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Pleading a Loss Cause: Resolving the Pleading Standard for the Element of Loss Causation in a Private Securities Fraud Claim and a Plaintiff's Heavy Burden Pleading it Under IQBAL

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Pleading a Loss Cause: Resolving the Pleading Standard for the Element of
Loss Causation in a Private Securities Fraud Claim and a Plaintiff's Heavy
Burden Pleading it Under IQBAL

PLEADING A LOSS CAUSE:
RESOLVING THE PLEADING STANDARD
FOR THE ELEMENT OF LOSS CAUSATION IN
A PRIVATE SECURITIES FRAUD CLAIM AND
A PLAINTIFF’S HEAVY BURDEN PLEADING
IT UNDER *IQBAL*

JASON N. HAYCOCK*

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* Articles Editor, *American University Law Review*, Volume 60; J.D. Candidate, May 2011, American University, Washington College of Law; B.A., Political Science, 2008, *University of California, Davis*. Foremost, I would like to thank my family and friends, whose love and encouragement inspires my every word and without whom I would surely be a lesser person—I love you all, and I thank you for your continued support. Next, I would like to thank Professor John (Bernie) Corr who encouraged me that I just might have an argument, and my editor, Lisa Kohl, who helped walk me through this process. I would also like to thank the authors cited in this Comment for providing some of the insight that I drew upon. Finally, I would like to thank Bethany Dickman, Kara Karlson, and Ian Spear, who contributed so much of their time, patience, and intellect; and thank you to the entire staff of the *American University Law Review* whose effort and dedication made this Comment better than I could have made it on my own.

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INTRODUCTION

The global community just experienced “the second-worst financial crisis in the history of the world,” and the worst economic collapse in seventy years.¹ Individuals lost homes, jobs, life savings, retirement funds, children’s college tuition and more. Not all of these losses were necessary, and victims of various acts of fraud stemming from the financial crisis are looking for someone to make them whole.²

One of the most-discussed causes of the financial crisis was the effect of mortgage-lending practices on the securities market.³ The media has focused much attention on the failure of regulators to prevent “predatory lending” in the mortgage market and the victims that succumbed to those predatory practices, but the general regulatory failure has had more far-reaching consequences.⁴ The impact of the predatory lending was not confined to the mortgage markets. Many of its effects found its way into the securities markets in the form of mortgage-backed securities.⁵

Mortgage-backed securities are financial instruments that are underwritten by, and derive their value from, rights to payment streams on

1. See Paul Krugman, Op-Ed., *Financial Reform Endgame*, N.Y. TIMES, Mar. 1, 2010, at A27 (noting the severity of the financial crisis and suggesting options for financial reform and regulation).

2. See generally *Senate Judiciary Committee Hearing on Mortgage Fraud, Securities Fraud, and the Financial Meltdown: Prosecuting Those Responsible*, Hearing before the S. Comm. on the Judiciary, 111th Cong. (2009) [hereinafter *Fraud Hearings*] (statement of Sen. Edward Kaufman, S. Comm. on the Judiciary) (discussing the need to focus on the role of financial fraud and how it contributed to the financial crisis in order to hold accountable those who perpetrated the fraud and prevent future economic collapse).

3. See *id.* (arguing that the failure of companies to disclose the proper value of mortgage-backed assets and the possibility that companies made false or misleading statements regarding the value of those assets significantly contributed to the financial crisis).

4. See, e.g., Sewell Chan & Eric Dash, *Fed Reviews Find Errors in Oversight of Citigroup*, N.Y. TIMES, Apr. 8, 2010, at B1 (covering the congressional testimony of former Commodity Futures Trading Commission Chairwoman Brooksley Born, who criticized regulators and blamed them for the devastating economic consequences).

5. Mortgage-backed securities are not a critical part of this Comment, and understanding their intricacies is largely unimportant here. The impact of these financial instruments on the securities markets does, however, provide an illustration as to why private securities litigation is currently relevant, so a cursory understanding is helpful. Mortgage-backed securities are a type of debt obligation financial instrument that represent an interest in a mortgage payment stream. See *Mortgage-Backed Securities*, U.S. SECURITIES & EXCHANGE COMM’N, <http://www.sec.gov/answers/mortgagesecurities.htm> (last modified July 23, 2010). The right to individual payment streams received from housing mortgages are purchased by some entity (generally a bank), and then “bundled” or “pooled” into one large financial instrument and used as a form of collateral to create securitized interests in the collective payments streams (i.e. they are securitized into “mortgage-backed securities”). See *id.* The mortgage-backed securities are then sold as a form of capitalization and investment just as any other security. See *id.*

mortgages.⁶ These instruments can become “toxic” where the mortgages that underwrite the security are high-risk in that the mortgagors are at risk to default or otherwise disrupt the payment stream on the mortgage. The toxicity becomes problematic when the securities are held as assets on companies’ balance sheets where the value of these assets is either uncertain or misrepresented.⁷

Like any other security, companies regularly purchase and sell mortgage-backed securities as a form of investment, profit, and capitalization.⁸ However, because the value of these securities is ultimately tied to the mortgage payments that underwrite them, the potential for fraud arises if a company is not forthright about the underlying source of the security’s value.⁹ The recent high-profile indictment of the largest investment bank in the United States, Goldman Sachs, illustrates this point.¹⁰ The Securities and Exchange Commission (SEC) alleges that Goldman Sachs intentionally created a mortgage-backed financial instrument comprised of high-risk mortgages with the purpose of inducing private investors to purchase securities in this instrument while Goldman Sachs shorted the instrument to make money on the collapse of the housing market.¹¹ Under such an arrangement, investors lost money as the crisis unfolded and Goldman Sachs made money by betting that the instrument’s value would decline.¹²

Mortgage-backed securities are not the only origin of securities fraud, and they are not the focus of discussion here. They do, however, represent a considerable source of potential fraud given recent economic events, and they are relevant to this Comment only to the extent that they illustrate the

6. *Id.*

7. *See Fraud Hearings*, *supra* note 2 (statement of Robert Khuzami, Director, Division of Enforcement, United States Securities and Exchange Commission) (noting that some of the assets on the books of public companies were underwritten by mortgages).

8. *Id.*

9. *See id.* (reporting the possible failure of companies to disclose the proper value of mortgage-backed assets and the possibility that companies made false or misleading statements regarding the value of those assets).

10. *See* Complaint at 1, SEC v. Goldman Sachs & Co., No. 10-CV-3229 (S.D.N.Y. Apr. 16, 2010) (charging Goldman Sachs with securities fraud in connection with activity in the mortgage-backed securities market).

11. *See* Louise Story & Gretchen Morgenson, *S.E.C. Accuses Goldman of Fraud in Housing Deal*, N.Y. TIMES, Apr. 17, 2010, at A1 (explaining the SEC’s indictment of Goldman Sachs and detailing the nature of the alleged securities fraud scheme).

12. *See id.* (reporting that the focus of the SEC’s case is an investment vehicle, Abacus 2007-AC1, created by Goldman Sachs so the bank and some of its clients could bet against the housing market). As a note, since the writing of this Comment, Goldman Sachs has settled its case with the SEC for 550 million dollars. *See* Sewell Chan & Louise Story, *Goldman Pays \$550 Million to Settle Fraud Case*, N.Y. TIMES, Jul. 16, 2010, at A1.

immediate saliency of private securities litigation.¹³ Indeed, in addition to the indictment of Goldman Sachs, the SEC has started to bring a number of actions specifically implicating mortgage-backed securities as a source of securities fraud on the investing public.¹⁴

While the SEC intervenes to protect investors in a general sense by correcting market violations, it does not facilitate individual monetary recovery.¹⁵ Individual investors who sustain financial losses resulting from securities fraud must bring claims in their individual, private capacities.¹⁶ The road to financial recovery begins with properly pleading the elements of the underlying securities fraud claim. This Comment will focus on the pleading standard for one of those elements: the element of “loss causation.”¹⁷ Loss causation is a statutorily-created element of a private securities fraud claim, and it represents the causal connection between the defendant’s fraudulent act and the plaintiff’s economic injury.¹⁸

In 1995, Congress passed the Private Securities Litigation Reform Act (the PSLRA), a statutory scheme that heightened the pleading standard for certain elements of a private securities fraud claim to require “particularity”

13. See *Fraud Hearings*, *supra* note 2 (statement of Robert Khuzami, Director, Division of Enforcement, United States Securities and Exchange Commission) (noting that “a central issue” of recent SEC enforcement cases is whether investors received accurate disclosures concerning the deteriorating business conditions, increased risks, and downward pressure on asset values).

14. See, e.g., Complaint at 1–2, SEC v. Morrice, No. SACV09-01426 (C.D. Cal. Dec. 7, 2009) (alleging that the officers of New Century Financial, Corp., one of the largest subprime mortgage lenders in the United States prior to the financial crisis, made material false and misleading statements regarding the true financial health of the company); Complaint at 3–4, SEC v. Mozilo, No. CV 09-03994 (C.D. Cal. June 4, 2009) (charging that officers of Countrywide Financial deliberately misled investors about the significant credit risks the company was taking in its efforts to expand its market share); Complaint at 2–3, SEC v. Strauss, No. 09-CIV-4150 (S.D.N.Y. Apr. 28, 2009) (accusing the officers of American Mortgage Investment Corp. of converting loan losses in the tens of millions of dollars into fictional profits).

15. See generally Securities Exchange Act of 1934 §§ 2, 4, 15 U.S.C. §§ 78b, 78d (2006) (creating the Securities and Exchange Commission for the broad and collective purposes of protecting the “public interest” and “insur[ing] the maintenance of fair and honest markets . . .” (emphasis added)).

16. See discussion *infra* Part I.A.1 (explaining that the most common form of a securities fraud claim is a Rule 10b-5 claim under § 10(b) of the Exchange Act). This Comment will assume that theory of action when discussing a “securities fraud claim” generically.

17. See discussion *infra* Part I.A.1 (discussing the element of “loss causation”).

18. See Securities Exchange Act of 1934 § 21D(b)(4) (requiring a plaintiff to plead the element of loss causation in a private securities claim); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (explaining that Congress intended to permit private securities actions only where plaintiffs adequately show the element of causation); see also *infra* Part I.A.1 (discussing securities fraud claims generally and the element of loss causation specifically).

at the pleadings stage.¹⁹ Additionally, the PSLRA formally created the element of loss causation as a requirement of a private securities fraud claim.²⁰ The PSLRA did not, however, specify the pleading standard under which loss causation would be pled.²¹ Absent statutory guidance, the Federal Rules of Civil Procedure govern the proper pleading standard.²² Due to the fact that loss causation is an element of a fraud claim, the federal circuits have split regarding whether it should be pled under the fraud pleading provisions of Federal Rule of Civil Procedure 9(b) (Rule 9(b)) or the general pleading provisions of Federal Rule of Civil Procedure 8(a)(2) (Rule 8(a)(2)).²³ This split creates two issues for resolution.

The first issue is the one just mentioned—it is still unclear which pleading standard applies to the element of loss causation.²⁴ Thus, since the PSLRA does not provide the proper pleading standard for the element of loss causation, the first issue requires resolution of which pleading standard governs pleading loss causation—the general pleading requirements under Rule 8(a)(2), or the particularized requirements under Rule 9(b) governing fraud claims.

As a result of this Comment's conclusion on the first issue that Rule 8(a)(2) should govern private securities fraud claims, the second issue arises due to the Supreme Court's reinterpretation of that rule, requiring a claimant to state a "plausible" claim to relief at the pleading stage. The plausibility standard announced in *Bell Atlantic Corp. v. Twombly*²⁵ and refined in *Ashcroft v. Iqbal*,²⁶ looks similar to the particularity requirement under Rule 9(b) despite the Court's insistence that plausibility pleading is

19. See Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 101(b), 109 Stat. 737 (1996) (codified as amended in scattered sections of 15 U.S.C.) (providing heightened pleading standards for certain elements of a private securities fraud claim).

20. *Id.* § 105.

21. *Id.*

22. See FED. R. CIV. P. 8 (outlining the requirements for properly pleading a complaint); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE 87 (3d ed. 2004) ("Rule 8 is the keystone of the system of pleading embodied in the Federal Rules of Civil Procedure.").

23. Compare *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 255 (5th Cir. 2009) (adopting and applying *Dura* and *Twombly*'s reading of Rule 8(a)(2) to the element of loss causation), with *In re Mut. Funds Inv. Litig.*, 566 F.3d 111, 120 (4th Cir. 2009) (clarifying that in the Fourth Circuit, Rule 9(b) controls all averments of fraud, and that Rule 9(b) is the proper pleading standard for pleading loss causation).

24. See Private Securities Litigation Reform Act, Pub. L. 104-67, § 101(b), 109 Stat. 737 (1996) (codified as amended in scattered sections of 15 U.S.C.) (providing heightened pleading standards for certain elements of a private securities fraud claim but not for the element of loss causation).

25. 550 U.S. 544, 556 (2007) (stating that a complaint must show certain factual matter to give rise to the plausibility of entitlement to relief).

26. 129 S. Ct. 1937, 1949–53 (2009) (outlining a formal two-prong approach to plausibility pleading and extending it to all civil claims).

not a heightened standard.²⁷ As a matter of logic, there may be substantial interplay between what is particular and what is plausible.²⁸ Further, pleading plausibility may actually be a more difficult standard to meet than pleading factual particularity in certain complex pleading contexts such as a securities fraud claim.²⁹ This is due to the fact that defining the “cause” of a given event often inherently requires a certain level of particularity, and this requirement is augmented by the fact-sensitive nature of a private securities fraud claim.³⁰ Adding a requirement of plausibility to this factually sensitive context, a plaintiff must not only identify which was the cause of his injury through pleading its factual particularities, a plaintiff must also identify a theory of causation that is plausible.³¹ In effect, meeting a standard of plausibility will entail pleading factual particularity.³² Accordingly, the second issue that this Comment will address is the operation of plausibility pleading in factually complex contexts such as private securities litigation.

A brief explanation will help illuminate this second issue. The basic scheme of loss causation requires a plaintiff to identify the causal chain between the defendant’s act of fraud (a material misstatement or omission) and the plaintiff’s economic injury, which is usually a financial loss in the form of a decline in share price.³³ The difficulty in identifying the correct causal chain derives from the fact that there are a myriad of potential causes for a decline in a share price.³⁴ Even if the defendant perpetrated a fraud, it does not necessarily follow that the fraudulent act, and not some other act (e.g. poor company performance, natural disaster, unfavorable economic conditions generally) caused the decline in share price and the

27. See A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 473–75 (2008) (suggesting that it is difficult to distinguish any meaningful difference between “particularity” under Rule 9(b) and “plausibility” under Rule 8(a)(2)).

28. *Id.*

29. *Cf. id.* at 475–76 (stating that plausibility under *Twombly* “is the very definition of particularized pleading”). While it does not necessarily follow from this statement that plausibility under *Iqbal* is more scrutinizing than particularity pleading under Rule 9(b), it does at least support such a proposition in certain contexts and this proposition will be further supported later in the text. See discussion *infra* Part II.B.

30. See Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 821 (2009) (explaining that a loss causation analysis is particularly difficult in the securities fraud context because of the many factors that can affect the value of a securities investment).

31. See *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 343 (2005) (noting that when a purchaser resells shares at a lower price after an alleged misrepresentation by an issuer, the lower price is not necessarily the result of the alleged misrepresentation, but often of changed economic conditions, and “[o]ther things being equal, the longer the time between purchase and sale, . . . the more likely that other factors caused the loss.”).

32. See *infra* Part II.B.

33. See *infra* text accompanying notes 51–54.

34. Fisch, *supra* note 30, at 821.

plaintiff's subsequent economic injury.³⁵ Therefore, the plaintiff must not only sufficiently identify a particular causal chain of events, but that causal chain must also be a plausible explanation for the plaintiff's loss.

In this situation, it may be that the "general," plausibility pleading requirements under Rule 8(a)(2) would actually be stricter than a simple particularity requirement under Rule 9(b).³⁶ This appears likely in complex claims such as securities fraud where there tends to be a significant amount of factual information surrounding a claim.³⁷ It is therefore important to understand not only which rule governs the pleading standard for loss causation, but also the practical effect of the governing rule on a plaintiff's ability to advance a successful claim.

Part I will provide the background information regarding the pleading standards under Rule 8(a)(2) and Rule 9(b), pleading within the context of a securities fraud claim specifically, and the various circuit courts' application of the pleading standards to the specific element of loss causation. Part II will analyze and address the proper pleading standard for loss causation as well as the practical effect of that pleading standard on properly pleading loss causation. This Comment will conclude by taking notice of the broader policy implications of these arguments within the general private securities litigation context.

35. See *Dura Pharm., Inc.*, 544 U.S. at 343–46 (holding that a complaint in a securities fraud action must prove more than an inflated purchase price on the date of purchase to establish that defendant's misrepresentation proximately caused economic loss); *Law v. Medco Research, Inc.*, 113 F.3d 781, 786–87 (7th Cir. 1997) (dismissing a securities fraud claim for failure to show loss causation after finding that defendant's share price moved in tandem with competitors' share price, so it was sufficient to conclude that market forces created plaintiff's loss).

36. There are some interesting implications following this assertion that touch on broader issues concerning the relationship between the plausibility pleading standard under Rule 8(a)(2) and the particularity pleading standard under Rule 9(b). Plausibility can be a more difficult standard to meet than particularity in certain contexts. As discussed in Part II.B, something can be sufficiently particular without crossing the line into the realm of plausibility. It is possible to imagine that a plaintiff could bring a claim that is highly particular and detailed in its factual recitation. Regardless of how particular that plaintiff's claim is (even if *possible*), however, pleading factual particularity does not ensure that the claim will be deemed *plausible*. This concern has implications broader than the scope of this Comment will allow, but it is important to examine the plausibility-particularity interplay in all complex contexts where, as here, Rule 8(a)(2) and Rule 9(b) run up against each other.

37. See THOMAS LEE HAZEN, *LAW OF SECURITIES REGULATION* § 12:11[3], at 167 (6th ed. 2010) (explaining that pleading loss causation can be a highly factual matter and noting that "failure to *specifically* allege facts showing loss causation will result in dismissal") (emphasis added); Fisch, *supra* note 30, at 821 (noting that stock prices can be impacted by many nonfraudulent events, which the court must ascertain); see also Patricia W. Hatamyar, *The Tao of Pleadings: Do Twombly and Iqbal Matter Empirically?*, 59 A.U. L. REV. 553, 605–09 (2010) (providing empirical data supporting the proposition that more complex claims are more likely to be dismissed under an *Iqbal* analysis than under *Twombly* or *Conley*).

I. BACKGROUND

There are essentially three pleadings standards at issue in the private securities fraud context: (1) the heightened pleading standards under the Private Securities Litigation Reform Act; (2) the general pleading standards under Rule 8(a)(2), and; (3) the particularity pleading standards under Rule 9(b). Part A will address each of these standards as well as begin by introducing a more comprehensive definition of the element of loss causation. Part B will survey the case law to examine how the Supreme Court and the federal circuits have handled these various pleading standards with respect to the element of loss causation.

A. *An Introduction to the Element of Loss Causation and the General Standards of Pleading*

The three aforementioned pleading standards converge in the context of pleading loss causation. Thus, to persuasively argue which standard applies and to understand the practical effects flowing therefrom, each pleading standard must be parsed and explored, beginning with the standards under the PSLRA and moving to Rule 8(a)(2) and Rule 9(b), respectively. However, to provide context, it is first necessary to understand a private securities fraud claim broadly and the element of loss causation specifically.

1. *A private securities fraud claim and the element of loss causation*

Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act)³⁸ prohibits fraud in connection with the purchase or sale of any security.³⁹ The statutory language itself, however, does not create a cause of action.⁴⁰ Rather, it sets up the general prohibition on securities fraud and then delegates the authority to the Securities and Exchange Commission to promulgate rules of enforcement.⁴¹

The SEC subsequently promulgated Rule 10b-5 to give practical effect to section 10(b) of the Exchange Act. Rule 10b-5 essentially prohibits making any untrue statement of a material fact, or the omission thereof, and the engagement in any fraudulent act in connection with the purchase or sale of any security.⁴² Rule 10b-5's language is broad and extends to

38. Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j (2006).

39. *Id.*

40. *Id.*

41. *See id.* (proscribing activity “in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors”).

42. 17 C.F.R. § 240.10b-5 (2004) (interpreting § 10(b) of the Exchange Act to set up an enforceable rule of liability for a violation thereof).

nearly every statement that a company makes concerning its operations⁴³ subject to certain designated exceptions, or “safe-harbors.”⁴⁴

Rule 10b-5 originally created a cause of action only for the SEC.⁴⁵ However, the courts have since interpreted the rule as implying a private right of action as well.⁴⁶ In bringing a private claim, however, the courts also require that a complaint include the common law elements of fraud in addition to the two statutory elements created under the PSLRA: economic loss and loss causation.⁴⁷

Loss causation is defined in section 21D(b)(4) of the Exchange Act and provides that for any private action, a plaintiff must prove that the act complained of caused the loss for which the plaintiff seeks to recover damages.⁴⁸ Analytically, loss causation is often best understood as analogous to the tort element of “proximate cause.”⁴⁹ At its simplest, it is the causal link between the defendant’s fraudulent act and the plaintiff’s economic injury.⁵⁰ Like proximate cause, loss causation adopts the “legal cause” (as opposed to the “but for” cause) approach to attaching liability.⁵¹ That is, a plaintiff must show that his injury is directly attributable to the defendant’s fraudulent act, but not that the defendant’s act was the “but for” cause of plaintiff’s injury.⁵² It should be noted, however, that loss causation generally receives greater scrutiny in assessing the viability of

43. *Id.* (“[I]n connection with the purchase or sale of any security”).

44. “Safe harbor” refers to exceptions created by statute or rule that allow certain statements to be protected against liability under Rule 10b-5. *See, e.g.*, Securities Exchange Act of 1934, § 21E (providing a safe harbor for “forward-looking” statements that attempt to forecast future business conditions).

45. *See* 17 C.F.R. § 240.10b-5 (2004) (making it unlawful to defraud).

46. The Supreme Court has never squarely held that a private right of action lies for a Rule 10b-5 claim. There is, however, well-recognized support for that proposition. *See* *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983) (observing that for forty years, the lower courts have recognized implied private rights of action under section 10(b) of the Securities Exchange Act of 1934 and its counterpart, Rule 10b-5, and stating that “[t]he existence of this implied remedy is simply beyond peradventure”).

47. *See, e.g.*, *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (outlining the requirements for a securities fraud claim as: (1) a material misrepresentation, or omission, of fact; (2) scienter, i.e., a wrongful state of mind; (3) in connection with the purchase or sale of a security; (4) reliance (sometimes referred to as “transaction causation”); (5) economic loss; and (6) loss causation, i.e. a causal connection between the material misrepresentation and the loss).

48. *See* Securities Exchange Act of 1934 § 21D(b)(4) (defining the element of “loss causation” and requiring a private plaintiff to plead it in his claim of securities fraud).

49. *See, e.g.*, *McAdams v. McCord*, 584 F.3d 1111, 1114 (8th Cir. 2009) (explaining that, similar to tort law, a securities fraud plaintiff “must show that the loss was foreseeable and that the loss was caused by the materialization of the concealed risk”).

50. *Id.*

51. *See* HAZEN, *supra* note 37, § 12:11[1], at 152 (explaining that causation in securities law involves a similar analysis as causation under the common law for tort and contracts cases).

52. *See id.* § 12:11[3], at 159.

securities fraud claims than does the element of proximate cause in general fraud claims.⁵³ Additionally, although the focus of this Comment is on the procedural aspects of loss causation, it is helpful to understand that as a substantive matter, loss causation is most commonly shown where there is a price movement in shares that sufficiently corresponds to the fraudulent misstatement or omission.⁵⁴

2. *Pleading requirements under the Private Securities Litigation Reform Act*

In 1995, Congress passed the PSLRA to raise the pleading standards in private securities fraud litigation in an effort to curb abusive litigation.⁵⁵ The heightened pleading standards resemble the particularity standards of Rule 9(b).⁵⁶ Section 21D(b)(1) of the Exchange Act essentially requires that for any private action⁵⁷ alleging a misstatement or omission of material fact, the plaintiff must plead with particularity.⁵⁸

The revised pleading standards under the PSLRA do not, however, discuss their applicability to the other elements of a 10b-5 claim beyond their applicability to the element of a misstatement or omission of material fact.⁵⁹ With respect to the element of loss causation, section 21D(b)(4) of the Exchange Act states only that a plaintiff must prove that the act or omission was the cause of the loss; it does not state the pleading standard that the plaintiff must meet in attempting to show that causal connection at the pleading stage.⁶⁰ Consistent with the Exchange Act's lack of specific application, the Supreme Court has given strong indication (and the federal

53. *See id.* (contrasting the level of scrutiny in the analysis of loss causation and proximate causation and noting that loss causation in securities law imposes stricter requirements than proximate causation would in general fraud claims).

54. *Id.* § 12:11[1], at 150–52.

55. *See generally* H.R. REP. NO. 104-369, at 730 (1995) (Conf. Rep.) *reprinted in* 1995 U.S.C.C.A.N. 679, 730 (citing evidence of abusive practices in securities litigation, including the routine filing of lawsuits whenever there is a significant change in stock price, “with only faint hope that discovery might lead to some plausible cause of action”).

56. *Compare* FED. R. CIV. P. 9(b) (“[A] party must state with particularity the circumstances constituting fraud or mistake.”), *with* Securities Exchange Act of 1934 § 21D(b)(1), 15 U.S.C. 78u-4 (2006) (“[T]he complaint shall specify each statement alleged to have been misleading . . . and, if [the] allegation . . . is made on information and belief, the complaint shall state with *particularity* all facts on which that belief is formed.”) (emphasis added).

57. Thus, the requirements do not apply to the Securities and Exchange Commission.

58. *See* Securities Exchange Act of 1934 § 21D(b)(1) (outlining heightened pleading standards).

59. *See id.* (applying the particularity standard only to statements alleged to be misleading).

60. *See id.* § 21D(b)(4) (stating only that the plaintiff has “the burden of proving” the requisite causal connection, but omitting any definition of what that burden of proof shall require at the pleading stage).

circuit courts have agreed) that the heightened pleading standards of the PSLRA do not apply to the element of loss causation.⁶¹ Thus, if the heightened pleading standards of the PSLRA do not apply to loss causation (due to the statute's silence and the courts' recognition of that silence),⁶² then a reasonable question arises regarding which pleading standard does apply—the traditional pleading standard under Rule 8(a)(2), or the heightened particularity standard under Rule 9(b), which was specifically designed to apply to claims alleging fraud.⁶³

3. Rule 8(a)(2)

Rule 8(a)(2) sets out the fundamental pleading standard for civil litigation and governs all claims in a civil suit.⁶⁴ It requires that a claim contain “a short and plain statement . . . showing that the pleader is entitled to relief.”⁶⁵ For the past sixty years, the “short and plain statement” recital has been commonly referred to as “notice pleading.”⁶⁶

The development of notice pleading was a cognizant attempt to relax pleading standards and to move away from the confusing Code pleadings scheme of the nineteenth century.⁶⁷ Notice pleading was intended to be liberal in allowing claims to advance procedurally so that they would receive an evaluation on their merits.⁶⁸ The adequacy of the pleading was

61. See *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (deciding the case on the assumption that Rule 8(a)(2) applied, and not resorting to the PSLRA for guidance on the pleading standard).

62. See, e.g., *In re Mut. Funds Inv. Litig.*, 566 F.3d 111, 119–20 (4th Cir. 2009) (“Because Congress only addressed misrepresentations[,] [fraud] and scienter in § 78u-4b [of the PSLRA], the other elements of a securities fraud claim are analyzed under the pleading standards of the Federal Rules of Civil Procedure. . . . [T]he PSLRA’s heightened pleading requirements do not govern our analysis of . . . loss causation.”).

63. FED. R. CIV. P. 9(b).

64. See WRIGHT & MILLER, *supra* note 22, § 1202, at 87 (3d ed. 2004) (noting that Rule 8 is the “keystone” of the Rules-based pleading system).

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

66. See *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (“[A]ll the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”).

67. See Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 862–66 (2010) (discussing the Code pleading system as an evolution from the belief in the ability to concretely distinguish a statement of fact from a conclusion of law and as a reaction to the perceived “hypertechnicality and . . . irrationality of the common law forms of action and common law pleading[.]” explaining how the drafters of the Federal Rules of Civil Procedure were reacting, in turn, to the legal realist movement that critiqued the ability to meaningfully distinguish between a statement of fact and a legal conclusion—in essence, the distinction “depends on the degree of factual specificity”). The author also argues that the “pure notice pleading system has little need for a distinction between legal conclusions and factual allegations [because] . . . [t]he question for notice pleading is whether the complaint, taken as a whole, gives fair notice of what the dispute is about.” *Id.*

68. *Id.* at 864–65.

analyzed under the “no set of facts” standard, where courts would appraise the sufficiency of a complaint on whether “it appear[ed] beyond a reasonable doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.”⁶⁹ To determine whether no set of facts existed, the courts took a holistic approach, evaluating the claim in its factual entirety.⁷⁰

The traditional notice pleading under the no set of facts⁷¹ standard, however, is no longer good law.⁷² In 2007, the Supreme Court clarified that a complaint’s sufficiency had always entailed the notion that the claim to relief must be plausible.⁷³ In *Twombly* the Supreme Court abrogated its no set of facts standard⁷⁴ derived from *Conley v. Gibson*⁷⁵ and instead required that a plaintiff present enough factual matter to lead to a plausible conclusion of wrongdoing.⁷⁶ The Court was careful to clarify that requiring “plausible grounds to infer [illegal conduct]” was not the same as “impos[ing] a probability requirement at the pleading stage.”⁷⁷

Though the Court stressed that it did not impose a probability standard at the pleadings stage it nonetheless emphasized that *Conley* was never intended to be read so strictly as to positively require a complaint to move forward *unless* it was *impossible* to show *some* set of facts on which the plaintiff could prevail.⁷⁸ Rather, “a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to

69. See *Conley*, 355 U.S. at 45–46 (emphasis added) (outlining the “no set of facts” standard).

70. See Bone, *supra* note 67, at 865–66 (explaining that the purpose of notice pleading is very simply to provide notice, and in determining whether the notice is sufficient, the *entire* complaint must be taken under consideration).

71. See *Conley*, 355 U.S. at 45–46 (outlining the traditionally liberal pleading standard 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”).

72. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1944 (2009) (“[a]cknowledging that *Twombly* retired the *Conley* no-set-of-facts test . . .”).

73. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561–62 (2007) (reading the factual requirement in *Conley*’s “no set of facts” standard to have implicitly required plausibility when considered within the context of the complaint as a whole); see also WRIGHT & MILLER, *supra* note 22, § 1202, at 94 (acknowledging that the Rules Advisory Committee intended the rule to “contemplate the statement of circumstances, occurrences, and events in support of the claim presented”).

74. See *Twombly*, 550 U.S. at 563 (stating that because the phrase “no set of facts” has been so misunderstood—to the point that the plausibility concept that the Court now claims is inherent in its reading is most often left unapplied—the term has “earned its retirement” and is “best forgotten as . . . incomplete”).

75. 355 U.S. 41 (1957).

76. *Twombly*, 550 U.S. at 557.

77. *Id.* at 556.

78. *Id.* at 561–62 (referencing courts and commentators who have resisted a literal reading of *Conley*’s no-set-of-facts language).

sustain recovery under some viable legal theory.”⁷⁹ That is, the complaint taken as a whole requires some element of plausibility, and plausibility is sufficient where the complaint alleges factual matter that allows for “direct or inferential allegations respecting all the material elements [of the claim]. . . .”⁸⁰

In *Iqbal*, the Court explicitly extended the *Twombly* plausibility pleading standard to all civil litigation and modified the formal analysis in determining sufficient plausibility.⁸¹ The Court formalized a two-prong approach that it claimed applied the underlying jurisprudential principles of the *Twombly* decision.⁸² The first prong required the Court to separate factual allegations from legal conclusions.⁸³ The Court then dismissed those allegations deemed to be “conclusory” on the basis that bare legal conclusions are not entitled to the privilege that all well-pled facts be taken as true at the motion to dismiss stage.⁸⁴ The second prong then applied the plausibility test to the remaining allegations.⁸⁵ The formal two-prong approach is the current standard for evaluating the plausibility of a complaint under Rule 8(a)(2).

4. Rule 9(b)

Whereas Rule 8(a)(2) applies to civil claims generally, Rule 9(b) is the traditional standard for pleading claims that assert a commission of fraud.⁸⁶ It requires a claimant to state with particularity the circumstances that constitute that act of fraud.⁸⁷ Because claims of fraud entail a certain stigmatizing effect upon the defendant,⁸⁸ the purpose of requiring

79. *Id.* at 562 (quoting *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989)).

80. *Id.*; see Bone, *supra* note 67, at 859 (explaining that *Twombly* interprets the complaint as a whole when determining which statements are simply conclusory and do not contribute anything factually new to the complaint). *But see* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1960–61 (2009) (Souter, J., dissenting) (arguing that the Court erred in analyzing the complaint in isolated parts because *Iqbal*’s allegations are sufficiently specific when considering the complaint as a whole).

81. 129 S. Ct. at 1953 (stating that *Twombly* is applicable to “all civil actions”).

82. *Id.* at 1949–50.

83. *Id.*

84. *Id.* (explaining that while the court must “take all of the factual allegations in the complaint as true”, it is “not bound to accept as true a legal conclusion couched as a factual allegation” (internal quotation marks omitted)).

85. *Id.* at 1950.

86. See FED. R. CIV. P. 9(b) (stating that for “fraud or mistake” a plaintiff must plead with “particularity”).

87. However, the particularity requirement does not apply to elements consisting of a person’s state of mind in a fraud claim; the second sentence of Rule 9(b) allows such elements to be alleged generally. *Id.*

88. See *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1104 (9th Cir. 2003) (describing the purpose of Rule 9(b) as protecting a defendant against reputational harm consequent of claims of fraudulent conduct); see also *Kearns v. Ford Motor Co.*,

particularity in a fraud claim is to ensure responsibility⁸⁹ and accuracy in the claimant's complaint.⁹⁰ The text of Rule 9(b) does not explicitly state what particularity requires, but it has generally been interpreted to include the "who, what, when, where, and how" of the alleged fraud.⁹¹ The exact kind of facts required for a claim to be sufficiently particular will tend to vary with the context of the underlying claim.⁹²

While it is clear that Rule 9(b) applies to all claims that "alleg[e] fraud or mistake[,]"⁹³ what is not as clear is the scope of the "circumstances [that] constitut[e] [the] fraud or mistake."⁹⁴ "Circumstances" becomes a difficult term to define. While the term generally includes the "who, what, when, where, and how" discussed above,⁹⁵ the term is ambiguous enough to potentially sweep up any and all elements of a claim of fraud⁹⁶—including, theoretically, the element of loss causation in a securities fraud claim.⁹⁷

567 F.3d 1120, 1125 (9th Cir. 2009) (listing the three purposes of Rule 9(b) as: (1) providing defendants with adequate notice while at the same time preventing plaintiffs from filing complaints as a pretext for discovery of unknown wrongs; (2) protecting defendants from reputational harm; (3) avoiding the social and economic costs of litigation absent factual basis for a claim).

89. See WRIGHT & MILLER, *supra* note 22, § 1296, at 38–39 (noting that courts are frequently concerned with irresponsible "fishing expeditions" that seek to use litigation and the prospect of discovery solely as an attempt to learn "whether unknown wrongs actually have occurred," and that forcing a plaintiff to be more particular helps to ensure that plaintiffs are more responsible in bringing their claims and allows defendants to have accurate information upon which to build an adequate defense).

90. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007) (commenting on the utility of Rule 9(b)'s particularity requirement in the context of certain subjects [such as fraud] because they otherwise risk "abusive litigation" under the general pleading standard of Rule 8(a)(2)); *Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 502, 507 (7th Cir. 2007) (citing *Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 627 (7th Cir. 1999)) (clarifying that the reason for the heightened pleading of "particularity" is to ensure that the claim of alleged fraud is "responsible and supported, rather than defamatory and extortionate" (internal citation omitted)); see also WRIGHT & MILLER, *supra* note 22, § 1296, at 31 (identifying the primary purpose of the heightened pleading requirements under Rule 9(b) as a desire to protect a defendant's "reputation and goodwill," and extensively detailing the case law across the circuits in support of this proposition.).

91. See, e.g., *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009) (stating that "particularity" means providing the essential elements found "in the first paragraph of any newspaper story").

92. See WRIGHT & MILLER, *supra* note 22, § 1296, at 53 (recognizing that the particularity requirement will have varying effect in different contexts and that in some situations "a motion to dismiss alleging noncompliance . . . is virtually *assured* in certain categories . . .") (emphasis added); cf. *Spencer*, *supra* note 27, at 441–47 (discussing that in the context of plausibility pleading under Rule 8(a)(2), facts sufficient to lead to a plausible claim will generally vary considerably with the context of the underlying claim itself).

93. FED. R. CIV. P. 9(b).

94. *Id.*

95. See, e.g., *Lusby*, 570 F.3d at 853 (defining "particularity" as "the who, what, when, where, and how: the first paragraph of any newspaper story").

96. See WRIGHT & MILLER, *supra* note 22, § 1297, at 74 (suggesting that a "prudent" lawyer may wish to plead "all of the elements of fraud [with

Given the fact that a securities fraud claim is predicated on the commission of a fraud—an intentional misstatement or omission of material fact—there is a legitimate question as to whether Rule 9(b) should govern the pleading standard for all elements of a securities fraud claim not already covered by the PSLRA, such as the element of loss causation.⁹⁸ Moreover, Congress made explicit its desire to heighten pleading standards in the private securities fraud context in order to curb frivolous and abusive litigation.⁹⁹ Thus, if Congress desired to heighten the pleading standards in private securities fraud litigation generally, requiring loss causation to be pled under Rule 9(b) would be consistent with that congressional intent and therefore may be the proper standard.¹⁰⁰

particularity] . . . whenever that is possible . . . [because] sometimes federal judges have gone beyond the limited text of Rule 9(b) and have required more particularity on a greater range of subjects”) (emphasis added).

97. Cf. *SEC v. U.S. Environmental, Inc.*, 82 F. Supp. 2d 237, 240 (S.D.N.Y. 2000) (addressing a market manipulation claim and asserting that “[t]o satisfy Rule 9(b) . . . [the] claim must specify what manipulative acts were performed, which defendants performed them, when the manipulative acts were performed, and what *effect* the scheme had on the market for the securities at issue”) (emphasis added). The added requirement that the plaintiff must show in his claim the *effect* of the scheme is suggestive of a sort of causal relationship—how some action affected or caused some detriment; this lends some support for the proposition that the element of loss causation could be swept up in Rule 9(b)’s particularity requirement. *But see, e.g., United States ex rel. Marlar v. BWXT Y-12, L.L.C.*, 525 F.3d 439, 444 (6th Cir. 2008) (restating the oft-used recitals of the minimum requirements for Rule 9(b) as essentially: time, place, and content; reliance; the fraudulent scheme itself; fraudulent intent; and injury resulting from the fraud). These familiar Rule 9(b) recitals mention the requirements of “fraudulent scheme” and “injury,” but they consistently fail to include the requirement of the causal connection between the two. *See, e.g., id.*

98. *See In re Mut. Funds Inv. Litig.*, 566 F.3d 111, 119–20 (4th Cir. 2009) (“Congress only addressed misrepresentations[,] [fraud] and scienter in [the PSLRA], the other elements of a securities fraud claim are analyzed under the pleading standards of the Federal Rules of Civil Procedure . . . the PSLRA’s heightened pleading requirements do not govern our analysis of . . . loss causation.”).

99. *See Private Securities Litigation Reform Act*, Pub. L. 104-67, § 101(b), 109 Stat. 737, 743–49 (1996) (codified as amended in scattered sections of 15 U.S.C.) (listing the heightened pleading standard requirements in a section titled “Reduction of Abusive Litigation”); WRIGHT & MILLER, *supra* note 22, § 1301.1, at 279 (detailing congressional concern that Rule 9(b) was not being properly applied to “frivolous” securities litigation and that more action was needed to curb abusive litigation).

100. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (stating in dicta that as a general matter, “[p]rior to the enactment of the PSLRA, the sufficiency of a complaint for securities fraud was governed *not* by Rule 8, but by the heightened pleading standards set forth in Rule 9(b).”) (emphasis added). *See generally* H.R. REP. NO. 104-369, at 31–37 (1995) (Conf. Rep.) *reprinted in* 1995 U.S.C.C.A.N. 730, 731, 736 (discussing throughout a desire to curb vexatious securities litigation chiefly aimed at inducing settlement).

*B. Judicial Application of Pleading Standards to the
Element of Loss Causation*

While the courts have been consistent in acknowledging that the pleading standards under the PSLRA do not apply to the element of loss causation,¹⁰¹ they have diverged on whether the proper standard should be Rule 8(a)(2) or Rule 9(b). To determine what the proper pleading standard should be, it is important to survey the courts' reasoning in support of each approach. The survey will begin with the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*¹⁰² where the Court assumed Rule 8(a)(2) as the pleading standard for the purpose of addressing the substantive requirements of loss causation. The survey will continue with an examination of the federal circuit courts that follow the Rule 8(a)(2) approach, and those courts that follow the Rule 9(b) approach.

1. The Supreme Court's implicit adoption of Rule 8(a)(2)

In *Dura*,¹⁰³ the Supreme Court addressed a Ninth Circuit decision holding that the purchase of an artificially inflated stock price, without more, was sufficient to establish the element of loss causation.¹⁰⁴ The Ninth Circuit reasoned that when a material misstatement or omission causes the price of a stock to be artificially inflated, the purchaser of that stock would necessarily suffer the economic loss at the time of purchase.¹⁰⁵ Therefore, because the material misstatement or omission caused the artificial price, that same material misstatement or omission legally caused the economic loss to the purchaser (the form of economic loss being the initial overpayment for the stock).¹⁰⁶

The Supreme Court rejected this approach¹⁰⁷ and ultimately found that an "'artificially inflated purchase price' is not itself a relevant economic loss."¹⁰⁸ The Court reasoned that the transaction involving the artificially inflated price did not guarantee that an injury or loss would occur; the

101. See, e.g., *In re Mut. Funds Inv. Litig.*, 566 F.3d at 120 (recognizing that Congress only addressed the pleading standards of the elements of misrepresentation, fraud, and scienter with the PSLRA; it did not address the element of loss causation, so it is governed by the Federal Rules of Civil Procedure).

102. 544 U.S. 336 (2005).

103. *Id.*

104. See *Broudo v. Dura Pharm., Inc.*, 339 F.3d 933, 938 (9th Cir. 2003) (holding that showing the purchase of an inflated stock price, absent showing the subsequent decline in stock price, is sufficient as a substantive showing of loss causation) rev'd 544 U.S. 336, remanded to 452 F.Supp. 2d 1005 (S.D. Cal. 2006).

105. *Id.*

106. See *Dura Pharm., Inc.*, 544 U.S. at 342–44 (restating the reasoning of the 9th Circuit's decision).

107. *Id.* at 338.

108. *Id.* at 347.

causal requirement (loss causation) was not *necessarily* satisfied because the purchase of the stock at the inflated price alone did not result in an injury in fact where it was not accompanied by some actual economic loss (through the sale of the stock).¹⁰⁹ The Court noted that when the purchaser finally sells the share, even at a lower price, the lower price might be the product of other factors and not necessarily the result of the material misstatements or omissions.¹¹⁰ Thus, the “purchase price will not itself constitute or proximately cause the relevant economic loss.”¹¹¹

While the Court’s determination of the substantive requirements of loss causation has implications for the procedural pleading requirements of loss causation, the Court’s loss causation analysis within the pleading context of Rule 8(a)(2) is the immediate concern. The Court explained that the “ordinary pleading rules [in Rule 8] are not meant to impose a great burden upon a plaintiff.”¹¹² The Court then cited *Conley* for the proposition that even though the claim may be a “‘short and plain statement’ . . . [it] must provide the defendant with ‘fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’”¹¹³ That is, the plaintiff in *Dura* failed to meet Rule 8(a)(2)’s pleading standard because he failed to provide “adequate grounds” for a right to relief.¹¹⁴ The Court went on to discuss that while there should not be too heavy of a burden on the plaintiff in showing loss causation,¹¹⁵ it must be balanced against the purpose of the securities statutes in curbing abusive litigation practices.¹¹⁶ While the Court did not directly hold that the element of loss causation would be evaluated under Rule 8(a)(2), by assuming the Rule 8(a)(2) pleading standard in its substantive analysis, the Court gave clear indication of a preference for that rule over Rule 9(b) in assessing the adequacy of pleading loss causation.¹¹⁷

109. *Id.* at 342–43.

110. *Id.*

111. *Id.* at 342.

112. *See id.* at 347 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513–15 (2002)) (representing the most recent affirmation of “notice pleading”).

113. *Dura Pharm., Inc.*, 544 U.S. at 346. Interestingly, this language arguably serves as the foundation for the Court’s rhetorical shift to the “enough factual matter (taken as true)” language in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 550, 556 (2007), to requiring a plaintiff to allege sufficient factual content to “[nudge his claim] . . . across the line from conceivable to plausible” in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009).

114. *Dura Pharm., Inc.*, 544 U.S. at 346.

115. *Id.* at 347.

116. *Id.* (citing H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.) 1995 U.S.C.C.A.N. 730, 730 (noting a desire to curb “abusive practices including the routine filing of lawsuits . . . with only a faint hope that the discovery process might lead eventually to some *plausible* cause of action” (emphasis added))).

117. *Dura Pharm., Inc.*, 544 U.S. at 346–47. *But see* *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (stating in dicta that as a general matter, “[p]rior to

2. *The Rule 8(a)(2) approach*

Both the Fifth and Eighth Circuits have clearly adopted Rule 8(a)(2) as the pleading standard for loss causation. The Fifth Circuit has adopted Rule 8(a)(2) as the governing standard while specifically including *Twombly*'s plausibility gloss.¹¹⁸ The Eighth Circuit is the first circuit court to address loss causation since the Supreme Court handed down *Iqbal*, and it expressly applied *Iqbal*'s two-prong analysis.¹¹⁹

a. *Explicit adoption of Rule 8(a)(2) in light of Twombly and Dura: The Fifth Circuit approach*

In *Lormand v. US Unwired, Inc.*,¹²⁰ the Fifth Circuit specifically discussed the effect of the *Twombly* plausibility standard on the element of loss causation in a Rule 10b-5 claim. The court began by suggesting that the *Twombly* Court relied, in part, on the *Dura* Court's discussion of the purpose of securities legislation and the desire to avoid abusive litigation in developing the plausibility pleading standard.¹²¹ The Fifth Circuit concluded that a contiguous reading of *Dura* and *Twombly* required that loss causation be pled under the plausibility standard of Rule 8(a)(2).¹²²

Consistent with the *Dura* and *Twombly* Courts, the Fifth Circuit noted that the plausibility standard was not meant to be overly burdensome on the plaintiff. The standard only required that the plaintiff allege enough factual matter to allow the court to reasonably expect that discovery will reveal a legitimate claim.¹²³ The plausibility test for loss causation, according to the Fifth Circuit, is one in the alternative that requires the "plaintiff [either] to allege . . . a facially 'plausible' causal relationship between the fraudulent statements or omissions and the plaintiff's economic loss [as *Dura* indicates] . . .

or, as *Twombly* indicates, . . . allege enough facts to give rise to a

the enactment of the PSLRA, the sufficiency of a complaint for securities fraud was governed *not* by Rule 8, but by the heightened pleading standards set forth in Rule 9(b)" (emphasis added).

118. See *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 255 (5th Cir. 2009) (adopting the Rule 8(a)(2) standard while giving deference to *Twombly*'s interpretation thereof).

119. See *McAdams v. McCord*, 584 F.3d 1111, 1113 (8th Cir. 2009) (relying on *Iqbal* in noting that the court is not required to accept as true a legal conclusion "couched as factual allegation," and that the complaint must instead contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'").

120. 565 F.3d 228 (5th Cir. 2009).

121. *Id.* at 255.

122. *Id.*

123. *Id.* at 258 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 556 (2007)) ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of the illegal agreement.").

reasonable hope or expectation that discovery will reveal evidence of the foregoing elements of loss causation.”¹²⁴

In its analysis, the Fifth Circuit approached the issue flexibly. Because it formulated a test in the alternative, a plaintiff is provided with two options to advance a claim.¹²⁵ Additionally, the court read *Dura* to require only that a plaintiff “provide[] the defendants with *notice* of what the relevant economic loss might be . . . and of what the causal connection might be between that loss and the defendants’ alleged misrepresentations.”¹²⁶ It also read the *Twombly* plausibility standard somewhat permissibly, requiring only that the allegation of facts give rise to a “reasonable hope or expectation” that discovery will provide the necessary evidence.¹²⁷

In *Lormand*, the court found that both of these standards were met (though meeting only one is sufficient).¹²⁸ The *Dura* pleading standard was satisfied because the plaintiff was suitably specific in detailing his loss—a drop in share price of eighty-two percent¹²⁹—and he gave the defendant fair notice about his theory of loss causation where the omission of the effects of the sub-prime credit program proximately caused the eighty-two percent decrease.¹³⁰ The *Twombly* pleading standard was satisfied because the plaintiff presented enough by way of factual allegations (an eighty-two percent decline in share price, and the omission of the effects of the sub-prime credit program) to give rise to a reasonable “hope or expectation” that discovery would reveal evidence that loss causation existed in fact.¹³¹

b. Explicit adoption of Rule 8(a)(2) in light of Iqbal: The Eighth Circuit approach

In *McAdams v. McCord*,¹³² the Eighth Circuit went out of its way to apply the newly explicated *Iqbal* plausibility standard. The district court dismissed the plaintiffs’ claim based on a failure to meet the pleading requirements of Rule 9(b) and the PSLRA for the elements of fraud and scienter.¹³³ The Eighth Circuit, however, asserted its authority to review dismissals under Rule 12(b)(6) *de novo*.¹³⁴ It noted that the district court did not reach the issue of loss causation, but

124. *Id.* at 258.

125. *Id.*

126. *Id.* at 262 (emphasis added).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 263.

132. 584 F.3d 1111 (8th Cir. 2009).

133. *Id.* at 1113.

134. *Id.*

because it wanted to decide the matter, the court reiterated that it “may affirm the district court’s judgment ‘on any basis supported by the record.’”¹³⁵ The court began with the now familiar *Iqbal* recital that it is “not bound to accept as true legal conclusions couched as a factual allegation,”¹³⁶ and that a “complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face.”¹³⁷

In its analysis, the court quickly moved to the “threadbare,” “conclusory” language of *Iqbal* to conclude that the plaintiffs’ claims of losses exceeding ten million dollars (the figure that represented the total amount of their investment) due to material misstatements and omissions of fact were simply conclusory.¹³⁸ The court required the complaint to plead both the purchase price of the share and the share price immediately following the revelation of the misstatement.¹³⁹ The lack of this specific (or “particular”) information rendered the allegations conclusory and “defeat[ed] the plausibility of the investors’ claim that [the defendant’s] audit opinions . . . caused their losses.”¹⁴⁰

3. *The Rule 9(b) approach*

Both the Fourth Circuit and the Ninth Circuit have indicated a willingness to analyze pleading loss causation under Rule 9(b). The Fourth Circuit has explicitly stated that it will evaluate the element of loss causation under Rule 9(b).¹⁴¹ The Ninth Circuit, after having its analysis concerning the substantive sufficiency of loss causation as pled under Rule 8(a)(2) overturned by the Supreme Court in *Dura*, has since assumed that Rule 9(b) governed pleading loss causation in a 2008 case.¹⁴² The Ninth Circuit did not, however, directly hold that Rule 9(b) is the applicable pleading standard.¹⁴³

a. Explicit adoption of Rule 9(b): The Fourth Circuit approach

In *In re Mutual Funds Investment Litigation*,¹⁴⁴ the Fourth Circuit recognized that the heightened pleading requirements of the PSLRA do not

135. *Id.* at 1113–14.

136. *Id.* at 1113.

137. *Id.*

138. *Id.* at 1114–15.

139. *Id.* at 1115.

140. *Id.*

141. *In re Mut. Funds Inv. Litig.*, 566 F.3d 111, 120 (4th Cir. 2009).

142. *See Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 989 (9th Cir. 2008) (assuming, without deciding, that Rule 9(b) governs).

143. *Id.*

144. 566 F.3d 111 (4th Cir. 2009).

govern the issue of loss causation.¹⁴⁵ It then stated that “[p]rior to the enactment of the [PSLRA], § 10(b) fraud claims in this circuit were governed by Federal Rule of Civil Procedure 9(b), not Rule 8.”¹⁴⁶ The Fourth Circuit therefore explained that under Rule 9(b) a plaintiff must show loss causation with “sufficient specificity to enable the court to evaluate whether the necessary causal link exists.”¹⁴⁷ The court made reference to Rule 8(a)(2) only to note that it was never used to plead claims of fraud in the Fourth Circuit, and the court made no mention at all of the *Twombly* plausibility pleading standard in the loss causation context.¹⁴⁸

In its analysis, the Fourth Circuit concluded that the plaintiff pled the element of loss causation with sufficient specificity.¹⁴⁹ The plaintiffs provided particular facts regarding the misstatements in the prospectuses, the revelation that the statements were false, the payment of fines for the false statements, and the subsequent decline in share price.¹⁵⁰ By alleging that the false or misleading statements printed in the prospectuses that were drafted and disseminated by the defendants were at least a “substantial cause” in the decrease in share price, the plaintiff was able to satisfy the Rule 9(b) pleading standard.¹⁵¹

b. Implicit adoption of Rule 9(b): The Ninth Circuit approach

In *Berson v. Applied Signal Technology, Inc.*,¹⁵² the Ninth Circuit did not directly rule on which pleading standard applied to loss causation, but it did assume a permissive formulation of Rule 9(b) for the purpose of analysis. The plaintiffs argued for what was then the somewhat less stringent standard under Rule 8(a)(2), while the defendants argued for the heightened standard under Rule 9(b).¹⁵³ The court acknowledged that neither it nor the Supreme Court had decided the matter, and proceeded to “assume—without deciding—that Rule 9(b) governs,” and required that a plaintiff plead loss causation with particularity.¹⁵⁴ More specifically, the plaintiff was required to give “sufficient detail to give defendants ample notice of plaintiff’s loss causation theory, and to give the court some assurance that the theory has a basis in fact.”¹⁵⁵ Like the Fourth Circuit in *In re Mutual*

145. *Id.* at 119–20.

146. *Id.* at 119.

147. *Id.* at 120.

148. *Iqbal* was handed down eleven days after this decision.

149. *In re Mut. Funds Inv. Litig.*, 566 F.3d 111, 129 (4th Cir. 2009).

150. *Id.* at 128–29.

151. *Id.* at 128.

152. 527 F.3d 982 (9th Cir. 2008).

153. *Id.* at 989.

154. *Id.*

155. *Id.* at 989–90.

Funds Investment Litigation, the Ninth Circuit made no mention of plausibility.¹⁵⁶ Moreover, after it explained that the plaintiff need only give the court “*some* assurance” that the claim had a basis in fact,¹⁵⁷ the court went on to declare that “Rule 9(b) require[d] no more.”¹⁵⁸ The court’s rhetoric suggests that the Ninth Circuit might be flexible in its pleading analysis even under the heightened pleading standard of Rule 9(b).¹⁵⁹

In *Berson*, the Ninth Circuit concluded that the plaintiffs sufficiently pled loss causation under Rule 9(b).¹⁶⁰ The court found that the plaintiffs alleged facts particular enough to show that “but for the circumstances that the fraud concealed—namely, the fact that much of Applied Signal’s backlog had been halted by stop-work orders—plaintiffs’ investment . . . would not have lost its value.”¹⁶¹ Pivotal to this conclusion may have been the fact that the plaintiffs were able to describe the effect of these stop-work orders on the company’s revenue.¹⁶² The plaintiffs showed that the stop-work orders caused revenue to drop by twenty-five percent, which subsequently led to a sixteen percent drop in the company’s stock price.¹⁶³ There is no discussion of the credibility of these calculations, but the court found them sufficiently particular at the pleading stage.¹⁶⁴

II. ANALYSIS

There are credible arguments on both sides of this federal circuit split. Part A will set out to resolve which is the proper approach to pleading loss causation. Resolving the proper pleading standard, however, is not enough. Part B will explore the practical effects of that pleading standard on pleading loss causation.

156. See *id.* (omitting from the analysis any mention of other circuits’ analysis of the element under Rule 8(a)(2) or the plausibility standard therein).

157. *Id.* (emphasis added).

158. *Id.*

159. *Contra* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1944 (2009) (rejecting the Second Circuit’s “flexible ‘plausibility standard’”).

160. *Berson*, 527 F.3d at 989.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

A. *The Proper Pleading Standard for Loss Causation is Rule 8(a)(2) as Demonstrated by an Analysis of "Causation" Generally and Within the Tort Law Context, a Textual Reading of the Rules, Supreme Court Precedent, and an Understanding of the Traditional Common Law Elements of Fraud*

As illustrated above, the federal circuit courts are split regarding the proper pleading standard for loss causation.¹⁶⁵ The Fourth Circuit makes the reasonable argument for Rule 9(b) essentially through simple syllogism: Rule 9(b) governs general fraud claims; a private securities fraud claim is a subset of a general fraud claim; loss causation is an element of a private securities fraud claim; therefore, Rule 9(b) should govern the pleading standard for loss causation.¹⁶⁶ Moreover, the Supreme Court has used broad language in dicta to suggest that Rule 9(b) governs all securities fraud claims.¹⁶⁷ On the other hand, the Fifth Circuit's survey of the evolution of Supreme Court precedent, combined with *Iqbal*'s broad extension of plausibility pleading and the Eighth Circuit's application thereof, is an equally persuasive indication that the proper standard for pleading loss causation is under Rule 8(a)(2).¹⁶⁸

1. *Applying an analysis of causation generally and of proximate cause to a textual reading of Rule 9(b)*

To determine which pleading standard applies to the element of loss causation, it is first important to appreciate the concept of causation generally. Causation as an element of a cause of action is difficult to define legally.¹⁶⁹ It does not readily lend itself to the same conceptually concrete

165. See *Dura Pharm., Inc. v. Broudo*, 544 U.S. 335, 346–47 (2005) (deciding the case under the pre-*Twombly* Rule 8(a)(2) standard, but not directly holding that Rule 8(a)(2) is the proper pleading standard for loss causation). Compare *Berson*, 527 F.3d at 989 (claiming that the Supreme Court assumed, but did not decide that Rule 8(a)(2) governs the pleading of loss causation so this court was free to assume—without deciding—that Rule 9(b) applied), with *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 255 (5th Cir. 2009) (synthesizing *Dura* and *Twombly* to conclude that in deciding the *Dura* case under Rule 8(a)(2), the Supreme Court had essentially “identified the basic principles of pleading loss causation under Federal Rule of Procedure 8(a)(2)”).

166. See *In re Mut. Funds Inv. Litig.*, 566 F.3d 111, 119–20 (4th Cir. 2009) (discussing why Rule 9(b), not Rule 8(a)(2), governs fraud claims in the Fourth Circuit).

167. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (stating in dicta that as a general matter, “[p]rior to the enactment of the PSLRA, the sufficiency of a complaint for securities fraud was governed not by Rule 8, but by the heightened pleading standards set forth in Rule 9(b)” (emphasis added)).

168. See *Lormand*, 565 F.3d at 255–56 (detailing the progression and refinement of pleading under Rule 8(a)(2) from *Dura* to *Twombly*).

169. See DOBBS, *THE LAW OF TORTS*, § 180, at 443 (3d ed. 2004) (discussing that despite its name, “proximate cause” is not truly about causation, but rather, it is about the appropriate scope of liability).

explanation that an element such as “material misstatement” (i.e. some important statement that is untrue) does. Logically, it is often difficult to distinguish a causal event from an event simply resulting from some other cause or event.

For example: if A caused B and B caused C, then A caused C in at least some respect because B necessarily could not have caused C until A caused B. Therefore, although we see B as the most immediate cause of C, it is possible to argue that B was not the true cause of C because without A there would have been no B to cause C. Viewed this way, A is the true cause of C. Of course, A is nothing more than an event brought about by some other cause or event such as A', thereby further confusing the “true” cause, or cause in fact, of C. Consequently, the law endeavors to circumvent and simplify this enigma by narrowing what is otherwise an infinite chain of cause and effect for the purposes of determining and attaching liability.¹⁷⁰ That is, the law actually defines the element of causation within a context of seeking to determine responsibility and liability rather than seeking to glean the “true” or ultimate cause of a given event or injury.¹⁷¹

Perhaps the best approach to understanding loss causation and which pleading standard should apply to it is by analogy. The element of proximate cause in the tort context is the most apt analogy for this purpose.¹⁷² While proximate cause is an element of a tort claim, it is analytically distinct from the negligent act that represents the underlying source of the claim.¹⁷³ This distinction is critical to understanding why Rule 8(a)(2) is the applicable standard of pleading loss causation because loss causation is not a “circumstance constituting the fraud” within the meaning of Rule 9(b).¹⁷⁴

In the tort law context, proximate cause represents the merger between cause in fact (i.e. the sort of physics-oriented causal chain of events described in the example above) and a policy decision that the law makes

170. *Id.*

171. *Id.*

172. See *McAdams v. McCord*, 584 F.3d 1111, 1114 (8th Cir. 2009) (analogizing loss causation in the securities fraud context to the common law requirement of “proximate causation” in the tort context); see also HAZEN, *supra* note 37, § 12:11[1], at 479–81 (describing the analysis of loss causation as similar to the analysis of proximate cause).

173. See DOBBS, *supra* note 169, § 182, at 447–48 (clarifying that the issue of proximate cause is distinct from a defendant’s negligent action and does not arise until after some negligence has been identified).

174. FED. R. CIV. P. 9(b).

in defining the scope of liability for some actor's conduct.¹⁷⁵ More simply, proximate cause creates the legal connection between a defendant's negligent conduct and a plaintiff's harm sufficient for the law to say that the defendant "caused," and is therefore liable for, the plaintiff's injury.¹⁷⁶ That causal connection, however, is itself something distinct from the defendant's action¹⁷⁷—it simply represents a string that fastens the act to the injury and thus creates the basis for the actor's legal liability.¹⁷⁸ The question of causation itself does not arise until *after* a defendant has committed some act that creates the basis for his liability.¹⁷⁹ The causal chain of events, beginning with a defendant's action and resulting in a plaintiff's injury, is therefore not itself an event that *constitutes* the defendant's action.¹⁸⁰

By analogy then, the element of loss causation is not a circumstance that constitutes an act of securities fraud, so it should not be pled under Rule 9(b). Because the issue of causation arises only after the commission of an act that gives rise to legal liability, the element of causation cannot properly be said to be a "circumstance[] *constituting*" that act within the language of Rule 9(b).¹⁸¹ Rather, it is simply the legal device that strings together the defendant's already constituted fraudulent act and the plaintiff's economic loss for the purpose of attaching legal accountability. Thus, given that the PSLRA does not specify any pleading standard, and causal elements do not properly fall within the language of Rule 9(b), Rule 8(a)(2) must apply as the proper pleading standard for the element of loss causation.¹⁸²

2. *Supreme Court precedent and the implicit adoption of Rule 8(a)(2)*

An additional factor suggesting that Rule 8(a)(2) is the proper pleading standard for loss causation is the fact that the Supreme Court assumed, even though it did not hold, that Rule 8(a)(2) governed loss causation in its decision in *Dura*.¹⁸³ The Court was clear that it would assume that "neither the Rules nor the securities statutes impose any *special further*

175. See DOBBS, *supra* note 169, § 181, at 445 (explaining that proximate cause is a causal connection that is aimed at expressing a value judgment about a defendant's behavior and the appropriate scope of the defendant's exposure to liability for that behavior).

176. *Id.* § 180, at 443.

177. See *id.* § 182, at 447–48 (noting that proximate cause is distinct from negligence because the former can only arise after the latter has been identified).

178. *Id.*

179. *Id.*

180. *Id.*

181. FED. R. CIV. P. 9(b) (emphasis added).

182. See *supra* Part I.A.2.

183. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (citing Rule 8 in dismissing plaintiff's case for failure to state a claim).

requirement” with respect to pleading loss causation.¹⁸⁴ The mention of a “special further requirement” suggests that the Court drew a distinction between the standard that it used to dismiss this case with the further particularity requirements of Rule 9(b) and the PSLRA.¹⁸⁵ If the Court made clear that it would use neither Rule 9(b) nor the PSLRA as the pleading standard, then the only remaining pleading standard is Rule 8(a)(2). While the Ninth Circuit is correct in explaining that the Supreme Court did not directly rule on the issue of what pleading standard is required for loss causation,¹⁸⁶ the Court made a significant, if only implicit, embrace of Rule 8(a)(2) as the proper standard by using it as the basis for its substantive conclusions.¹⁸⁷

Adding weight to this implicit adoption of Rule 8(a)(2) is the Fifth Circuit’s analysis recognizing the consistent line of progression from *Conley* through *Dura* to *Twombly*.¹⁸⁸ The *Twombly* Court itself suggested that the notion of plausibility was implicit in its reasoning in *Dura*.¹⁸⁹ There, the Court emphasized that in *Dura*, it “explained that something beyond the mere *possibility* of loss causation must be alleged”¹⁹⁰ Thus, if *Dura* is the jurisprudential genesis of the plausibility requirement, it stands to reason that the plausibility standard under Rule 8(a)(2), conceived of in *Dura* (a loss causation case) and refined in *Twombly* and *Iqbal*, is the same standard that ought to apply to all subsequent loss causation cases.¹⁹¹

3. *Common law elements of fraud and the statutorily created element of loss causation*

Finally, loss causation, though analogous to causal elements under the common law such as proximate cause, is not one of the common law

184. *Id.* (emphasis added).

185. *Id.*

186. *See* Berson v. Applied Signal Tech., Inc., 527 F.3d 982, 989 (9th Cir. 2008).

187. *See Dura Pharm, Inc.*, 544 U.S. at 346, 348 (assuming Rule 8(a)(2) as the proper pleading standard while dismissing plaintiff’s claim).

188. *See* Lormand v. US Unwired, Inc., 565 F.3d 228, 255–57 (5th Cir. 2009) (describing an emerging plausibility standard implied by Rule 8(a)(2) from *Conley* to *Twombly*).

189. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–58 (2007) (recognizing *Dura* as a source of the concept of plausibility and that insufficient claims should be cut off at the earliest point).

190. *Id.* at 557–58 (citing *Dura Pharm, Inc.*, 544 U.S. at 347).

191. *See Lormand*, 565 F.3d at 255 (discussing *Dura* and applying *Twombly*’s reading of Rule 8(a)(2) to the element of loss causation to require facially “plausible” causation or allegation of enough facts); *McAdams v. McCord*, 584 F.3d 1111, 1113–14 (8th Cir. 2009) (applying *Iqbal*’s formulation of Rule 8(a)(2) to the element of loss causation and emphasizing the requirement of sufficient factual allegations to create a plausible causal connection).

elements of a fraud claim in fact, so pleading standards designed to govern common law claims of fraud should not control it.¹⁹² Rule 9(b) generally applies only to the “traditional” elements of a fraud claim.¹⁹³ Loss causation is not one of the traditional elements of a fraud claim.¹⁹⁴ Rather, loss causation is a statutorily created element of a securities fraud claim,¹⁹⁵ and the statute that created the element, the PSLRA, does not specify which pleading standard should apply.¹⁹⁶ Thus, not being a common law element of fraud, Rule 9(b) would not control the pleading standard for loss causation, thereby leaving Rule 8(a)(2) as the governing pleading standard.

B. Pleading Loss Causation Under Iqbal’s Formulation of Rule 8(a)(2) Will Create a Higher Standard for a Plaintiff to Meet than Pleading Under Rule 9(b) Because Rule 8(a)(2) Requires that a Private Securities Fraud Claim Must Meet Plausibility as Well as Particularity

It is not yet clear the degree to which *Twombly* and *Iqbal* altered general pleading standards under Rule 8(a)(2).¹⁹⁷ It is at least clear that the *Twombly* Court intended the scrutiny of plausibility to be something more than mere “possibility.”¹⁹⁸ Further, *Iqbal* may be a higher pleading standard in some contexts than what the *Twombly* Court originally envisioned because the formalized two-step analysis begins by removing certain “conclusory” recitals from consideration under the plausibility

192. See Securities Exchange Act of 1934 § 21D(b)(4), 15 U.S.C. § 78u-4 (b)(4) (2006) (creating the requirement that a plaintiff prove the element of loss causation); WRIGHT & MILLER, *supra* note 22, § 1297, at 60–71 (outlining the traditional common law elements of fraud and Rule 9(b)’s applicability to those elements but omitting the element of loss causation from the list).

193. WRIGHT & MILLER, *supra* note 22, § 1297, at 56.

194. *Id.* at 60–70.

195. See Securities Exchange Act of 1934 § 21D(b)(4) (creating the requirement that a plaintiff prove the element of loss causation).

196. See *id.* Securities Exchange Act of 1934 § 21D(B)(1)(B) codified at 15 U.S.C. § 78u-4(b)(1), (b)(4) (applying, specifically, the heightened pleading standard of particularity to averments of misstatements and omissions, but remaining silent on the element of loss causation).

197. See Bone, *supra* note 67, at 867–83 (arguing that *Iqbal* significantly heightened the *Twombly* plausibility pleading standard through the alteration of the “conclusory statements” analysis); Hatamyar, *supra* note 37, at 596–625 (2010) (providing an interesting and novel empirical analysis of the increase in the rate at which courts have granted motions to dismiss from *Conley* through *Twombly* to *Iqbal* and suggesting the demise of notice pleading). But see Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1098 (2009) (arguing that the *Twombly* “plausibility standard does not represent a deviation from traditional notice pleading”).

198. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (explaining that the plausibility standard does not require a probabilistic analysis, but holding that sheer possibility is insufficient); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (distinguishing between what is possible and what is plausible and requiring the latter).

analysis.¹⁹⁹ Isolating and removing from the plausibility analysis allegations deemed to be “conclusory” could create a more difficult standard for a plaintiff to meet because he will not have the benefit of those recitals when a court passes on his claim’s overall plausibility.²⁰⁰ In pleading loss causation, notwithstanding the fact that Rule 9(b) is not the proper pleading standard, *Iqbal*’s two prong formulation of plausibility may actually encompass Rule 9(b) particularity pleading in the first prong, and go further to require plausibility in the second prong.

1. *The first prong of the Iqbal analysis is functionally equivalent to Rule 9(b)’s particularity requirement*

The *Iqbal* Court actually strengthened the pleading standard set out in *Twombly* by formalizing the plausibility analysis through a two-prong approach.²⁰¹ This is accomplished primarily through the *Iqbal* Court’s application of the first prong.²⁰² The first prong requires the reviewing court to search out and identify claims that are deemed too “conclusory” and eliminate them from the plausibility analysis as nothing more than “[t]hreadbare recitals of the elements of a cause of action.”²⁰³ Once eliminated, these “conclusory” statements are effectively removed from consideration under the actual plausibility analysis in the second prong.²⁰⁴ Thus, the plausibility analysis is ultimately applied to a redacted version of the original complaint.²⁰⁵ In such a context, it is easy to see how a claim that might otherwise seem plausible when considered as a whole

199. See *Iqbal*, 129 S. Ct. at 1960 (Souter, J., dissenting) (taking issue with the majority’s approaching “conclusory” statements in isolation rather than within the context of the complaint as a whole); see also Bone, *supra* note 67, at 859–62 (characterizing *Iqbal*’s first prong as problematic, especially because *Iqbal* provides no guidance where “classification of allegations as legal conclusions can be decisive,” and agreeing with Souter’s opinion that factual allegations can be specific when read in the context of a complaint as a whole).

200. *Contra Twombly*, 550 U.S. at 561–62 (reading *Conley*’s “no set of facts” standard to implicitly require factual plausibility when considered in the context of the complaint as a whole).

201. See Bone, *supra* note 67, at 870–79 (arguing that *Iqbal*’s formal two-prong approach sets up a “thick screening model” that is more discriminating in its evaluation of a pleading’s sufficiency than *Twombly*’s “thin screening model” approach).

202. *Id.* at 859–60 (discussing the inevitable condemnation of claims deemed to be conclusory).

203. *Iqbal*, 129 S. Ct. at 1949.

204. See Bone, *supra* note 67, at 861–62 (finding that *Iqbal*’s first prong is decisive and does “all the work”).

205. *Id.* *Contra Twombly*, 550 U.S. at 564–65 (analyzing the complaint as a whole in determining that certain claims were too conclusory).

(conclusory statements and all), is considered implausible when selectively analyzed after the first prong's hollowing effect on the complaint.²⁰⁶

In *Twombly*, the Court claimed that it was not expanding the heightened factual particularity requirements under Rule 9(b) to all civil litigation.²⁰⁷ In *Iqbal*, however, the Court stated that to show facial plausibility, a plaintiff must plead sufficient "*factual content* that allows the court to draw the reasonable inference that the defendant is liable."²⁰⁸ The *Iqbal* Court emphasized the requirement of pleading sufficient "factual content to nudge [the plaintiff's] claim . . . across the line from conceivable to plausible"²⁰⁹ in developing the first prong of the formal two-prong analysis.²¹⁰

Justice Souter, who authored *Twombly*, dissented in *Iqbal*, calling the analysis a misapplication of *Twombly* and arguing that the factual allegations that the Court dismissed as "conclusory" should not have been read in isolation.²¹¹ Rather, the statements should be read in the context of the complaint as a whole.²¹² While *Twombly* utilized the "conclusory" language in its analysis,²¹³ the distinction, as Justice Souter noted, is that the *Twombly* court interpreted the complaint as a *whole* and only excluded from the analysis those statements that were conclusory restatements of conduct alleged elsewhere in the complaint that did not add anything factually new to the complaint.²¹⁴ In contrast, *Iqbal* began by utilizing the

206. See Bone, *supra* note 67, at 861–62 (explaining how the first prong essentially does all of the work so that what factual matter remains is likely to appear implausible if not considered within the context of the complaint as a whole).

207. See *Iqbal*, 129 S. Ct. at 1949 (citing the *Twombly* language and reiterating the point that "detailed factual allegations" are not required for the Rule 8 pleading standard); *Twombly*, 550 U.S. at 555 (stating that a pleading under Rule 8(a)(2) "does not need detailed factual allegations.").

208. See *Iqbal*, 129 S. Ct. at 1949 (emphasis added).

209. *Id.* at 1952 (internal quotations omitted) (citing *Twombly*, 550 U.S. at 570).

210. See *id.* at 1949–52 (outlining a two-prong approach that begins with the identification and dismissal of any "conclusory" statements, and then moves to a plausibility analysis of the remaining factual claims); see also Bone, *supra* note 67, at 851 ("Twombly uses plausibility to screen only for truly meritless suits, but *Iqbal* uses it to screen for weak lawsuits too.").

211. See *Iqbal*, 129 S. Ct. at 1960–61 (Souter, J., dissenting) (criticizing the majority for examining claims in isolation rather than within the context of the complaint as a whole).

212. *Id.*; see Bone, *supra* note 67, at 861–62 (critiquing the use of the first prong to isolate and eliminate certain claims).

213. *Twombly*, 550 U.S. at 556–57 ("[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.").

214. See *Iqbal*, 129 S. Ct. at 1960 (Souter, J., dissenting) (arguing that the mere recitation of the elements of a cause of action does not entitle the plaintiff to the assumption that those statements are true, but that those statement ought to be evaluated within the context of the whole complaint); *Twombly*, 550 U.S. at 564 (examining the claim in its entirety); see also Bone, *supra* note 67, at 861–62 (discussing the two distinct approaches of the Supreme Court in *Twombly* and *Iqbal*).

first prong to eliminate from the plausibility analysis any statements deemed to be conclusory, and *then* used the second prong to apply the plausibility analysis to what remained.²¹⁵

It is problematic that the Court provided no clarity regarding how to apply the first prong.²¹⁶ Rather than provide criteria for assessing which statements are conclusory, the *Iqbal* Court simply states that certain claims just *are* conclusory.²¹⁷ Without guidance, it is difficult to discern what a fatal assertion of a legal conclusion is, and what a proper assertion of a fact is²¹⁸ because the distinction between the two is likely to turn on their relative degree of specificity or particularity.²¹⁹ Therefore, it may be that properly pleading plausibility entails that the complaint's factual recitals be particularly pled so as to pass the scrutiny of *Iqbal*'s conclusory analysis in the first prong.²²⁰

The conclusory analysis essentially utilizes concepts similar to those that underlie Rule 9(b)—a plaintiff cannot simply state the element of a claim without a sufficiently particularized factual underpinning.²²¹ The rhetorical similarities between the first prong of the plausibility analysis under Rule 8(a)(2) and the particularity requirement

215. See *Iqbal*, 129 S. Ct. at 1949–52 (asserting that the two-pronged approach conformed with and clarified *Twombly*); Bone, *supra* note 67, at 859–62 (interpreting the *Iqbal* court to have found “some defect or deficiency intrinsic to the allegation itself” and repeating Souter’s argument that allegations that appear generalized and formulaic can gain specificity when read in context). *But see Twombly*, 550 U.S. at 564–65 (analyzing the complaint as a whole without the formal two-prong approach).

216. See Bone, *supra* note 67, at 859–60 (criticizing the Court for its lack of clarity regarding the proper application of the first prong).

217. See *Iqbal*, 129 S. Ct. at 1951 (“It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”); Bone, *supra* note 67, at 859 (highlighting the fact that the Court failed to provide guidance on how to determine whether an allegation is conclusory or not).

218. See Bone, *supra* note 67, at 864 (gathering from Walter Wheeler Cook’s legal realist critique of pleading the proposition that the “distinction between legal conclusions and factual allegations is necessarily a matter of degree rather than in kind, and in particular depends on the degree of factual specificity.” (citing Walter Wheeler Cook, ‘Facts’ and ‘Statements of Fact’, 4 U. Chi. L. Rev. 233, 242–44 (1936)).

219. *Id.*

220. *Contra Twombly*, 550 U.S. at 555 (stating that a pleading under Rule 8(a)(2) “does not need detailed factual allegations.”) (emphasis added); *Iqbal*, 129 S. Ct. at 1949 (citing to the *Twombly* language and reiterating the point that “detailed factual allegations” are not required); CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING, 242–43 (2d ed. 1947) (deeming, as the chief architect of the Federal Rules of Civil Procedure, as an improvement the fact that the Federal Rules avoided the code distinction between factual and legal conclusions by refraining from using the term “fact” in a simplified pleading rule).

221. Compare WRIGHT & MILLER, *supra* note 22, § 1297, at 152, 160 (“A pleading that simply avers the technical elements of fraud without providing any showing that a factual relationship exists between the defendant . . . and the . . . conduct does not have sufficient informational content to satisfy [Rule 9(b)]’s pleading-with-particularity requirement.”), with *Iqbal*, 129 S. Ct. at 1949 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”).

under Rule 9(b) suggest that they may operate in the same way in certain applications.²²² Thus, there appears to be no meaningful distinction between whether a plaintiff is required to plead “factual particularity” under Rule 9(b) or sufficient “factual content” under Rule 8(a)(2) to meet the conclusory analysis of the first prong.²²³

The Eighth Circuit’s approach in *McAdams* illustrates how the distinction between legal conclusion and factual allegation is generally a matter of specificity and is difficult to distinguish.²²⁴ The plaintiffs, who invested a total of \$11 million dollars in the defendant company, UCAP,²²⁵ alleged that the defendant made two statements that misrepresented its overall financial condition.²²⁶ At a later date, the company revised those statements to reflect the truth about the company’s financial condition.²²⁷ The Eighth Circuit found that the plaintiffs failed to provide the value of UCAP’s stock either before, during, or after the announcements correcting the previous misstatements.²²⁸ Without this crucial, but seemingly elementary information, the court was able to call the plaintiffs’ assertions of loss causation conclusory, eliminate them from the analysis, and ultimately deem the rest of the claim implausible.²²⁹ Had the plaintiffs provided this crucial bit of information and provided more factual *particularity*, it appears that the court would have been willing to let the claim proceed. As the analysis does appear to turn simply on a matter of factual particularity, this decision is consistent with *Iqbal*’s stricture in its first prong of analysis, requiring a claim to be pled at a certain level of particularity lest it be deemed conclusory.²³⁰ Pleading particularity to meet the requirements of *Iqbal*’s first prong, however, is only the first step; the particular factual recitals and legal assertions must also be plausible.²³¹

222. *Id.*

223. See Spencer, *supra* note 27, at 473–77 (suggesting that *Twombly*’s plausibility standard inherently rejects a generalized pleading approach to the particularity requirement of Rule 9(b) because “[r]equiring specific facts that back up a conclusory allegation of wrongdoing is the very definition of particularized pleading.”).

224. See *McAdams v. McCord*, 584 F.3d 1115 (8th Cir. 2009) (describing how missing facts affected the plausibility of the allegations).

225. *Id.*

226. *Id.* at 1114.

227. *Id.* at 1114–15.

228. *Id.* at 1115.

229. *Id.*

230. *Id.*; see also Bone, *supra* note 67, at 864 (explaining that the distinction between legal conclusion and factual assertion is a matter of particularity because statements of fact “pitched at too high a level of generality” can so easily be interpreted as legal conclusions).

231. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009) (clarifying that while Rule 8(a)(2) might have relaxed the older system of code-pleading, it did not loosen the standard so much as to allow a plaintiff to proceed only on conclusions, and further, that plausibility is required to survive a motion to dismiss).

2. *Pleading loss causation under the second prong of the Iqbal analysis is particularly difficult due to the complex nature of securities fraud claims*

The plausibility analysis under *Iqbal*'s second prong may pose a particularly challenging standard in the loss causation context. This is due to two factors: as a matter of logic, even if a claim is sufficiently particular, it does not guarantee that it will be sufficiently plausible; and, even assuming that a claim could be said to be "plausible" in isolation, the Supreme Court, in other contexts, has indicated a willingness to engage in a type of "plausibility in light of the alternatives" analysis where it could look to alternative explanations of causation that are determined to be *more* plausible than the plaintiff's theory.²³²

The Supreme Court called Rule 8(a)(2)'s pleading requirements "less rigid" than a heightened pleading standard,²³³ but it is not clear that the *Iqbal* gloss on Rule 8(a)(2) ensures that it remains "less rigid" than Rule 9(b) in all situations.²³⁴ Regardless of what the Court claims is more or less rigid, as a matter of logic, it seems nearly impossible (or at least "implausible") to advance a plausible claim if it is not sufficiently particular.²³⁵ Indeed, it would be difficult to find a claim plausible if that claim did not also state particularities such that they would "nudge [the claim] . . . across the line from conceivable to plausible."²³⁶

While particularity may be necessary to stating a plausible claim, it is unlikely to be sufficient. A claim can be adequately particular so as to avoid being conclusory under *Iqbal*'s first prong, but, for some other reason, that claim is not sufficiently plausible under the second prong. Moreover, in a loss causation context, the factual posture is generally such that multiple factors potentially contribute to an individual's loss, thereby augmenting the difficulty already inherent in the fact that pleading

232. See *id.* at 1951 (concluding that there was an "obvious alternative explanation" to the plaintiff's theory of liability) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 567 (2007) where the Court also found an "obvious alternative explanation" to plaintiff's claim); cf. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007) (requiring that properly pleading the element of scienter must be "strong in light of other explanations . . . and at least as compelling as any [plausible] opposing inference one could draw from the facts alleged").

233. *Iqbal*, 129 S. Ct. at 1954.

234. See Bone, *supra* note 67, at 870–79 (disapproving of equating *Iqbal* and *Twombly* where *Iqbal*'s thick-screening approach eliminates weak suits while *Twombly*'s thin-screening approach accepts weaker suits that at least suggest that "something fishy might be going on"); Spencer, *supra* note 27, at 473–74 (equating plausibility pleading and heightened particularity pleading).

235. Bone, *supra* note 67, at 870–79.

236. *Iqbal*, 129 S. Ct. at 1952 (internal quotations omitted).

particularity does not ensure plausibility as a matter of logic.²³⁷ Accordingly, it may be difficult to isolate a material misstatement or omission as *the* cause of an economic loss if other economic factors also contributed to that loss.²³⁸ Thus, even if a plaintiff could satisfy both particularity *and* initial plausibility, the claim *still* may not be plausible in light of alternative explanations.²³⁹

Looking at the Supreme Court's reasoning in a securities fraud cause dealing with the element of scienter, *Tellabs Inc. v. Makor Issues and Rights, Ltd.*,²⁴⁰ it may be that a plaintiff's pleading of loss causation must not only be plausible, but at least as plausible as reasonable alternatives.²⁴¹ Indeed, there is support for this approach in both *Twombly* and *Iqbal*.²⁴² While the *Iqbal* Court does not go so far as to hold that "plausibility" must be determined in light of plausible alternatives, in dismissing his complaint, the Court relied heavily on the notion that *Iqbal*'s claim was unlikely, and certainly not plausible in light of "obvious alternative explanations."²⁴³

237. See Fisch, *supra* note 30, at 820–21, 845–46 (noting that a loss causation analysis is particularly difficult in the securities fraud context because of the myriad factors that can affect the valuation of a securities investment).

238. See, e.g., *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342–43 (2005) (observing that the link between share purchase price and consequent economic loss is not always strong because there are a "tangle of factors affecting price"); see also Fisch, *supra* note 30, at 821 (noting that loss causation analysis can depend on how a plaintiff's loss is measured, testimony of expert witnesses, and timing of price changes).

239. The concept of "negative causation" provides some guidance here. It does not go to a defendant's liability, but it provides the defendant with an affirmative defense in the assessment of damages where the defendant can point to other factors that contributed to a plaintiff's loss. It is a mitigation of damages scheme, and although it does not go to liability, it shows that the idea that "alternative" causes can factor into a plaintiff's loss and that a defendant should not bear the full burden of liability in such circumstances is a well-understood concept in securities law. See Securities Act of 1933 § 11, 15 U.S.C. § 77k (2006) (allowing, for the purposes of mitigation of damages, a "negative causation" affirmative defense in which a defendant offers alternative explanations for the plaintiff's loss).

240. 551 U.S. 308 (2007).

241. See *id.* at 323–24 ("To determine whether the plaintiff has alleged facts that give rise to the requisite 'strong inference' of scienter, a court must consider plausible, nonculpable explanations . . . as well as inferences favoring the plaintiff . . . [that] must be more than merely 'reasonable' or 'permissible'—it must be cogent and compelling, thus strong in light of other explanations.").

242. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951–52 (2009) (stating that "[a]s between that 'obvious alternative explanation' for the arrests [that the plaintiff had been arrested not because of his religion or race, but because he was part of a class of individuals who made an attack on the United States], and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion." (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567(2007))). This suggests that the Court may be willing to look to its seminal pleading case to find support for transporting a "plausible in light of alternatives," *Tellabs*-type of analysis into the Rule 8(a)(2) plausibility test.

243. See *Iqbal*, 129 S. Ct. at 1951–52 (rejecting the plaintiffs' allegations of discrimination in light of the Court's conclusion that a national security policy of detaining individuals with suspected links to terrorism would naturally have a disparate effect on Arab Muslims and therefore provides a more plausible explanation for plaintiff's detention).

This at least opens the door for a “plausibility in light of the alternative” style of analysis.

The Fourth Circuit’s decision in *In re Mutual Funds Investment Litigation* (a case decided under the particularity standard of Rule 9(b)) provides an apt example.²⁴⁴ There, the plaintiffs provided detailed factual allegations regarding: (1) misstatements in the prospectuses of defendant Janus Capital Group, Inc.; (2) subsequent disclosure that the statements were false; (3) the payment of fines for the false statements, and; (4) the ensuing decline in share price.²⁴⁵ The court concluded that these allegations were a “substantial cause” in the decrease in share price and allowed the plaintiff to clear the particularity hurdle of Rule 9(b)’s heightened pleading.²⁴⁶ While these facts were sufficiently particular for the court to find them to be a “substantial cause” of the plaintiffs’ injury, a “substantial cause” of some injury does not necessarily mean that it is the *most plausible* cause of the injury in light of alternate plausible explanations.²⁴⁷ As the *Dura* Court alluded to, in a typical securities fraud context, it is plausible that a myriad of other factors such as lower earnings than expected, poor performance in a particular market sector, a decrease in general consumer demand in China, or an act of God halfway across the world could provide *more* plausible explanations for what “caused” a given loss.²⁴⁸ As discussed earlier, determining the exact cause of some event is a difficult endeavor, but even determining an event’s most plausible cause is not much easier, particularly in the securities fraud context.²⁴⁹ In such a situation, a plaintiff may be able to plead sufficient factual particularity to meet the requirements of Rule 9(b)’s particularity standard and even the first prong of *Iqbal*’s conclusory analysis under Rule 8(a)(2), yet still fail to meet the second prong of *Iqbal*’s analysis either because the factual pleading is not plausible, or is not plausible in light of alternate plausible explanations.²⁵⁰

244. *In re Mutual Funds Investment Litigation* 566 F.3d 111, 119 (4th Cir. 2009).

245. *Id.* at 128–29.

246. *Id.* at 128.

247. *See id.* (maintaining that allegations do not have to conclusively show that an injury is caused solely by one action, only that it was a substantial cause).

248. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342–43 (2005) (noting that in a loss causation context, a loss is susceptible to multiple and intervening factors); *Law v. Medco Research, Inc.*, 113 F.3d 781, 786–87 (7th Cir. 1997) (dismissing for failure to state loss causation after finding no ground to doubt causation when plaintiffs failed to respond to defendant’s studies showing that because defendant’s share price moved in tandem with competitors’ share price, market forces created plaintiff’s loss); *see also* Fisch, *supra* note 30, at 840 (highlighting the difficulty of showing loss causation because of the many factors that can affect the value of a securities investment).

249. *See supra* note 237 and accompanying text.

250. *See supra* notes 240–43 and accompanying text.

C. As a Policy Matter, Pleading Loss Causation under Iqbal's Construction of Rule 8(a)(2), Combined with the Strict Pleading Requirements for the other Elements of a Private Securities Fraud Claim, Suggests that a Plaintiff Will Face a Substantial Barrier in Accessing Judicial Redress

As a matter of congressional intent, requiring the element of loss causation to be pled under a heightened standard is in line with Congress's desire to curb abusive litigation practices in private securities fraud claims.²⁵¹ Pleading under *Iqbal*'s plausibility standard, however, may present policy concerns about a plaintiff's access to judicial remedy for loss resulting from securities fraud.²⁵² Placing the issue of pleading loss causation within the broader context of pleading a private securities fraud claim suggests that the heightened pleading standard may be too strong.

The entire pleading scheme for a private securities fraud claim operates under a heightened standard. For example, section 21D(b)(2) of the Exchange Act sets out the heightened pleading standard for the state of mind element of scienter.²⁵³ A plaintiff must state factual particularity that creates a *strong inference* that the defendant acted with scienter.²⁵⁴ The Supreme Court has since interpreted "strong inference" to be more than simply what is reasonable; it must be at least as likely as reasonable alternative inferences.²⁵⁵

When considering the combination of the PSLRA particularity pleading requirements for the misstatement or material omission elements,²⁵⁶ the *Tellabs* "strong inference" requirement for scienter²⁵⁷, and the application of *Iqbal*'s formulation of plausibility to the remaining elements, including loss causation,²⁵⁸ the plaintiff faces a significant burden in putting forward

251. See generally S. REP. NO. 104-98, at 4, reprinted in 1995 U.S.C.C.A.N. 679, 683; H.R. REP. NO. 104-369, at 31-32 (1995) (Conf. Rep.), reprinted in 1995 U.S.C.C.A.N. 730, 730-31 (describing legislative reforms, in line with the overall goal of securities laws, as implementing "needed procedural protections" to protect investors, innocent parties, and the confidence in and integrity of the American securities market system).

252. See *supra* note 199 and accompanying text (discussing the challenges presented by a heightened pleading standard).

253. See Securities Exchange Act of 1934 § 21D(b)(2), 15 U.S.C. § 78u-4(b)(2) (2006) (designating the pleading requirements for scienter, requiring a complaint to "state with particularity facts giving rise to a strong inference that the defendant acted with required state of mind").

254. *Id.*

255. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 328 (2007).

256. Securities Exchange Act of 1934 § 21D(b)(1)(B).

257. *Id.*

258. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009) (clarifying that while Rule 8(a)(2) might have relaxed the older system of code-pleading, it did not loosen the standard so much as to allow a plaintiff to proceed only on conclusions, and further, that plausibility is required to survive a motion to dismiss).

facts that can clear all of these procedural hurdles. Ultimately, there may be legitimate concerns regarding system accessibility. The more difficult that it becomes to adequately plead a private securities fraud claim, the less likely an investor with a meritorious claim will be able to recover his losses absent a clearly compelling case and the financial means to weather a storm of motions to dismiss.²⁵⁹ Pleading loss causation under the *Iqbal* plausibility gloss on Rule 8(a)(2), while perhaps jurisprudentially consistent with the intentions of the PSLRA, only serves to augment the concern about system accessibility.

CONCLUSION

The current economic climate suggests that a steady stream of private securities fraud claims should enter the court system in the near term. Understanding the proper pleading standard for the element of loss causation will be pivotal for a plaintiff bringing a claim if he is to avoid dismissal. Although the general pleading standard under Rule 8(a)(2) is the proper pleading standard for the element of loss causation, it is likely a difficult standard for a plaintiff to meet in light of *Iqbal*'s new, formal two-prong approach.²⁶⁰

Several factors suggest that Rule 8(a)(2) is the proper pleading standard for loss causation. While the Supreme Court did not formally adopt Rule 8(a)(2) as the pleading standard to govern loss causation in *Dura*, it clearly assumed it as the standard in dismissing a claim for insufficiently pleading the element of loss causation. Additionally, *Dura* begins a fairly clear line of progression in the development of the plausibility pleading under Rule 8(a)(2) that is further refined in *Twombly* and *Iqbal*. The fact that the Supreme Court cited *Dura*, a loss causation case, in *Twombly* and *Iqbal* as a source of the current plausibility standard shows that *Dura* was an integral case in the development of the Court's plausibility pleading jurisprudence and strongly suggests that the Court would apply Rule 8(a)(2) to future loss causation cases. Moreover, analogies to the elements of common law fraud and the element of proximate cause in the tort context reinforce the conclusion that, notwithstanding the fact that Rule 9(b) generally governs the pleading standard for elements of a fraud claim, Rule 8(a)(2) is the proper pleading standard.

However, properly pleading the element of loss causation may prove to be particularly difficult under the *Iqbal* plausibility construction of Rule

259. See Spencer, *supra* note 27, at 471 (recognizing the irony that a plaintiff will often be unable to plead a plausible claim absent discovery to key information necessary to do so).

260. See discussion *supra* Part II.B.

8(a)(2). *Iqbal*'s formal two-prong approach entails requirements of both particularity and plausibility, and possibly even "plausibility in light of other reasonable alternatives."²⁶¹ To meet *Iqbal*'s first prong—avoiding conclusory statements—a plaintiff will need to plead factual particularity.²⁶² To meet *Iqbal*'s second prong, the plausibility requirement, a plaintiff will need to plead a factual description of events that are not only sufficiently particular to satisfy the first prong, but also sufficiently plausible, and perhaps even the most plausible description of events among reasonable alternatives.²⁶³ This pleading scheme suggests a substantial burden for the plaintiff to carry at the pleadings stage. Moreover, considering pleading the element of loss causation within the context of the broader private securities fraud claim and the heightened requirements therein, policy concerns arise regarding a plaintiff's ability to access judicial remedy for loss. The cumulative effect is that there will likely be many cases where a plaintiff with a meritorious, *detailed*, but not clear-cut private securities fraud claim, will ultimately find himself pleading a lost cause.

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

262. See *supra* Part II.B.1.

263. See *supra* Part II.B.2.