefore in violation of the FDCPA, could be quite difficult for the district court. After discovery, both parties will theoretically be armed with information about the facts of the underlying debt dispute *and* expert opinion about what consumers do indeed find misleading. In the absence of this detailed information at pleadings, however, courts appear to be relying on the findings of the FTC and the CFPB to conclude that a complaint consistent with those findings states a claim sufficient to justify discovery.

C. *Americans with Disabilities Act*

In the antitrust and FDCPA contexts, courts appear to grant some latitude to plaintiffs who can plead facts consistent with a finding by an agency that suggests liability on the part of the defendant. The Americans with Disabilities Act (ADA) context shows how

collection letters think they might get sued? Do they understand the consequences of partial payment? Should the agency require additional disclosures when a debt is time barred?” *Id.* at 398.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

institutional facts can also lead a court to determine, at pleading, that a defendant has likely acted lawfully.

A group of cases alleging violations of the Americans with Disabilities Act (ADA) by hotels offers a compelling example. Title III of the ADA forbids discrimination on the basis of disabilities in places of public accommodation.¹¹⁹ The DOJ has issued the so-called “Reservations Rule,” interpreting the ADA to require places of public lodging to “ensure that individuals with disabilities can make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms.”¹²⁰ The Rule requires that hotel reservation systems “identify and describe accessible features in the hotels and guest rooms offered through its reservation service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs.”¹²¹

Recognizing that the Reservations Rule is ambiguous, and that each individual traveler may have variations in the level of accessibility required, the DOJ also issued guidance interpreting, in part, the practical implications of the Rule as follows:

[A] reservations system is not intended to be an accessibility survey. . . . [I]t may be sufficient to specify that the hotel is accessible and, for each accessible room, to describe the general type of room (e.g., deluxe executive suite), the size and number of beds (e.g., two queen beds), the type of accessible bathing facility (e.g., roll-in shower), and communications features available in the room (e.g., alarms and visual notification devices). Based on that information, many individuals with disabilities will be comfortable making reservations.¹²²

District courts have repeatedly relied on this guidance in holding that plaintiffs have failed to allege plausible ADA violations regarding hotel reservation systems. In *Love v. CCMH Fisherman’s Wharf, LLC*,¹²³ plaintiff Samuel Love alleged ADA violations on the part of the defendant hotel because its website did not list the hotel’s accessible features in sufficient detail.¹²⁴ For example, Love alleged that the website’s failure to disclose specific features of the guestroom bathroom, bed, and desk prevented him from booking a guestroom.¹²⁵ After recognizing that the DOJ’s guidance was entitled to deference

¹¹⁹ 42 U.S.C. § 12182(b)(1)(B).

¹²⁰ 28 C.F.R. § 36.302(e)(1)(i) (2011).

¹²¹ *Id.* § 36.302(e)(1)(ii).

¹²² 28 C.F.R. pt. 36, app. A (2011).

¹²³ No. 20-CV-07131, 2021 WL 1734924 (N.D. Cal. May 3, 2021).

¹²⁴ *Id.* at *1.

¹²⁵ *Id.* at *2.

under circuit precedent, the district court “[a]ccept[ed] the DOJ’s determination that ‘many individuals with disabilities will be comfortable making reservations’ based on the type of information [the defendant] provided [on its website],” and held that Love had therefore failed to state a plausible ADA claim.¹²⁶ Courts have relied on the DOJ guidance in dismissing other ADA claims against hotels on substantially similar or identical grounds.¹²⁷

The ADA context demonstrates that courts are willing to grant latitude to parties—not just plaintiffs—whose claims are consistent with institutional findings at the pleading stage. While the FDCPA cases showed plaintiffs pleading facts consistent with an institutional finding that liability was likely, the ADA cases show the opposite: plaintiffs pleading facts consistent with an institutional finding that liability is unlikely. Thus, in such a circumstance, a court will credit the institutional fact and find that a plaintiff has failed to state a plausible claim.

The cases surveyed in this Part demonstrate that courts appear to grant a measure of latitude in the plausibility analysis for parties whose claims are consistent with a pattern or finding that has been recognized by these competent entities. As the antitrust and FDCPA contexts show, relying on “institutional facts” can be a pro-plaintiff doctrine, as it alleviates some of the difficulties of meeting the plausibility pleading standard by allowing plaintiffs to rely on institutional knowledge, rather than personal knowledge, to state a claim. However, the ADA context shows how the doctrine of institutional facts could also benefit defendants. This “doctrine” of institutional facts is clearly in its early stages of development in the lower courts. Part III, then, will suggest guardrails for courts (and litigants) to consider when evaluating a claim that relies on an institutional fact.

¹²⁶ *Id.* at *9.

¹²⁷ *See, e.g.,* Love v. Ashford S.F. II LP, No. 20-CV-08458, 2021 WL 1428372, at *4–5 (N.D. Cal. Apr. 15, 2021) (finding the hotel’s website more than satisfies the DOJ’s Reservations Rule); *see also* Garcia v. SL&C Ontario, LLC, No. EDCV 21-61, 2021 WL 3557818, at *4 (C.D. Cal. Mar. 26, 2021) (finding the hotel meets the requirements of DOJ rule § 36.302(e)(1)(ii)); Love v. Concord Hotel LLC, 549 F. Supp. 3d 1047, 1049–50 (N.D. Cal. July 15, 2021) (deferring to DOJ guidance on § 36.302 and siding with the hotel). *But see* Garcia v. Patel & Joshi Hosp. Corp., No. EDCV 20-2666, 2021 WL 1936809, at *4 (C.D. Cal. Mar. 19, 2021) (finding that DOJ guidance says that the enumerated features may sometimes be sufficient and that this does not foreclose the plaintiff’s ADA claim that the information is not enough to meet one’s accessibility needs).

III NEXT STEPS FOR INSTITUTIONAL FACTS

With these examples of institutional facts in mind, this Part suggests guardrails for courts to apply as they continue to develop this doctrine. This Part then identifies reasons why courts should continue to rely on institutional facts when evaluating motions to dismiss.

Despite the Court's admonishment that "[t]he plausibility standard is not akin to a 'probability requirement,'"¹²⁸ scholarship on *Twombly* and *Iqbal* by and large acknowledges that district courts must engage in some method of probabilistic reasoning when evaluating a complaint under the new standard.¹²⁹ Professor Luke Meier conceptualizes *Twombly* as imposing a "confidence analysis"—an inquiry into whether the facts alleged in the complaint, taken as true, "constitute a sufficient basis from which to make a conclusion regarding *other* facts."¹³⁰ Similar to Professor Noll's argument, Professor Meier's articulation of the plausibility standard is that it operates as a screen for whether conclusions from the facts asserted by the plaintiff "involve an impermissible amount of guess-work."¹³¹

Institutional facts factor into this probabilistic analysis by signaling to a district court whether the complaint provides a sufficient basis to conclude that the defendant acted unlawfully, or, to use Professor Noll's framework, whether the ultimate allegation of unlawful conduct is reasonable given the facts in the plaintiff's possession. To state it another way, the existence of a relevant institutional fact moves the allegations in the complaint over the line from "conceivable" to "plausible"—or, it makes clear that the claim is *not* plausible. A workable doctrine of institutional facts, then, will first require a narrow fit between the allegations in the complaint and the institutional facts such that the institutional facts can have some bearing on

¹²⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

¹²⁹ See, e.g., Rory Bahadur, *The Scientific Impossibility of Plausibility*, 90 NEB. L. REV. 435, 456–57 (2011) ("The Court's use of the term 'possibility,' however, belies the assertion that plausibility is not a probability analysis because possibility is an expression of probability."); see Malveaux, *supra* note 13, at 84 ("Rather than clarifying what plausibility means in relation to possibility post-*Twombly*, *Iqbal*'s analysis suggests that probability is applicable." (footnote omitted)); see also Miller, *supra* note 41, at 26 ("[T]he plausibility of factual allegations appears to depend on the relative likelihood that legally actionable conduct occurred versus a hypothesized innocent explanation. In both *Twombly* and *Iqbal*, the Court proposed explanations for the alleged factual pattern that were thought to be . . . 'more likely' than the plaintiffs' inferences of wrongdoing . . .").

¹³⁰ See Luke Meier, *Probability, Confidence, and Twombly's Plausibility Standard*, 68 SMU L. REV. 331, 340–41 (2015) (emphasis added). I believe that the differences between what Professor Meier articulates and the scholarship he criticizes are mostly semantic.

¹³¹ *Id.* at 334.

the court's probabilistic analysis. Second, the facts must come from a competent institutional actor.

A. *Guardrails for the Doctrine*

1. *Narrow Fit*

The cases highlighted in Part II reflect this narrow fit. In the antitrust cases, this requirement of narrow fit was satisfied because the DOJ and FTC investigations involved the same anticompetitive behavior by the same defendants and during the same time period as the plaintiffs alleged in their complaints.¹³² In the FDCPA cases, the debt collection letters that the plaintiffs used as the bases for their complaints contained precisely the same patterns of misleading behavior that the CFPB and FTC flagged in their enforcement guidance and research agendas.¹³³ And, in the ADA cases, the allegedly defective hotel websites reflected strict compliance with the guidance issued by the DOJ for how to comply with the Act.¹³⁴ What constitutes a narrow fit will often be a situation-specific inquiry. However, the cases explored in Part II of this Note provide indicia of guardrails for this emerging doctrine.

First, for a narrow fit, an institutional fact must have significant overlap with the facts alleged in the complaint. The institutional fact should concern the same defendant or class of defendants as those named in the complaint.¹³⁵ Likewise, the institutional fact should describe an injury either to the plaintiff or to a class of which the plaintiff is a member.¹³⁶ These are not absolute requirements, however; factual overlap is best understood as a sliding scale rather than an on-off switch. For example, a finding that a specific defendant

¹³² See *supra* Section II.A.

¹³³ See *supra* Section II.B.

¹³⁴ See *supra* Section II.C.

¹³⁵ In the antitrust cases, the complaints in question alleged wrongdoing against defendants who themselves were subject to enforcement proceedings by the FTC or the DOJ, the sources of the institutional facts. See *supra* Section II.A. In the FDCPA context, the defendants were part of the class of debt collectors who attempted to collect on time-barred debt—the subject of the FTC and CFPB guidance. See *supra* Section II.B. And in the ADA context, the defendant hotels were the subject of the enforcement guidance put forth by the DOJ. See *supra* Section II.C.

¹³⁶ Once again, the antitrust context is the most straightforward illustration, as the relevant enforcement proceedings dealt with anticompetitive behavior that harmed consumers who in turn filed private suits. See *supra* Section II.A. In the FDCPA context, the FTC and CFPB guidance specifically mentioned debtors who received debt-collection letters on time-barred debt, and plaintiffs in the relevant suits all fit that description. See *supra* Section II.B. The DOJ guidance in the ADA suits dealt with individuals who wanted to make online reservations at accessible hotels, and plaintiffs in the ADA suits fell into that category. See *supra* Section II.C.

acted unlawfully toward a different plaintiff and during a different time period may nonetheless form a narrow fit if the patterns of unlawful behavior recognized in the institutional fact and alleged in the complaint are substantially similar. A sufficient degree of factual overlap, and thus a narrow fit between the complaint and the institutional fact, ensures that the institutional fact speaks directly to the court's probabilistic inquiry into whether the plaintiff's allegations stand on sufficiently firm ground to state a plausible claim. An institutional fact with insufficient factual overlap leaves a court no more or less able to evaluate the reasonability of the inferences drawn by the plaintiff in the complaint and is therefore not a useful tool for a court to use in its plausibility analysis.

Second, an institutional fact should signal the ultimate disposition of a key issue of law or fact. Thus, in addition to factual overlap with the allegations in the complaint, the institutional fact should "move the ball" in some fashion by signaling how the litigation will ultimately shake out. This inquiry is necessarily tied in with the analysis of factual overlap, but recognizing it as a separate analytical element recognizes that there may be institutional facts that are on point but are not robust enough to signal whether a claim has crossed the line from conceivable to plausible.

A pair of Title VII disparate impact cases illustrates the importance of this prong well. In *Mandala v. NTT Data*,¹³⁷ two Black men brought suit under Title VII against NTT, an information technology services company, after NTT rescinded their offers of employment following disclosure of prior felony convictions.¹³⁸ The men alleged that NTT had a blanket policy of not hiring candidates with prior felony convictions and that this policy had an unlawful disparate impact on the basis of race and national origin.¹³⁹ To support the allegation of disparate racial impact, the plaintiffs in *Mandala* attempted to rely on institutional facts: They cited a slew of national statistics from the DOJ and the Census Bureau showing that Black Americans are arrested and incarcerated at higher rates than white Americans relative to their respective shares of the national population.¹⁴⁰ The plaintiffs also cited nonbinding Enforcement Guidance from the U.S. Equal Opportunity Employment Commission (EEOC) stating that national data, similar to those cited by plaintiffs, "supports a finding

¹³⁷ 975 F.3d 202 (2d Cir. 2020).

¹³⁸ Complaint at ¶¶ 15, 32–34, 48, *Mandala v. NTT Data, Inc.*, (No. 18-CV-6591), 2019 WL 3237361 (W.D.N.Y. July 18, 2019), *aff'd*, 975 F.3d 202 (2d Cir. 2020); *Mandala*, 975 F.3d at 205.

¹³⁹ Complaint, *supra* note 138, at ¶¶ 48–53.

¹⁴⁰ *Id.* ¶¶ 41–43.

that criminal record exclusions have a disparate impact based on race and national origin.”¹⁴¹ Nevertheless, the district court determined that plaintiffs had failed to state a plausible claim,¹⁴² and the Second Circuit affirmed.¹⁴³

Contrast *Mandala* with *Carson v. Lacy*,¹⁴⁴ a disparate impact case in the Eighth Circuit. The facts of *Carson* are similar to those in *Mandala*: Plaintiff, a Black man, alleged disparate racial impact under Title VII based on defendant’s policy of not hiring individuals with prior felony convictions.¹⁴⁵ Like *Mandala*, the plaintiff in *Carson* cited statistics from government agencies showing increased rates of incarceration for Black Americans nationwide and in Arkansas, the state in which the claim arose.¹⁴⁶ While the district court granted the defendant’s motion to dismiss,¹⁴⁷ the Eighth Circuit reversed in relevant part, finding that the plaintiff had stated a plausible claim.¹⁴⁸

What accounts for the different results in *Mandala* and *Carson*? The institutional facts in *Mandala*, unlike those in *Carson*, did not have the requisite narrow fit. The panel majority in *Mandala* focused on the lack of fit between the national statistics that plaintiffs cited in the complaint and the likely applicant pool for the specialized technical roles from which plaintiffs were denied employment.¹⁴⁹ In contrast, the Eighth Circuit opinion specifically mentioned the plaintiff’s citation of Arkansas-specific facts to allege disparate impact.¹⁵⁰ In addition to the better geographic fit in *Carson*—which speaks to the degree of factual overlap between the plaintiff’s allegations and the institutional facts—the general, population-level statistics signaled the ultimate disposition on the issue of disparate impact for *Carson*, but not *Mandala*. While the plaintiff in *Carson* was denied a janitorial position, the plaintiffs in *Mandala* were denied technical roles. Because the qualified pool of applicants for the latter position is nar-

¹⁴¹ *Id.* ¶ 41 n.5 (citing U.S. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-CVG-2012-1, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT, (2012)).

¹⁴² *Mandala*, 2019 WL 3237361, at *4.

¹⁴³ *Mandala*, 975 F.3d at 205.

¹⁴⁴ 856 F. App’x 53 (8th Cir. 2021).

¹⁴⁵ Complaint at 1–3, *Carson v. Lacy*, No. 4:19-CV-00256, 2020 WL 1557426 (E.D. Ark. Apr. 1, 2020), *aff’d in part, rev’d in part*, 856 F. App’x 53 (8th Cir. 2021).

¹⁴⁶ *Id.* at 3.

¹⁴⁷ *Carson v. Lacy*, No. 4:19-CV-00256, 2020 WL 1557426, at *1 (E.D. Ark. Apr. 1, 2020).

¹⁴⁸ *Carson*, 856 F. App’x at 54.

¹⁴⁹ See *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 211 (2d Cir. 2020) (“Plaintiffs provide no allegations to demonstrate that national arrest or incarceration statistics are in any way representative of the pool of potential applicants qualified for a position at NTT.”).

¹⁵⁰ See *Carson*, 856 F. App’x at 54.

rower than for the former, the court in *Mandala* was not confident that inferences drawn from population-level statistics in the complaint would ultimately hold.¹⁵¹ In contrast, the pool of qualified applicants for the janitorial position in *Carson* is larger, and the court there may have had fewer concerns about the applicability of the population-level statistics to the relevant applicant pool for the plaintiff's claim. While the statistics cited in *Carson* signaled that the plaintiff was likely to establish disparate impact after discovery, this was not the case in *Mandala*: The lack of fit between the institutional facts and the allegations in the complaint left too much to conjecture, and thus the claim continued to wallow in the land of "conceivable," rather than "plausible."¹⁵²

This requirement of narrow fit alleviates possible floodgates concerns that could arise from a robust doctrine of institutional facts: that is, that plaintiffs with thin facts and little chance of success on the merits could flood the district courts with complaints and cite institutional facts of marginal relevance in an attempt to survive motions to dismiss and extract settlements from defendants. After all, *Twombly* and *Iqbal* were themselves concerned with what the courts thought were thin claims unlikely to ultimately succeed on the merits.¹⁵³ However, the doctrine of institutional facts as outlined in this Note is concerned with precisely the issue which animated the Court: ensuring that complaints that move past the motion to dismiss stage state plausible, not just conceivable claims. The narrow-fit analysis, by requiring both a high degree of factual overlap between the institutional fact and the complaint and a sense that the fact speaks to a key issue in the litigation, ensures that institutional facts are used by parties to drive directly at that inquiry. Thus, the doctrine of institutional facts supports, rather than eviscerates, the standard espoused by the Court in *Twombly* and *Iqbal*.

¹⁵¹ This line of reasoning tracks the line of reasoning in the Second Circuit's opinion. See *Mandala*, 975 F.3d at 212.

¹⁵² To be sure, *Mandala* and *Carson* still show how the lines of "narrow fit" can be blurry. The dissent in *Mandala* argued that the national statistics were enough to plausibly allege disparate impact even in a subset of the population. See *Mandala*, 975 F.3d at 219 (Chin, J., dissenting). Likewise, the dissent in *Carson* argued that the population-level statistics were inappropriate for alleging disparate impact in the applicant pool for the janitorial position. See *Carson*, 856 F. App'x at 56 (Colloton, J., dissenting) (arguing that statistics from 2007 are not a "sound proxy" for a claim originating in 2020 and that even current population-level statistics, without more, do not establish disparate impact for the applicant pool for custodial positions at defendant's company).

¹⁵³ See Meier, *supra* note 130, at 335; Noll, *supra* note 57, at 123–24.

2. *Institutional Competence and Expertise*

In addition to a requirement of narrow fit, a robust doctrine of institutional facts requires that the relevant findings come from an entity with sufficient expertise to make competent determinations of law or fact. A court's plausibility analysis is in part an inquiry into the reasonability of the plaintiff's inferences.¹⁵⁴ For the institutional fact to have any bearing on the plausibility of the claim, a court must have confidence that the fact reflects a well-researched fact or a reasoned determination. This requirement of institutional competence is clear from the previous examples, with relevant institutional facts coming from administrative agencies charged with enforcing the relevant body of law: the DOJ, FTC, and CFTC for antitrust;¹⁵⁵ the FTC and the CFPB for the FDCPA;¹⁵⁶ the DOJ for the ADA;¹⁵⁷ and the EEOC for Title VII.¹⁵⁸

While what constitutes an entity sufficiently competent for a court to credit its institutional fact will necessarily be a situation-specific inquiry based on the area of law and the content of the plaintiff's complaint, the Supreme Court's doctrine of *Skidmore* deference, itself grounded in ideas of agency expertise,¹⁵⁹ is instructive. While not absolute requirements, an institutional fact may come from a sufficiently competent entity when the fact represents a "body of experience and informed judgment"¹⁶⁰ informed by "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade"¹⁶¹ While this Note focuses on executive agencies charged by Congress with enforcing substantive areas of law, institutional facts could theoretically come from a wider variety of expert sources—though a debate over which non-governmental institutions could promulgate reliable institutional facts is outside the scope of this Note.

B. *Advantages of the Doctrine*

A robust doctrine of institutional facts, in addition to supporting the core of the *Twombly/Iqbal* plausibility analysis, can help ameliorate some of the concerns stemming from these decisions. First, reli-

¹⁵⁴ See Noll, *supra* note 57, at 147.

¹⁵⁵ See *supra* Section II.A.

¹⁵⁶ See *supra* Section II.B.

¹⁵⁷ See *supra* Section II.C.

¹⁵⁸ See *supra* Section III.A.1.

¹⁵⁹ See Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. REV. 1, 13 (2015).

¹⁶⁰ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

¹⁶¹ *Id.*

ance on institutional facts can help solve the information asymmetry problem inherent in the plausibility pleading regime. Second, using institutional facts at the pleading stage grounds the vague term “judicial experience and common sense” in institutional competence, and thus has the power to assuage fears about broad judicial discretion at pleading.

1. *Solving the Information Asymmetry Problem*

Many scholars have focused on the idea that *Twombly* and *Iqbal* locked plaintiffs into a Catch-22: To survive a motion to dismiss, plaintiffs essentially need to obtain information only available via discovery; however, those plaintiffs cannot begin discovery without surviving a motion to dismiss.¹⁶² Colin Reardon has pointed out that with increased volume of public information available to plaintiffs, there are significantly fewer cases where informal investigation will not yield enough information to state a plausible claim, thus decreasing the applicability of this so-called information asymmetry criticism.¹⁶³ However, Reardon notes that while this proliferation of public information is likely to be helpful for plaintiffs in, for example, environmental, products liability, securities, and some civil rights contexts, others will be left behind, particularly those bringing claims “concerning behavior occurring in private or . . . involving the defendant’s mental state,” like antitrust claims in lightly regulated industries or employment discrimination claims.¹⁶⁴

A court’s reliance on institutional facts is a recognition that the burden of the pleading standard does not have to fall entirely on the plaintiff; rather, the plausibility standard can be satisfied by some combination of facts available to the plaintiff and a comparable finding by a competent entity. As described in Part II, plaintiffs in certain antitrust actions were able to state plausible Sherman Act claims by pleading the objective facts available to them (such as parallel behavior) and by pointing to parallel investigations (and indicia of liability) by competent enforcement agencies. Similarly, plaintiffs alleging violations of the FDCA were able to convince district courts that the letters they received were plausibly misleading by pointing to

¹⁶² See Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 68 (2010) (“[T]he plaintiff is trapped in a Catch-22: she may have a meritorious claim, but, because critical facts are not obtainable through informal means, she cannot plead her claims with sufficient factual detail to survive a motion to dismiss under the New Pleading standard of *Twombly* and *Iqbal*.”); see also Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1352 (2010); Miller, *supra* note 41, at 42–43. For an overview and critique of the so-called “information asymmetry” criticism, see Reardon, *supra* note 12.

¹⁶³ Reardon, *supra* note 12, at 2183–203.

¹⁶⁴ *Id.* at 2203–04.

guidance and research from the FTC and CFPB. Likewise, one could imagine a plaintiff plausibly alleging an ADA violation by showing that a hotel's website did not conform with DOJ guidelines on accessible websites.

A more robust doctrine of institutional facts could be particularly helpful for plaintiffs whose pleadings tend to rely on facts that do not raise what Professor Spencer would call "a presumption of impropriety," such as plaintiffs bringing employment discrimination claims.¹⁶⁵ For example, a plaintiff could demonstrate that his complaint is consistent with EEOC guidance describing indicia of Title VII liability and have the opportunity to develop his claim in discovery, rather than have his claim dismissed at pleading because evidence showing discriminatory intent or impact is in the hands of the defendant employer. Likewise, a plaintiff in a product liability action could plausibly allege that her injury stemmed from a manufacturing defect (instead of misuse) by pointing to a finding from the Consumer Product Safety Commission. While broader recognition of the value of institutional facts at pleading would not represent a panacea for all information asymmetry issues caused by the plausibility standard, it has the potential to keep the courthouse door open for plaintiffs with reasonable claims as recognized by competent institutional entities.

2. *Grounding "Judicial Experience and Common Sense" in Institutional Competence*

The plausibility standard has also been widely criticized for "the widely-shared impression that directing judges to apply their 'judicial experience and common sense' confers 'virtually unbridled discretion' on a district court judge to determine whether the allegations in a complaint 'ring true' to that particular judge."¹⁶⁶ Professor Arthur R. Miller has critiqued the concepts as "highly ambiguous and subjective" and "devoid of accepted—let alone universal—meaning."¹⁶⁷ The lower courts themselves have conceded that applying the plausibility standard has been difficult and that *Iqbal* left open the question of precisely how judicial experience and common sense should fit into the plausibility analysis.¹⁶⁸

A doctrine of institutional facts would ground ideas of judicial experience and common-sense in institutional competence rather than

¹⁶⁵ See Spencer, *supra* note 4, at 5.

¹⁶⁶ See Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 *YALE J.L. & HUMANS*. 1, 17 (2014) (footnotes omitted).

¹⁶⁷ Miller, *supra* note 41, at 26.

¹⁶⁸ See Ralph, *supra* note 166, at 11–12 (collecting cases).

in a particular judge's intuition about the merits of a claim. In determining whether a plaintiff has nudged her claim across the line from conceivable to plausible, institutional facts help a court determine, wherever the line is, if the plaintiff has crossed it. Determining whether an antitrust conspiracy exists or whether a specific debt-collection letter is misleading is a difficult task without a full record and evidentiary development. However, relying on a finding by an authoritative institution represents a principled way to make such a determination.

Reliance on the findings of an authoritative institution allows a district court both to take the plaintiff at her word with regard to the facts and also screen for whether the complaint shows a plausible entitlement to relief without relying on the opinions and experiences of a single district judge. Indeed, Professor Noll argues that *Iqbal* commands that district judges ground their judicial experience and common sense in "judgmental facts."¹⁶⁹ While judgmental facts are broader than what I conceptualize as institutional facts in this Note, Professor Noll noted that reliance on judgmental facts should temper fears that *Iqbal* will result in arbitrary or overly subjective decision-making by district judges.¹⁷⁰

CONCLUSION

This Note points out an emerging doctrine of "institutional facts" in the lower courts, under which a court will consider findings by a competent entity in order to determine whether a plaintiff has pleaded a plausible claim under *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*. By analyzing groups of cases in different areas of substantive law, this Note illustrates how this doctrine is currently playing out in the district courts. Finally, this Note articulates guiding principles for the development of this doctrine such that it remains useful to courts and litigants without flooding the district courts with thinly-pleaded claims unlikely to succeed on the merits.

¹⁶⁹ See Noll, *supra* note 57, at 139–40.

¹⁷⁰ See *id.* at 140.