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DING, DONG, *CONLEY*'S DEAD: *BELL ATLANTIC* CHANGES THE FEDERAL PLEADING STANDARD

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INTRODUCTION

In 1957, Justice Hugo Black, writing for the Supreme Court in *Conley v. Gibson*, penned the famous words, that "[i]n appraising the legal sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief."[1] For the next 50 years, this language both defined and embodied the standard for pleading a complaint in the federal court system, under Rule 8(a)(2) of the Federal Rules of Civil Procedure.[2] However, in *Bell Atlantic v. Twombly*, the Supreme Court, stating that *Conley*'s "no set of facts" language has been "questioned, criticized, and explained away long enough," concluded that "this famous observation has earned its retirement."[3]

* J.D. candidate, May 2008, Chicago-Kent College of Law, Illinois Institute of Technology. To Mom and Dad with love, everything that I am, I owe to you. Also, special thanks to Professor Joan Steinman for her edits and commentary on the rough drafts of my article. Her input was invaluable and deeply appreciated.

[1] Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (emphasis added).

[2] Iqbal v. Hasty, 490 F.3d 143, 157 (2d Cir. 2007) (stating that *Conley*'s "no set of facts" language has been cited by federal courts over 10,000 times in different contexts).

[3] Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1969 (2007).

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Writing for the *Bell Atlantic* majority, Justice Souter held that a well-pleaded complaint must contain factual allegations sufficient "to raise a right to relief above the speculative level."[4] Yet nowhere in Rule 8(a)(2)[5] is there any mention of "facts" or "factual allegations."[6] Rather, the drafters of Rule 8 were careful to avoid any reference to "facts," "evidence," or "conclusions" in the Federal Rules, so as to avoid the confusion that abounds under the Field Code of 1848.[7] To achieve this goal, the drafters intentionally substituted the phrase, "*claim* showing that the pleader is entitled to relief,"[8] in place of the code formulation, "*facts* constituting a cause of action."[9] The *Conley* decision embraced this relaxed standard of pleadings, which sought to keep litigants in the court system rather than force them out of it.[10] Under *Conley*, outright dismissal of a claim was only permitted when the judge had determined—after taking all the allegations in the complaint as true—that proceeding to discovery or beyond would be futile.[11] The express disavowal of *Conley's* "no set of facts" language

[4] *Id.* at 1965.

[5] Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

[6] Fed. R. Civ. P. 8(a).

[7] *Bell Atlantic*, 127 S. Ct. at 1975-76 (Stevens, J., dissenting). In 1848, David Dudley Field created the New York Code, which required "[a] statement of facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." 1848 N. Y. Laws pp. 497, 521. The predecessor to modern notice pleading, the New York Code of 1848, while more accessible by the common litigant than the Hilary Rules of 1834, implemented a pleading spectrum that confounded many commentators. The spectrum moved from evidentiary facts, to ultimate facts, to conclusions of law, with the goal being to plead only the ultimate facts. However, the distinctions between these three groupings were not abundantly clear and often times were too subtle to provide any substantive guidance.

[8] *Bell Atlantic*, 127 S. Ct. at 1976 (Stevens, J., dissenting) (citing 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (3d ed. 2004)) (emphasis added).

[9] *Id.* (emphasis added).

[10] *Id.* at 1976-77.

[11] *Id.* at 1977.

by the Supreme Court indicates a heightening of federal pleading standards, despite the *Bell Atlantic* majority's unconvincing insistence that they remain unchanged.[12]

In the wake of *Bell Atlantic*, the federal appellate courts have been put to the task of interpreting the Supreme Court's opinion and applying this new standard of federal pleading to the cases before them. Part I of this Note reviews the relevant background required to discuss the Seventh Circuit's interpretation of *Bell Atlantic*. This background includes Federal Rules of Civil Procedure 8(a) and 12(b)(6), the Supreme Court's decision in *Conley*, and the Seventh Circuit's pre-*Bell Atlantic* Rule 12(b)(6) jurisprudence. Part II dissects the Supreme Court's opinion in *Bell Atlantic* and looks at the Supreme Court's subsequent decision in *Erickson v. Pardus*.[13] Part III discusses two Seventh Circuit cases—*EEOC v. Concentra Health Services, Inc.*[14] and *Airborne Video & Beepers, Inc. v. AT & T Mobility LLC*[15]—that interpret the Supreme Court decision in *Bell Atlantic*. Part IV explores the way in which the district courts have applied *Concentra* and *Airborne*. This Note concludes with a recapitulation of what is required for a complaint to withstand a Rule 12(b)(6) motion to dismiss in the Seventh Circuit, as well as a brief discussion of the impact that *Concentra*, *Airborne* and the other recent Seventh Circuit decisions will have on practitioners in the Seventh Circuit.

I. BACKGROUND

Before discussing *Bell Atlantic*, it is necessary to understand Federal Rules of Civil Procedure 8(a) and 12(b)(6), as well as the history of the Supreme Court's Rule 8(a) jurisprudence.

[12] *Id.* at 1973.
[13] 127 S. Ct. 2197 (2007).
[14] 496 F.3d 773 (7th Cir. 2007).
[15] 499 F.3d 663 (7th Cir. 2007).

A. Federal Rules of Civil Procedure 8(a) and 12(b)(6)

Federal Rule of Civil Procedure 8 lays out the general rules of pleading in the federal court system.[16] Subsection (a) of Rule 8 specifically describes what information a claim for relief (also referred to in this Note as the complaint) must contain:

> **(a) Claim for Relief.** A pleading that states a claim for relief must contain:
>
> **(1)** a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> **(2)** a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> **(3)** a demand for the relief sought, which may include relief in the alternative or different types of relief.[17]

Court's interpret Rule 8(a)(2) when determining the standard of pleading in the federal court system.[18]

A defendant can test the sufficiency of a plaintiff's complaint by making a motion under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted."[19] If the complaint has not satisfied the requirements of Rule 8(a), this motion should be granted by the court.[20] The key question is what information Rule 8(a)(2) requires to be stated in the complaint. *Conley v. Gibson* was one of the first cases to provide an answer to this question.

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[16] Fed. R. Civ. P. 8.

[17] *Id.*

[18] Conley v. Gibson, 355 U.S. 41, 45-46 (1957); *Bell Atlantic* 127 S. Ct. at 1964-1965.

[19] Fed. R. Civ. P. 12(b)(6).

[20] *Id.*

B. Conley v. Gibson

In *Conley*, plaintiffs brought a class action suit under the Railway Labor Act alleging discrimination against them by their bargaining agents.[21] The complaint alleged that the petitioners were employees of the Texas and New Orleans Railroad; that Local 28 of the Brotherhood was the designated bargaining agent for the petitioners under the Railway Labor Act; and that a contract existed between the Union and the Railroad which provided the employees in the bargaining unit certain protections against discharge and loss of seniority. It further alleged that in May of 1954, the Railroad purported to abolish 45 jobs held by the petitioners or other black railroad workers and that all of the petitioners were either discharged or demoted. The complaint further stated that the 45 jobs were not actually abolished, but instead filled by whites as the blacks were forced to leave; that despite pleas from the petitioners, the Union did nothing to protect them from the racially discriminatory discharges; and that the Union refused to give them protection comparable to that afforded to white employees. Ultimately, the petitioners alleged that the Union was acting according to a plan and that under the Railway Labor Act such discrimination violated petitioners' rights to fair representation from their bargaining agent.[22] Petitioners asked for a declaratory judgment, an injunction and damages.[23]

The respondents moved to dismiss the complaint on several grounds including that the complaint failed to state a claim upon which relief could be given.[24] The district court dismissed the case due to lack of jurisdiction, finding that the National Railroad Adjustment Board had exclusive jurisdiction over the controversy, and the Fifth Circuit Court of Appeals affirmed.[25] The Supreme Court of the United States granted certiorari and held that the dismissal for lack of

[21] *Conley*, 355 U.S. at 42.
[22] *Id.* at 43
[23] *Id.*
[24] *Id.*
[25] *Id.*

jurisdiction was error.[26] The Supreme Court also decided the respondents' Rule 12(b)(6) motion, even though it had not been decided below because of the lower court's ruling on the jurisdictional issue.[27] The Court found it proper to rule on the respondent's motion because both parties had already briefed the issue and the respondents urged the Court to uphold the decision below on grounds other than lack of jurisdiction if necessary.[28]

Justice Black first set forth the above-quoted and oft-cited rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[29] In adjudicating the sufficiency of the petitioners' complaint, the Court looked to the general principle that the Railway Labor Act prohibits discrimination in representation on the basis of race.[30] Because the petitioners alleged in their complaint that the Union denied them protection on the basis of their race, the allegations, if proven, would demonstrate that the Union breached its statutory duty to fairly represent all of the employees of the bargaining unit.[31] As such, petitioner's complaint sufficiently stated a claim upon which relief could be granted.[32]

The respondents argued that dismissal was proper because the petitioners' complaint failed to set forth specific facts in support of its general allegations of discrimination.[33] However, the Court stated emphatically that:

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[26] *Id*. at 44

[27] *Id*. at 45

[28] *Id.*

[29] *Id.* at 45-46

[30] *Id.* at 46; *see* Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952); Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232 (1949); Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944).

[31] *Conley*, 355 U.S. at 46.

[32] *Id.* at 48.

[33] *Id*. at 47.

> [T]he Federal rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short 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.[34]

According to Justice Black, this loose standard of pleading—referred to as "notice pleading"—was made possible by the opportunity for discovery and the other pretrial procedures authorized by the Federal Rules.[35] These devices, and not the pleadings, are aimed at more precisely establishing the basis of the plaintiff's claims.[36]

In dozens of cases over the next half century, the Supreme Court and the federal courts of appeals followed Justice Black's reasoning from *Conley* and cited his "no set of facts" language as the standard for notice pleading required by Rule 8(a)(2).[37] Although court's[38] and

[34] *Id.*

[35] *Id.* at 47-48

[36] *Id.*

[37] In Justice Stevens' dissent in *Bell Atlantic*, 127 S. Ct. at 1978, he provides the following string citation to illustrate his point that *Conley's* "no set of facts" language has indeed been the federal pleading standard since the Court's decision in *Conley* in 1957:

SEC v. Zandford, 535 U.S. 813, 818, 122 S. Ct. 1899, 153 L. Ed. 2d 1 (2002); Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 654, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 811, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993); Brower v. County of Inyo, 489 U.S. 593, 598, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989); Hughes v. Rowe, 449 U.S. 5, 10, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980) (per curiam); McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 246, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980); Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976); Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972) (per curiam); Haines v. Kerner, 404 U.S. 519, 521, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) (per curiam); Jenkins v. McKeithen, 395 U.S. 411, 422, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969) (plurality opinion); see also Cleveland Bd. of Ed. v. Loudermill,

470 U.S. 532, 554, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (Brennan, J., concurring in part and dissenting in part); Hoover v. Ronwin, 466 U.S. 558, 587, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984) (Stevens, J., dissenting); United Air Lines, Inc. v. Evans, 431 U.S. 553, 561, n. 1, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977) (Marshall, J., dissenting); Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 55, n. 6, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (Brennan, J., concurring in judgment). *See, e.g.*, EB Invs., LLC v. Atlantis Development, Inc., 930 So. 2d 502, 507 (Ala. 2005); Department of Health & Social Servs. v. Native Village of Curyung, 151 P. 3d 388, 396 (Alaska 2006); Newman v. Maricopa Cty., 167 Ariz. 501, 503, 808 P.2d 1253, 1255 (App. 1991); Public Serv. Co. of Colo. v. Van Wyk, 27 P. 3d 377, 385-386 (Colo. 2001) (en banc); Clawson v. St. Louis Post-Dispatch, LLC, 906 A.2d 308, 312 (D. C. 2006); Hillman Constr. Corp. v. Wainer, 636 So. 2d 576, 578 (Fla. App. 1994); Kaplan v. Kaplan, 266 Ga. 612, 613, 469 S. E. 2d 198, 199 (1996); Wright v. Home Depot U.S.A., 111 Haw. 401, 406, 142 P. 3d 265, 270 (2006); Taylor v. Maile, 142 Idaho 253, 257, 127 P. 3d 156, 160 (2005); Fink v. Bryant, 2001-CC-0987, p. 4 (La. 11/28/01), 801 So. 2d 346, 349; Gagne v. Cianbro Corp., 431 A.2d 1313, 1318-1319 (Me. 1981); Gasior v. Massachusetts Gen. Hospital, 446 Mass. 645, 647, 846 N.E.2d 1133, 1135 (2006); Ralph Walker, Inc. v. Gallagher, 926 So. 2d 890, 893 (Miss. 2006); Jones v. Montana Univ. System, 337 Mont. 1, 7, 155 P. 3d 1247, ____ (2007); Johnston v. Neb. Dep't of Corr. Servs., 270 Neb. 987, 989, 709 N.W.2d 321, 324 (2006); Blackjack Bonding v. Las Vegas Munic. Ct., 116 Nev. 1213, 1217, 14 P. 3d 1275, 1278 (2000); Shepard v. Ocwen Fed. Bank, 361 N. C. 137, 139, 638 S. E. 2d 197, 199 (2006); Rose v. United Equitable Ins. Co., 2001 ND 154, P10, 632 N.W.2d 429, 434; State ex rel. Turner v. Houk, 112 Ohio St. 3d 561, 562, 2007-Ohio-814, P5, 862 N.E.2d 104, 105 (per curiam); Moneypenney v. Dawson, 2006 OK 53, P2, 141 P. 3d 549, 551; Gagnon v. State, 570 A.2d 656, 659 (R. I. 1990); Osloond v. Farrier, 2003 SD 28, P4, 659 N.W.2d 20, 22 (per curiam); Smith v. Lincoln Brass Works, Inc., 712 S.W.2d 470, 471 (Tenn. 1986); Association of Haystack Property Owners v. Sprague, 145 Vt. 443, 446, 494 A.2d 122, 124 (1985); In re Coday, 156 Wn. 2d 485, 497, 130 P. 3d 809, 815 (2006) (en banc); Haines v. Hampshire Cty. Comm'n, 216 W. Va. 499, 502, 607 S. E. 2d 828, 831 (2004); Warren v. Hart, 747 P.2d 511, 512 (Wyo. 1987); see also Malpiede v. Townson, 780 A.2d 1075, 1082-1083 (Del. 2001) (permitting dismissal only "where the court determines with reasonable certainty that the plaintiff could prevail on no set of facts that may be inferred from the well-pleaded allegations in the complaint" (internal quotation marks omitted)); Canel v. Topinka, 212 Ill. 2d 311, 318, 818 N.E.2d 311, 317, 288 Ill. Dec. 623 (2004) (replacing "appears beyond doubt" in the Conley formulation with "is clearly apparent"); In re Young, 522 N.E.2d 386, 388 (Ind. 1988) (per curiam) (replacing "appears beyond doubt" with "appears to a certainty"); Barkema v. Williams Pipeline Co., 666 N.W.2d 612, 614 (Iowa 2003) (holding that a motion to dismiss should be sustained "only when there exists no conceivable set of facts entitling the non-moving party to relief"); Pioneer Village v.

scholars[39] frequently questioned this standard over that period of time, the viability of *Conley* remained intact until *Bell Atlantic v. Twombly*.[40]

*C. The Seventh Circuit's Pre-*Bell Atlantic *Rule 12(b)(6) Jurisprudence*

In *Doe v. Smith*,[41] the plaintiff, a 16-year-old girl, engaged in consensual sexual relations with the defendant.[42] Unbeknownst to plaintiff, the defendant used a hidden camera to make a recording of the two in bed together.[43] Plaintiff alleged that after their relationship ended the defendant circulated copies of the videotape via email, and

Bullitt Cty., 104 S. W. 3d 757, 759 (Ky. 2003) (holding that judgment on the pleadings should be granted "if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief"); Corley v. Detroit Bd. of Ed., 470 Mich. 274, 277, 681 N.W.2d 342, 345 (2004) (per curiam) (holding that a motion for judgment on the pleadings should be granted only "'if no factual development could possibly justify recovery'"); Oberkramer v. Ellisville, 706 S.W.2d 440, 441 (Mo. 1986) (en banc) (omitting the words "beyond doubt" from the Conley formulation); Colman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990) (holding that a motion to dismiss is appropriate "only if it clearly appears that [the plaintiff] can prove no set of facts in support of his claim"); NRC Mgmt. Servs. Corp. v. First Va. Bank - Southwest, 63 Va. Cir. 68, 70 (2003) ("The Virginia standard is identical [to the Conley formulation], though the Supreme Court of Virginia may not have used the same words to describe it").

[38] *Bell Atlantic*, 127 S. Ct. at 1969 (citing Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989); O'Brien v. DiGrazia, 544 F.2d 543, 546 n.3 (1st Cir. 1976); McGregor v. Indus. Excess Landfill, Inc., 856 F.2d 39, 42-43 (6th Cir. 1988)).

[39] Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 463-465 (1986), (cited in *Bell Atlantic*, 127 S. Ct. at 1969).

[40] 127 S. Ct. 1955 (2007).

[41] 429 F.3d 706, 707 (7th Cir. 2005).

[42] *Id.*

[43] *Id.*

that at least one of the recipients posted the recording on the internet.[44] Plaintiff filed suit under the federal wire-tapping statute,[45] alleging that the video recording was an unauthorized interception, and that its disclosure was forbidden.[46] The district court dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.[47] It ruled that plaintiff's complaint was deficient because it failed to allege that the recording was an "interception" within the meaning of §2510(4).[48] The Seventh Circuit Court of Appeals reversed and remanded.[49]

Writing for the court, Judge Easterbrook agreed that the complaint did not allege that the defendant "intercepted" anything.[50] However, he wrote:

> [P]leadings in federal court need not allege facts corresponding to each "element" of a statute . . . . Usually they need do no more than narrate a grievance simply and directly, so that the defendant knows what he has been accused of . . . . Complaints initiate the litigation but need not cover everything necessary for the plaintiff to win; factual details and legal arguments come later. A complaint suffices if any facts consistent with its allegations, and showing entitlement to prevail, could be established by affidavit or testimony at trial.[51]

He determined that the plaintiff's complaint satisfied this standard because "it is easy to tell what [the defendant] is complaining about."[52]

[44] *Id.*
[45] 18 U.S.C. §§ 2510-2522 (2000).
[46] *Smith*, 429 F.3d at 707.
[47] *Id.* at 708.
[48] *Id.*
[49] *Id.* at 710.
[50] *Id.* at 708.
[51] *Id.*
[52] *Id.*

Judge Easterbrook cautioned that district court judges tempted to dismiss a complaint because it does not contain a specific allegation should recall that only those claims explicitly stated in Rule 9(b) are required to be pleaded with particularity.[53] Because "interception" is not on Rule 9(b)'s short list, it was error by the district court to dismiss.[54]

In *Kolupa v. Roselle Park District*,[55] the Seventh Circuit Court of Appeals followed the reasoning of the *Smith* court. Plaintiff, Christopher Kolupa, alleged that the defendant violated Title VII of the Civil Rights Act of 1964[56] by firing him on account of his religious beliefs.[57] The district judge dismissed the complaint for failure to state a claim upon which relief could be granted.[58] On appeal, Judge Easterbrook affirmed in part, reversed in part, and remanded the case for proceedings consistent with the court's opinion.[59]

Judge Easterbrook began by explaining the applicable federal pleading standard.[60] He wrote that, "Federal complaints plead *claims* rather than facts . . . It is enough to name the plaintiff and the defendant, state the nature of the grievance, and give a few tidbits (such as the date) that will let the defendant investigate. A full narrative is unnecessary."[61] In order to state a claim for religious discrimination, a plaintiff is only required to "recite that the employer has caused some concrete injury by holding the worker's religion against him."[62]

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[53] *Id.*

[54] *Id.*

[55] 438 F.3d 713 (7th Cir. 2006) *overruled by* EEOC v. Concentra Health Servs., Inc., 496 F.3d 773 (7th Cir. 2007).

[56] 42 U.S.C. § 2000e-2(a)(1) (2000).

[57] *Kolupa*, 438 F.3d at 714.

[58] *Id.*

[59] *Id.* at 716.

[60] *Id.* at 714.

[61] *Id.*

[62] *Id.*

The district judge dismissed the plaintiff's complaint because it failed to allege that the other employees were similarly situated with respect to him, or that the other employees were outside of the protected class.[63] According to Judge Easterbrook, however, it was error on the part of the district court to require the plaintiff to plead facts that pertain to every aspect of a prima facie case for a Title VII violation.[64] Citing the *Smith* decision, Judge Easterbrook reiterated "that complaints need not plead facts and need not narrate events that correspond to each aspect of the applicable legal rule. Any decision declaring 'this complaint is deficient because it does not allege X' is a candidate for summary reversal, unless X is on the list of *Fed. R. Civ. P. 9(b).*"[65] He reversed the lower court's decision with respect to the discriminatory discharge claim.[66]

Plaintiff's complaint also alleged that the Park District failed to accommodate his religious beliefs, failed to promote him, and retaliated against him when he tried to protect his rights.[67] Judge Easterbrook affirmed the dismissal of these claims because there was no mention made of them in the plaintiff's administrative charge.[68]

II. THE RECENT SUPREME COURT DECISIONS

A. Bell Atlantic Corp. v. Twombly

In *Bell Atlantic*, plaintiffs William Twombly and Lawrence Marcus brought a class action suit on behalf of the subscribers of local telephone and/or high speed internet services against the incumbent local exchange carriers ("ILECs") that comprise Bell Atlantic

[63] *Id.*

[64] *Id.*

[65] *Id.* at 715; Federal Rule of Civil Procedure 9(b) says: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b).

[66] *Kolupa*, 438 F.3d at 716.

[67] *Id.* at 715.

[68] *Id.* at 716.

Corporation.[69] The complaint alleged violations of Section 1 of the Sherman Antitrust Act, which proscribes "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or foreign nations."[70] The complaint alleged that the Bell Atlantic ILECs conspired to restrain trade (1) by engaging in parallel conduct in their respective service areas to inhibit the growth of competitive local exchange carriers ("CLECs") and (2) by agreeing to refrain from competing against one another, as evidenced by their common failure to pursue attractive business opportunities in contiguous markets, and by a statement of one ILEC's CEO that competing in another ILEC's territory did not seem right.[71]

The district court dismissed the complaint because it found that the plaintiffs failed to state a claim upon which relief could be granted.[72] It reasoned that mere allegations of parallel business conduct do not state a claim under Section 1 of the Sherman Act, and that the plaintiffs are required to allege additional facts tending to exclude independent self-interested conduct as an explanation for the parallel action of the ILECs.[73] On appeal, the Second Circuit, citing *Conley*, reversed the trial court's ruling and held that plaintiffs' complaint was sufficient to withstand a Rule 12(b)(6) motion because the ILECs failed to show that there is "no set of facts" that would permit the plaintiffs to demonstrate that the parallel conduct they alleged was the product of collusion rather than coincidence.[74]

The United States Supreme Court granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.[75] In reversing the Second Circuit and reinstating the trial court's dismissal of the plaintiffs' complaint, the

[69] Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1962 (2007).
[70] *Id.*
[71] *Id.*
[72] Twombly v. Bell Atlantic Corp., 313 F.Supp.2d 174, 179 (S.D.N.Y. 2003).
[73] *Id.*
[74] Twombly v. Bell Atlantic Corp., 425 F.3d 99, 119 (2d Cir. 2005).
[75] *Bell Atlantic*, 127 S. Ct. at 1963.

Court held that even though a complaint need not contain detailed factual allegations, "a plaintiff's obligation to demonstrate the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[76] "Factual allegations must be enough to raise a right to relief above the speculative level," and absent at least some factual allegations in the complaint, "it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claims, but also 'grounds' on which the claim rests."[77]

The Court's rationale for requiring such factual allegations in the complaint was rooted in the rising costs of litigation and of compliance with discovery, in particular.[78] According to the Court, a complaint that contains no factual allegations does not give rise to a "reasonable expectation" that discovery will reveal any evidence of the conduct complained of and "'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'"[79] The Court mentioned that the expense of antitrust discovery, the use of discovery by plaintiffs to extract nuisance value from suits, and the increasing caseload of the federal court system all weighed in favor of requiring a plaintiff to demonstrate the plausibility of his claims at the pleading stage.[80]

Plaintiffs' main argument against the "plausibility standard"[81] was based on Justice Black's "no set of facts" language from the Court's decision in *Conley*.[82] However, the Court says that *Conley's* "no set of facts" language never was intended to be read literally or in isolation, and that such a narrow reading of those words led to the erroneous conclusion that "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the

[76] *Id.* at 1964-1965.
[77] *Id.* at 1965.
[78] *Id.* at 1965-1966.
[79] *Id.* at 1966.
[80] *Id.* at 1966-1967.
[81] *Id.* at 1968.
[82] *Id.*

possibility that a plaintiff might later establish some 'set of undisclosed facts' to support recovery." [83] Rather, the Court stated that *Conley* stands for the proposition that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[84] In dismissing the complaint, the Court reasserted that it was not applying a heightened pleading standard in the context of antitrust litigation, but instead was clarifying and enunciating an often misunderstood legal principle. [85]

According to the *Bell Atlantic* dissent, however, there is not, nor has there ever been, any confusion about the standard of notice pleading that has dominated the federal system for the last 50 years.[86] Justice Stevens—the author of the dissent— believes that two practical concerns are at the heart of the Court's departure from "settled procedural law."[87] Namely, the extraordinary expense that antitrust litigation can impose on a defendant, and the risk that jurors may believe that evidence of parallel conduct is sufficient to find an agreement as opposed to similar decisions made while defendants act independently of one another.[88]

In response to these legitimate concerns, Justice Stevens argued that careful case management, strict controls over the discovery process, close examination of the evidence at the summary judgment stage, and carefully crafted jury instructions offer a satisfactory solution.[89] He did not believe that the Majority's concerns provided a sufficient reason to dismiss an adequately pleaded complaint and to allow the defendants to avoid filing an answer in which they could deny, or perhaps admit, that they acted, or omitted to act, in concert.[90]

[83] *Id.* at 1968-1969.
[84] *Id.* at 1969.
[85] *Id.* at 1973.
[86] *Id.* at 1978 (Stevens, J., dissenting).
[87] *Id.* at 1975
[88] *Id.*
[89] *Id.*
[90] *Id.*

The dissent went on to describe the history of pleading rules throughout the Anglo-American experience, noting the stringency with which such rules were applied in the early 19th century and the relaxation of these standards as time passed.[91] According to Justice Stevens, the goal of the relaxed pleading requirements of the Federal Rules "was not to keep litigants out of court but rather to keep them in," and *Conley's* "no set of facts" language is consistent with that goal. Its "formulation permits outright dismissal only when proceeding to discovery or beyond would be futile."[92]

In further support of the dissenters' belief that Rule 8(a)(2) does not require a plaintiff to plead any specific facts in the complaint, the dissent pointed to Rule 9's imposition of a "particularity" requirement on all complaints that allege fraud or mistake.[93] Given the canon of statutory construction *expressio unius est exclusion alterius*— "the expression of one is the exclusion of others"—it argued that Congress clearly did not intend plaintiffs who are not alleging fraud or mistake to have to plead with the kind of factual specificity required by the majority.[94]

B. Erickson v. Pardus

Just two weeks after *Bell Atlantic*, the Supreme Court handed down another opinion regarding Rules 8(a)(2), 12(b)(6) and the federal pleading standard.[95] In *Erickson*, a prison inmate filed suit under 42 U.S.C. § 1983, for violations of his Eighth and Fourteenth Amendment rights by prison officials at the Limon Correctional Facility in Colorado.[96] The petitioner, William Erickson, alleged that a liver condition that resulted from hepatitis C required a medical treatment

[91] *Id.* at 1975-1976

[92] *Id.* at 1977

[93] *Id.* at 1977 n.4

[94] *Id.*

[95] The decision in *Bell Atlantic* was handed down on May 21, 2007. The Court decided *Erickson* on June 4.

[96] Erickson v. Pardus, 127 S. Ct. 2197, 2197-98 (2007).

program that the officials had commenced but wrongfully terminated, consequently putting his life in danger.[97] The district court dismissed petitioner's complaint for failure to state a claim, and the Court of Appeals for the Tenth Circuit affirmed, characterizing the complaint's allegations as "conclusory."[98] The Supreme Court vacated the judgment from below and remanded the case for further review.[99]

According to petitioner's complaint, officials at the Colorado Department of Corrections ("Department") diagnosed the petitioner with hepatitis C.[100] Petitioner began treatment for the disease after completing the necessary courses and complying with Department procedures.[101] The year-long treatment program required the use of a syringe for weekly self-injections of medication.[102] However, after petitioner's treatment began prison officials were unable to account for one of the syringes made available to him and the other prisoners receiving similar medical attention.[103] Eventually, they found it in a communal trash can, modified in a manner which suggested illegal drug use.[104]

The prison officials, disbelieving petitioner's claim that he had not taken the syringe, cited him for violating the Colorado penal code's provisions against possession of drug paraphernalia.[105] Furthermore, petitioner was removed from his treatment program as a result of the officials' assessment that he intended to use drugs.[106] Petitioner alleged that "Dr. Bloor had 'removed [him] from [his] hepatitis C treatment' in violation of department protocol, 'thus endangering [his]

[97] *Id.* at 2197-98.
[98] *Id.* at 2198.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*

life.'"[107] He requested relief including damages and an injunction requiring the Department to resume his treatment for hepatitis C.[108]

Three months after filing his complaint, petitioner filed a Motion for expedited Review Due to Imminent Danger indicating it was undisputed that he had hepatitis C, that he met the Department's standards for treatment of the disease, and that his liver was suffering irreversible harm due to lack of treatment.[109] Respondents filed a motion to dismiss, and the Magistrate Judge before whom the motion was pending recommended that the District Court dismiss the complaint because petitioner failed to allege that Dr. Bloor's actions caused him "substantial harm."[110] The District Court agreed with the Magistrate Judge and dismissed the complaint.[111] The Court of Appeals affirmed, stating that petitioner had failed to "allege that as a result of the discontinuance of the treatment itself shortly after it began or the interruption of treatment for approximately eighteen months he suffered any harm, let alone substantial harm, [other] than what he already faced from Hepatitis C itself[.]"[112]

The Supreme Court granted certiorari and, in a Per Curiam opinion, reversed the decision from below, holding that "[i]t was error for the Court of Appeals to conclude that petitioner's allegations were too conclusory to establish for pleading purposes that petitioner had suffered 'a cognizable independent harm' as a result of his removal from the hepatitis C treatment program."[113] Quoting Justice Stevens' opinion from *Bell Atlantic*, the Court stated that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are

[107] *Id.* at 2199 (quoting Petitioner's Complaint) (brackets in original).

[108] *Id.*

[109] *Id.*

[110] *Id.* (quoting the Magistrate Judge's Recommendation on Defendants' Motion to Dismiss).

[111] *Id.*

[112] *Id.* (quoting Erickson v. Pardus, 198 Fed. Appx. 694, 697 (10th Cir. 2006)).

[113] *Id.* at 2200 (quoting *Erickson*, 198 Fed. Appx. At 698).

not necessary; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[114]

Petitioner's complaint stated that Dr. Bloor's decision to remove him from his hepatitis C treatment constituted a danger to his life.[115] It alleged that his medication was discontinued shortly after the treatment program began; that the prescribed treatment program was supposed to last a year; that he was still in need of treatment for his condition; and that prison officials refused to provide him with treatment.[116] According to the Court, "[t]his alone was enough to satisfy Rule 8(a)(2)." In addition, petitioner strengthened his claim by making more specific allegations in documents attached to the complaint and in later filings.[117]

The Court also pointed out that petitioner was proceeding *pro se*, and that documents filed *pro se* are "to be liberally construed."[118] This fact made the Court of Appeals' departure from Rule 8(a)(2)'s liberal pleading standards even more evident, because "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."[119]

The Court did not determine whether petitioner's complaint was sufficient in all respects, because respondents' raised multiple arguments in their motion to dismiss that were not decided by the district court.[120] The Court did decide, however, that the complaint could not be dismissed on the ground that the allegations in the complaint were too conclusory.[121] The Court vacated the judgment of the Court of Appeals, and remanded for further proceedings consistent with the Court's opinion.

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[114] *Id.* at 2200 (quoting *Bell Atlantic*, 127 S. Ct. at 1964 (quoting *Conley*, 355 U.S. at 47)).

[115] *Id.* at 2200.

[116] *Id.*

[117] *Id.*

[118] *Id.* (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

[119] *Id.*

[120] *Id.*

[121] *Id.*

III. THE SEVENTH CIRCUIT CASES INTERPRETING *BELL ATLANTIC V. TWOMBLY*

Although the Seventh Circuit had already cited *Bell Atlantic* in three separate decisions, it did not seriously dissect the Supreme Court's opinion in that case until *EEOC v. Concentra Health Servs., Inc.* [122] In *Concentra*, the Seventh Circuit determined that the federal pleading standard laid out in *Bell Atlantic* requires a complaint not only to provide the defendant with fair notice of the claims against him and the grounds upon which they rest, but to also plausibly suggest that the pleader is entitled to relief.[123] However, *Bell Atlantic* left largely unanswered what it means to "plausibly suggest that the pleader is entitled to relief."

Although the Supreme Court attempted to explain the newly imposed plausibility standard with declarations such as, "the 'plain statement' [must] possess enough heft to 'show that the pleader is entitled to relief,'"[124] and "[f]actual allegations must be enough to raise a right to relief above a speculative level,"[125] such statements do not provide any substantive guidance as to how much, or what type of factual detail is ultimately required under the "plausibility standard." The Seventh Circuit maintained in *Airborne Video & Beepers, Inc. v. AT & T Mobility LLC* that specific facts need not be pled in the complaint. [126] As a practical matter, however, it does not appear possible to satisfy either *Bell Atlantic*, or the Seventh Circuit's

[122] The Seventh Circuit Court of Appeals issued opinions in three cases that cited to or quoted *Bell Atlantic* before *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773 (7th Cir. 2007). None of them, however, delved into the Supreme Court's decision as deeply as the court in *Concentra* did. *See* In re Ocwen Loan Servicing, 491 F.3d 638, 646 (7th Cir. 2007); Jennings v. Auto Meter Products, 495 F.3d 466, 472 (7th Cir. 2007); Local 15, IBEW v. Exelon Corp., 495 F.3d 779, 782 (7th Cir. 2007).

[123] *Concentra*, 496 F.3d at 776.

[124] *Bell Atlantic*, 127 S. Ct. at 1966 (quoting Fed. R. Civ. P. 8(a)(2)).

[125] *Id.* at 1965.

[126] *Airborne*, 499 F.3d at 667.

interpretation of *Bell Atlantic*, without including some factual allegations in the complaint.

A. EEOC v. Concentra Health Services

In *EEOC v. Concentra Health Servs., Inc.*, plaintiff Charles Horn filed a complaint with the Equal Employment Opportunity Commission ("EEOC") when he was fired by his employer Concentra Health Services ("Concentra").[127] The EEOC brought suit against Concentra on behalf of Horn alleging retaliation, in violation of 42 U.S.C. §20003-3(a).[128] According to the complaint, Horn reported to Concentra's director of human resources that "his female supervisor gave a male subordinate, with whom she was having an inappropriate sexual relationship, preferential treatment over similarly situated employees with respect to his employment," and that Concentra responded by firing Horn.[129]

The district court granted Concentra's Rule 12(b)(6) motion and dismissed the EEOC's complaint.[130] It held that Horn could not have believed that the activities he opposed violated Title VII because, at the time Horn reported the affair, favoring a subordinate because of a sexual relationship did not, without more, constitute a violation of Title VII.[131] The court further held that even had Horn actually believed that the affair was a violation of Title VII, his belief was not reasonable, and thus the EEOC's complaint did not state a claim.[132]

The EEOC filed an amended complaint which, in the opinion of the district court, differed from the original only in that the paragraph setting forth the EEOC's claim was far less detailed.[133] It read as follows:

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[127] *Concentra*, 496 F.3d at 775
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.* at 775-776.
[133] *Id.* at 776.

> Since at least 2001, Defendant has engaged in unlawful employment practices at its Elk Grove location in violation of Section 704(a) of title VII, 42 U.S.C. § 2000e-3(a). Such unlawful employment practices include, but are not limited to, retaliating against Horn after he opposed conduct in the workplace that he objectively and reasonably believed in good faith violated Title VII by reporting the conduct to Concentra's Director of Human Resources. Concentra's retaliation includes, but is not limited to, issuing Horn unwarranted negative evaluations and terminating him.[134]

Concentra again moved to dismiss and the district court again granted the motion, this time with prejudice.[135] The court based its decision on its opinion that the complaint did not provide sufficient notice of the nature of the EEOC's claim and that the complaint failed to specify the conduct that Horn believed to be in violation of Title VII.[136] The EEOC subsequently appealed.[137]

The Seventh Circuit affirmed the district court's dismissal on appeal. Writing for the majority, Judge Cudahy engaged in a discussion about the standard of pleading required in the federal court system in the aftermath of *Bell* Atlantic. [138] He began by stating that the Supreme Court has interpreted the language of Rule 8(a)(2) as "impos[ing] two easy-to-clear hurdles" on the pleader:[139]

> First, the complaint must describe the claim in sufficient detail to *give the defendant* "*fair notice* of what the claim is

[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*

> and the grounds upon which it rests."[140] Second, its allegations must *plausibly suggest that the plaintiff has a right to relief*, raising that possibility above a "speculative level"; if they do not, the plaintiff pleads itself out of court.[141]

Concentra argued that the EEOC failed to meet either of the *Bell Atlantic* requirements.[142]

Somewhat confusingly, Judge Cudahy began his 'plausibility' analysis by focusing on the EEOC's initial complaint rather than the amended complaint.[143] Careful consideration of the arguments advanced on appeal by Concentra, as well as consideration of an argument that Concentra chose *not* to advance in support of dismissal are necessary to understand the Seventh Circuit's reasoning on the plausibility issue.

Concentra's first argument for affirming the lower court's dismissal was that the EEOC "pleaded itself out of court by alleging that Horn reported his supervisor's favoritism to a lover," an argument that, according to Judge Cudahy, "reflects a fond nostalgia for the EEOC's original complaint."[144] Judge Cudahy acknowledged that dismissal of the initial complaint was probably correct; however, he did note that the now "rejected 'favoring a paramour' theory [] *did not logically foreclose the possibility* that some other aspect of Horn's report might have furnished a ground for relief."[145] In so doing, he pointed out that some of the Seventh Circuit's past cases suggested that the EEOC's initial complaint would have been able to withstand a

[140] *Id.* (quoting Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007)(quoting Conley v. Gibson, 355 U.S. 41, 47 (1957))(emphasis added).

[141] *Id.* (citing Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007)(emphasis added).

[142] *Id.* at 776-777.

[143] *Id.* at 777.

[144] *Id.* at 777.

[145] *Id.* (emphasis added).

Rule 12(b)(6) motion to dismiss.[146] Yet those cases all were based on *Conley's* disavowed "no set of facts" language and no longer dictated the Seventh Circuit's jurisprudence with regard to the sufficiency of a complaint.[147] Now, a complaint "must actually *suggest* that the plaintiff has a right to relief by providing allegations that 'raise a right to relief above the speculative level.'"[148] "[I]t is not enough for a complaint to *avoid foreclosing* possible bases for relief[.]"[149]

The court also discussed the fact that Concentra did *not* argue that the allegations in the EEOC's amended complaint "fail[ed] to plausibly suggest a right to relief."[150] Rather, Concentra attempted to rely on a "narrow exception" to Federal Rule 10(c) that would have incorporated Horn's original charge to the EEOC into the amended complaint, thus condemning the amended complaint to the same fate as the original.[151] Why take this back door approach to having the complaint dismissed, as opposed to attacking its face? According to Judge Cudahy:

> *Bell Atlantic* itself does not appear to suggest that the *bare idea* of an antitrust conspiracy among major telephone companies like the one alleged in that case is implausible; rather, it appears to hold that the plaintiffs pleaded themselves out of court with detailed "allegations of parallel conduct" that did not plausibly suggest such a conspiracy.[152]

Similarly, it was Horn's *detailed* allegations of the conduct giving rise to the Title VII violation that resulted in the dismissal of the

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[146] *Id.*

[147] *Id.*

[148] *Id.* (quoting Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007))(emphasis in original).

[149] *Id.* (emphasis in original).

[150] *Id.*

[151] *Id.* at 778.

[152] *Id.* (quoting *Bell Atlantic*, 127 S. Ct. at 1963, 1966) (emphasis in original).

original complaint.[153] The leaner allegations of the amended complaint, that Concentra retaliated against Horn for making a report protected by Title VII—although possibly deficient in providing the defendant with the notice required by Rule 8—is no less plausible than a prison doctor improperly withholding medication from a prisoner.[154] The court found that the EEOC did not plead itself out of court with its amended complaint and it moved on to the question of notice.[155]

On the notice issue, Concentra argued that dismissal was proper because the complaint did not specify the conduct that the plaintiff reported to Concentra's Human Resources Director.[156] Here the court agreed.[157] Judge Cudahy reasoned that Rule 8(a)(2) requires that there be some minimum level of factual detail in the complaint that is sufficient to "give the defendant fair notice of what . . . the claim is and the grounds upon which it rests."[158] The question for the court to resolve in close cases is how much factual detail is required before the defendant has been given fair notice.[159]

Judge Cudahy explained that, although the Rules do not require highly detailed factual pleadings, they do not "promote vagueness or reward deliberate obfuscation" either.[160] Rather:

> Encouraging a plaintiff to plead what few facts can be easily provided and will clearly be helpful serves to expedite resolution by quickly alerting the defendant to the basic, critical factual allegations (that is, by providing "fair notice" of the plaintiff's claim) and, if appropriate, permitting a quick test of the legal sufficiency of those allegations.[161]

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[153] *Id.* at 775-776.
[154] *Id.* at 778 (referencing *Erickson*, 127 S. Ct. at 2200).
[155] *Id.* at 778-779.
[156] *Id.* at 779.
[157] *Id.* at 782.
[158] *Id.* at 779.
[159] *Id.*
[160] *Id.* at 780.
[161] *Id.*

Simply put, a complaint should contain clearly important information that a plaintiff is easily able to provide.[162] The Seventh Circuit affirmed the district court's dismissal and Judge Cudahy denied the EEOC's request for leave to file a second amended complaint in order to conform to *Bell Atlantic*, expressing doubt that *Bell Atlantic* changed the applicable federal pleading standard.[163]

B. Airborne Video & Beepers, Inc. v. AT & T Mobility LLC

The Seventh Circuit refined its Rule 8 analysis in a case decided three weeks after *Concentra*. In *Airborne Video & Beepers, Inc. v. AT & T Mobility LLC*, [164] the Seventh Circuit tried to read the Supreme Court's *Bell Atlantic* decision in harmony with *Erickson v. Pardus*.[165] In *Airborne*, an owner of a retail store specializing in cellular, pager and long-distance telephone services brought suit against a telephone company for, among other things, breach of contract, tortious interference with business relationships, and deceptive and fraudulent practices when the telephone company stopped paying the plaintiff commissions on service activations. [166] Due to the plaintiff's repeated inability to properly file an adequate complaint, the district court denied plaintiff's motion for leave to file a fourth amended complaint.[167]

On appeal the Seventh Circuit affirmed the district court's ruling.[168] In so doing Judge Wood further explored the Seventh Circuit's pleading standards even though she acknowledged that this issue was not raised on appeal.[169] In her opinion, Judge Wood recited *Bell Atlantic's* language that "a plaintiff's obligation to provide the

[162] *Id.*
[163] *Id.* at 782.
[164] 499 F.3d 663, 667 (7th Cir. 2007).
[165] *Id.* (citing Erickson v. Pardus, 127 S. Ct. 2197 (2007)).
[166] *Id.* at 664.
[167] *Id.* at 666.
[168] *Id.* at 668.
[169] *Id.* at 667-668.

'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions."[170] Yet, she found that the *Erickson* decision clearly indicated that *Bell Atlantic* did not represent a shift to fact-pleading in the federal system.[171] According to Judge Wood, *Erickson* reaffirmed that Rule 8 does not require specific facts, but merely requires that the defendant be given "fair notice of what the . . . claim is and the grounds upon which it rests."[172] Taking these two propositions together, Judge Wood wrote:

> [W]e understand the [Supreme] Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.[173]

As such, a plaintiff can present as little factual detail in the complaint as he wants, provided the complaint *plausibly* raises his right to relief above a speculative level, as well as puts the defendant on *notice* of the claims against him and the grounds upon which they rest.[174]

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[170] *Id.* at 667.

[171] *Id.*; Contrary to the federal pleading standards, Illinois is a fact pleading jurisdiction. In a fact-pleading jurisdiction, rather than merely provide the defendant with fair notice of what the claim is and the grounds upon which it rests, *Bell Atlantic*, 127 S. Ct. at 1964, a plaintiff "must allege facts sufficient to bring a claim within a legally recognized cause of action." Vernon v. Schuster, 179 Ill. 2d 338, 344 (1997); *see* Weiss v. Waterhouse Secs., Inc., 208 Ill. 2d 439, 451 (Ill. 2004) (stating that "Illinois is a fact-pleading jurisdiction").

[172] *Airborne*, 499 F.3d at 667.

[173] *Id.*

[174] *Concentra*, 496 F.3d 773; *Airborne*, 499 F.3d 663; Killingsworth v. HSBC Bank Nevada, N.A., 507 F.3d 614, 619 (7th Cir. 2007); *See*, *e.g.*, Johnson v. Lappin, No. 07-1465, 2008 U.S. App. LEXIS 3393 at *4 (7th Cir.Feb. 13, 2008); Vancrete v. Appelman, No. 07-3214, 2008 U.S. App. LEXIS 2837 at *7 (7th Cir. Jan. 18, 2008); Lang v. TCF National Bank, 249 Fed. Appx. 464, 466 (7th Cir. 2007); Sellers v. Daniels, 242 Fed. Appx. 363, 364 (7th Cir. 2007); Estate of Sims v. County of Bureau, 506 F.3d 509, 514 (7th Cir. 2007); George v. Smith, 507 F.3d 605, 608 (7th

IV. ATTEMPTING TO APPLY THE SEVENTH CIRCUIT TEST

The district courts within the Seventh Circuit have had several opportunities to decide cases involving Rule 12(b)(6) motions in the aftermath of the Court of Appeals' decisions discussed above. The cases discussed below demonstrate how the district courts' are applying the Seventh Circuit's interpretation of *Bell Atlantic*.

A. Higgins v. Conopco, Inc.

Michael Higgins, a commercial truck driver, was injured when his truck shifted while he was trying to secure it to a loading dock at the defendant's facility.[175] Plaintiff alleged that the mechanism by which he was supposed to hitch his truck to the dock was old, improperly maintained and, as a result, did not properly function, thus causing his injury.[176] In his third amended complaint, Higgins brought negligence claims against Conopco and four other defendants—Unilever, Unilever Illinois, Seng and Overhead.[177] Conopco, Unilever and Unilever Illinois filed a third-party complaint against Higgins' employer, England.[178]

Their complaint alleged that Conopco entered into an agreement with England that required England to provide Conopco with transportation services.[179] The complaint further alleged that, at the time of the accident, Higgins was an employee of England, and that, in accordance with the transportation agreement, England agreed to carry liability insurance and indemnify Conopco for any harm arising out of services under that agreement.[180] The third-party plaintiffs' complaint

Cir. 2007); Bartley v. Wis. Dep't of Corr., 258 Fed. Appx. 1, 3 (7th Cir. 2007); Jervis v. Mitcheff, 258 Fed. Appx. 3, 5 (7th Cir. 2007).

[175] Higgins v. Conopco, Inc., No. 06 C 7077, 2008 U.S. Dist. LEXIS 5508 at *3 (N.D. Ill. Jan. 23, 2008).

[176] *Id.* at *3-4.

[177] *Id.* at *4.

[178] *Id.*

[179] *Id.*

[180] *Id.* at *5.

contained a breach of contract claim and a contribution claim against England.[181] England brought a 12(b)(6) motion to dismiss the third-party plaintiffs' claims.[182]

In ruling on the motion, the district court set out the standard of pleading required to survive a Rule12(b)(6) motion in the Seventh Circuit.[183] It said that "[a] plaintiff is required to include allegations in the complaint that 'plausibly suggest that the plaintiff has a right to relief, raising that possibility above a speculative level' . . . 'if they do not, the plaintiff pleads itself out of court.'"[184]

England argued that the Court should grant its motion to dismiss the breach of contract claim because the transportation agreement was not a valid contract; that the agreement never went into effect; and, alternatively, that if the agreement was valid and went into effect, the accident was not covered by the agreement.[185] As such, the third-party plaintiffs' contribution claim should be dismissed as well.[186] In response, the Court stated that the purpose of a Rule 12(b)(6) motion is to contest the validity of the claim, and *not* to assess whether the claim is meritorious.[187] A complaint need only provide the defendant with sufficient notice of the claim being brought.[188] Applying the *Concentra* standard, the court found that the third-party plaintiffs' allegations concerning England's breach of the transportation agreement provided "sufficient detail and are not based upon pure speculation or legal generalizations."[189] As such, the complaint

[181] *Id.*
[182] *Id.*
[183] *Id.* at *5-6.
[184] *Id.* at *6 (quoting *Concentra*, 496 F.3d at 776).
[185] *Id.* at *7.
[186] *Id.* at *17.
[187] *Id.* at *8.
[188] *Id.*
[189] *Id.* at 9.

satisfied Rule 8(a)(2)'s requirements of plausibility and notice.[190] The district court denied England's motion to dismiss.[191]

B. Safeco Ins., Co. v. Wheaton Bank and Trust, Co.

In *Safeco*, the plaintiff, Safeco Insurance ("Safeco"), sued Wheaton Bank and Trust ("Wheaton") for conversion, improper use of trust funds, and constructive trust.[192] Safeco's claims against Wheaton arose out if Safeco's duties as a surety to Integrated Construction Technology Corporation ("ICTC"), a construction contractor that had a deposit account with Wheaton.[193] ICTC borrowed over $4 million from Wheaton, and when a portion of the debt became due, Wheaton set off over $500,000 from ICTC's deposits—unbeknownst to ICTC or Safeco—in order to satisfy the debt.[194] Because of these set offs to ICTC's account, there were insufficient funds with which to pay its creditors and suppliers.[195] As such, Safeco became obligated as a surety to provide the funds for ICTC while the account was short.[196] Safeco contended that the set offs were improper and, as a result of the set offs, it had to pay more than $1.6 million in order to satisfy ICTC's debts to its subcontractors.[197] Wheaton made a Rule 12(b)(6) motion to dismiss Safeco's complaint for failure to state a claim.[198]

The court said that in order for a plaintiff to state a claim upon which relief can be granted, "[he] must plead sufficient facts to give fair notice of the claim and the grounds upon which it rests, and those,

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[190] *Id.* (citing *Airborne*, 499 F.3d.at 667).

[191] *Id.* at *18 (finding that because it was too early in the proceedings to assess the validity of the transportation agreement, England's motion to dismiss the contribution claim had to be denied).

[192] Safeco Ins. Co. v. Wheaton Bank and Trust, No. 07 C 2397, 2008 U.S. Dist. LEXIS 5513, 1-2 (N.D. Ill. Jan. 24, 2008).

[193] *Id.* at *1.

[194] *Id.*

[195] *Id.* at *4.

[196] *Id.*

[197] *Id.* at *1.

[198] *Id.* at *5-6.

if true, must plausibly suggest that the plaintiff is entitled to relief, 'raising that right to relief above the speculative level.'"[199]

Regarding the conversion claim, Wheaton argued that Safeco's complaint should be dismissed under Rule 12(b)(6) because it failed to adequately allege that Safeco had a right to the money it demanded; that its right was present and unconditional; and that the defendant wrongfully refused to return the money. [200] The court agreed.[201]

Safeco claimed that as subrogee of the subcontractors it had a present and unconditional right to the money set off by Wheaton.[202] However, under Illinois law a bank takes title to the money deposited with it and subsequently becomes a debtor to the creditor depositor.[203] As such, when a trustee—such as ICTC—deposits trust funds into a bank account, only the trustee, and not the beneficiary—in this case Safeco, as subrogee of the subcontractors—has an immediate and unconditional right to possess the amount deposited.[204] The beneficiaries of the trust may seek to recover their funds from the trustee, but they cannot recover their funds from the bank under a theory of conversion.[205] The court reasoned that because of this principle, Safeco could not sue Wheaton for conversion based on the subcontractors' equitable interest in the deposits.[206]

The court also found that the conversion claim was deficient because Safeco did not allege that the bank knew, or should have known, that the set offs included trust funds.[207] While a bank has a right to set off the accounts of its customers in order to satisfy their indebtedness, this right does not extend to situations in which the bank has notice, whether actual or constructive, that the accounts include

[199] *Id.* at *5 (quoting in part *Concentra*, 496 F.3d at 776).
[200] *Id.* at *6.
[201] *Id.*
[202] *Id.*
[203] *Id.* at *7.
[204] *Id.*
[205] *Id.*
[206] *Id.* at *8-9.
[207] *Id.* at *9.

trust funds.[208] Because the "[c]omplaint does not contain sufficient allegations to plausibly suggest that the bank knew or should have know that it was setting off trust assets[,]" the court dismissed the conversion claim without prejudice.[209] In so doing it stated that Safeco may be able to correct the defects by amending the complaint to allege that Wheaton had knowledge that the set offs contained trust assets, and by pleading claims subrogated from ICTC, rather than from its subcontractors.[210]

The court dismissed the mechanics lien claim, holding that the act does not create a right of action against a bank that sets off funds held by a contractor in trust for a subcontractor, and it dismissed the constructive trust claim for failure to allege knowledge on the part of Wheaton.[211] Because Safeco's complaint lacked plausibility, the court did not reach the question of notice.

C. Zamudio v. HSBC N.Am. Holdings, Inc.

In 2005, plaintiff Robert Zamudio, a 55 year-old Mexican-American, attempted to refinance the mortgage on his home at Beneficial, a subsidiary mortgage company of the defendant, HSBC.[212] Zamudio alleged that a Beneficial loan officer told the him that if his home was appraised at more than $140,000 he would be able to refinance.[213] Plaintiff's home was subsequently appraised at $144,900, but his loan application was denied.[214] When plaintiff contacted the loan office to ask why his application had been denied he was informed that the value of his home was insufficient.[215]

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[208] *Id.*

[209] *Id.* at *9, 14.

[210] *Id.* at *14.

[211] *Id.* at *15, 17-18.

[212] Zamudio v. HSBC N.Am. Holdings, Inc., No. 07 C 4315, 2008 U.S. Dist. LEXIS 13952 at *1-2 (N.D. Ill. Feb. 20, 2008).

[213] *Id.* at *2.

[214] *Id.*

[215] *Id.*

Plaintiff alleged that this was not the real reason his loan was denied, but rather, the denial was a result of HSBC's automated underwriting and credit scoring systems, which have a discriminatory impact on minority applicants, such as the plaintiff.[216] He filed suit against HSBC alleging violations of the Fair Housing Act ("FHA")[217] and the Equal Opportunity Credit Act ("ECOA").[218] The defendant made a Rule 12(b)(6) motion to dismiss the plaintiff's claims.

The district court said that in order to satisfy the requirements of Rule 8(a)(2), a complaint must accomplish two things:

> "[T]he complaint must describe the claim in sufficient detail to give the defendant 'fair notice of what . . . the claim is and the grounds upon which it rests . . . .'[219] Second, its allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level'; if they do not, the plaintiff pleads itself out of court."[220]

HSBC argued that because Zamudio failed to specifically identify any discriminatory policy or practice, that he failed to provide the defendants with fair notice of the claims against them.[221] However, the court ruled that Zamudio's assertion that "racially discriminatory assumptions are embedded in the statistical formulas used [by the defendants] to analyze credit information and ultimately form underwriting decisions" is sufficient to meet the pleading requirements imposed by *Bell Atlantic*.[222] Furthermore, the complaint plausibly suggested a right to relief because the FHA and ECOA both make

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[216] *Id.*

[217] 42 U.S.C. §§ 3601-3609 (2000).

[218] 15 U.S.C. § 1691 (2000).

[219] *Zamudio*, 2008 U.S. Dist. LEXIS 13952 at *3 (quoting *Bell Atlantic*, 127 S. Ct. at 1964 (quoting *Conley*, 355 U.S. at 47).

[220] *Id.* (quoting *Concentra*, 496 F.3d at 779).

[221] *Id.* at *4.

[222] *Id.*

available to plaintiffs a claim for disparate-impact claim.[223] The court denied the defendant's motion to dismiss.[224]

D. CardioNet, Inc. v. LifeWatch, Corp.

LifeWatch and CardioNet are competitors that make heart monitoring devices.[225] In January of 2007, LifeWatch launched a product called the LifeStar Ambulatory Cardiac Telemetry ("LifeStar ACT"), which was the subject of the litigation.[226] Counter-plaintiff, LifeWatch, filed suit against CardioNet for a series statements made and actions taken by CardioNet with respect to the LifeStar ACT.[227] LifeWatch's complaint alleged trade secret misappropriation,[228] intentional interference with expectation of business relationships, unfair competition, and three counts of fraud.[229] The district court dismissed the fraud claims for failure to state a claim under Rule 9(b),[230] but denied the CardioNet's motion to dismiss with respect to the other claims.[231]

The district court began its analysis by setting forth the applicable federal pleading standard.[232] In order to avoid dismissal under Rule 12(b)(6), "LifeWatch need only provide enough detail [in the complaint] to give CardioNet fair notice of its claims, show that the

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[223] *Id.*

[224] *Id.* at *6.

[225] CardioNet v. LifeWatch, No. 07 C 6625, 2008 U.S. Dist. LEXIS 15941 at *3 (N.D. Ill. 2008).

[226] *Id.*

[227] *Id.* at *3-5.

[228] CardioNet's motion to dismiss do not challenge LifeWatch's trade misappropriation claim. As such, the court did not assess the sufficiency of LifeWatch's complaint with respect to that claim.

[229] *Id.* at *1-2.

[230] Fraud is one of the claims that must be pleaded with heightened specificity under Rule 9(b). A discussion of the court's ruling with respect to the fraud claims contained in LifeWatch's complaint is outside the scope of this Note.

[231] *CardioNet*, 2008 U.S. Dist. LEXIS 15941 at *12.

[232] *Id.* at *2.

claims are plausible, rather than merely speculative, and that relief is warranted."[233] In order to state a claim for tortious interference with prospective economic advantage, "LifeWatch must allege (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) an intentional and malicious interference inducing or causing a breach [or] termination of the relationship or expectancy; [and] (4) resultant damage to the party whose relationship has been disrupted."[234]

LifeWatch's complaint alleged that in June of 2007, without its knowledge, a physician improperly arranged to have a LifeStar ACT system delivered to the CEO of CardioNet.[235] While in the CEO's possession, CardioNet's heads of research and product development dismantled, tampered with, tested and photographed the LifeStar ACT without informing LifeWatch that it had done so. LifeWatch alleged that CardioNet used the information it learned to further its marketing strategy, and that it:

> [M]isrepresented in advertisements and statements to physicians and governmental and private third party insurers that (1) [CardioNet's] device was the only FDA approved and Medicare reimbursed arrhythmia detection and alarm system; (2) the LifeStar ACT device did not and could not meet the FDA's requirements for approval of an arrhythmia detection and alarm system; and (3) its device was superior and/or safer than the LifeStar ACT.[236]

LifeWatch argued that the statements made by CardioNet were false and misleading because they wrongfully suggested that the

[233] *Id.*
[234] *Id.* at *9.
[235] *Id.*
[236] *Id.* at *4.

LifeStar ACT was less safe and reliable than CardioNet's device, and because the LifeStar ACT was and is FDA approved.[237]

The court held that LifeWatch's allegations that CardioNet knowingly issued false and misleading statements to the targeted consumers of the LifeStar Act device were sufficient to give notice to CardioNet of the intentional interference claim against it.[238] The court also found LifeWatch sufficiently pleaded its unfair competition claim because the underlying allegations of a tortious interference claim sufficiently state a claim for unfair competition.[239]

E. Analysis

As mentioned before, the Supreme Court's decision in *Bell Atlantic* provided very little substantive guidance to lower courts interpreting the "plausibility standard." Understandably, it is a difficult task to provide a bright-line rule to determine to determine the sufficiency of a complaint without reverting to code pleading, or imposing fact-pleading on plaintiffs in federal court. It is thus reasonable to assume that the Court, by expressly disavowing *Conley's* longstanding "no set of facts" language, intended for the circuit courts to experiment with new (and ostensibly more stringent) formulations of Rule 8(a)(2).

Although the Seventh Circuit Court of appeals has explicitly adopted *Bell Atlantic's* plausibility standard, it remains unclear, even after thorough examination of *Concentra* and *Airborne*, how a plaintiff satisfies the plausibility standard without going as far as fact-pleading. While *Airborne* makes clear that specific facts are not required to adequately plead a claim in the Seventh Circuit, it is equally clear that the pre-*Bell Atlantic* standard of pleading espoused in *Smith* and *Kolupa* is no longer viable. So what is necessary to satisfy the plausibility standard and to adequately plead a claim in the Seventh Circuit?

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[237] *Id.* at *4-5.

[238] *Id.* at *10-11.

[239] *Id.* at *11.

One common thread that ties together the district court cases described above is that the courts in those cases seem to require either direct (factual) or inferential allegations touching on all elements of a cause of action. For example, in *Safeco*, the court dismissed plaintiff's conversion claim because the plaintiff's complaint did not plausibly demonstrate that it was entitled to relief. In order to state a conversion claim, a plaintiff must establish that it (1) has a right to certain property; (2) that it has a present and unconditional right to immediate possession of the property; (3) that it made a demand for the return of the property; and (4) that the defendant wrongfully refused to return it.[240] Plaintiff's complaint, however, failed to adequately allege that it had a "present and unconditional right to immediate possession of the property."[241]

In *CardioNet*, the court denied cross-defendant's motion to dismiss for failure to state a claim, because the factual allegations in cross-plaintiff's complaint touched on each element of the causes of action for intentional interference with expectation of business relationships and unfair competition.[242]

Similarly, in *Zamudio*, defendant's motion to dismiss plaintiff's disparate-impact claims were denied because plaintiff's allegations of discriminatory affect in defendant's automated underwriting and credit scoring systems were sufficient to state a disparate-impact claim under both the FHA and ECOA.[243]

The *Higgins* court explicitly stated that, "[u]nder current notice pleading standard in federal courts a plaintiff need not 'plead facts that, if true, establish each element of a cause of action. . . .'" [244] This, however, is not contrary to the requirement that a plaintiff plead either direct or inferential allegations in order to state a claim. In *Higgins*,

[240] Safeco Ins. Co. v. Wheaton Bank and Trust, No. 07 C 2397, 2008 U.S. Dist. LEXIS 5513 at *6 (N.D. Ill. Jan. 24, 2008).

[241] *Id.*

[242] *CardioNet*, 2008 U.S. Dist. 15941 at *10-11.

[243] Zamudio v. HSBC N.Am. Holdings, Inc., No. 07 C 4315, 2008 U.S. Dist. LEXIS 13952 at *4 (N.D. Ill. Feb. 20, 2008).

[244] Higgins v. Conopco, Inc., No. 06 C 7077, 2008 U.S. Dist. LEXIS 5508 at *6 (N.D. Ill. Jan. 23, 2008).

third-party defendant argued that plaintiffs' breach of contract claim should be dismissed because plaintiffs failed to allege the consideration that supported the transportation agreement, as well as the facts regarding the formation the agreement.[245] The court denied defendant's motion to dismiss and found that plaintiff's breach of contract claim was adequately pleaded.[246] Plaintiffs' complaint contained a description of the alleged contract, as well as the date on which it was entered into. This information is detailed enough for a court to infer that a valid contract was formed. Whether the contract was supported by adequate consideration, and whether there was a valid offer and acceptance reach the merits of plaintiffs' claims and do not address the legal sufficiency of plaintiffs' complaint. Providing factual details concerning these points is outside the requirements of Rule 8(a)(2).

A Seventh Circuit Court of Appeals decision handed down April 2, 2008, lends support to the requirement that a plaintiff's complaint must contain at least inferential allegations respecting each element of a claim.[247] In *Glick v. Walker*, plaintiff filed suit in the Southern District of Illinois against several prison officials at the Menard Correctional Center claiming that they were "deliberately indifferent" towards his mental health needs and the risks of harm posed to him by one cellmate's smoking and another's threat to kill him.[248] The district court screened his complaint and dismissed it for failure to state a claim.[249] A three judge panel, consisting of Judges Kanne, Rovner, and Sykes, assessed the Eighth Amendment claims of the plaintiff and vacated the judgment of the district court, remanding the case for further proceedings on all claims except plaintiff's Americans with Disabilities Act[250] claim.[251]

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[245] *Id.* at *10.

[246] *Id.* at *10-12.

[247] Walker v. Glick, No. 07-2929, 2008 U.S. App. LEXIS 7716 at *1 (7th Cir. Apr. 2, 2008).

[248] *Id.*

[249] *Id.*

[250] 42 U.S.C. § 12132 (2000).

The unanimous court held that plaintiff's Eighth Amendment claim regarding his exposure to second-hand smoke included enough detail to state a claim.[252] Exposure to second-hand smoke can give rise to two Eighth Amendment claims: one for both present injury and future injury.[253] According to the Court:

> To state a claim based on present injury, an inmate must allege that prison officials knew of and disregarded 'serious existing health problems' caused by the second-hand smoke. . . . To state a claim based on future injury, an inmate must allege that prison officials knew of and disregarded exposure to levels of second-hand smoke that 'pose an unreasonable risk of serious damage to his future health.'[254]

In the instant case, plaintiff alleged that he was diagnosed with emphysema; that he suffered increased chest pain due to his cellmate's smoking; that defendants knew of his condition and his complaints; and, that defendants did nothing to remedy the situation.[255] These allegations were sufficient to state a claim for both present and future injury under the Eighth Amendment.[256]

The court also held that plaintiff's complaint contained enough detail to state an Eighth Amendment claim against prison officials that failed to prevent his cellmate from harming him.[257] "To state a claim for failure to prevent harm, the inmate must allege that prison officials knew of and disregarded a 'substantial risk of serious harm,' and that harm did occur."[258] Plaintiff alleged that he gave a prison social

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[251] *Walker*, 2008 U.S. App. LEXIS 7716 at *1.

[252] *Id.* at *7.

[253] *Id.*

[254] *Id.* (quoting Henderson v. Sheahan, 196 F.3d 839, 845 (7th Cir. 1999); Helling v. McKinney, 509 U.S. 25, 35 (1993)).

[255] *Id.* at *7-8.

[256] *Id.* at *8

[257] *Id.*

[258] *Id.* (internal citations omitted).

worker two letters describing the threats made against him by his cellmate and detailing his concerns for his own safety.[259] The complaint further alleged that the social worker told him that she had passed his letters along to internal affairs; that he never heard from internal affair; and, that his cellmate beat him badly enough to cause his head to bleed.[260] As such, plaintiff's complaint satisfied the serious-harm requirement.[261]

The court goes on to address the plaintiff's remaining claims in an almost identical manner, reversing and remanding plaintiff's deliberate indifference and retaliation claims, but affirming dismissal of his Americans with Disabilities Act claim.[262] It is apparent from the *Walker* court's decision that the pleading standard set forth by Judge Easterbrook in *Smith* and *Kolupa* is long gone in the wake of *Bell Atlantic*. Whereas in *Smith* and *Kolupa*, Judge Easterbrook indicated that district judges would be reversed for requiring plaintiffs to provide allegations on specific points, the *Walker* court's analysis promotes exactly what the pre-*Bell Atlantic* standard prohibited. The Seventh Circuit's analysis in the *Walker* opinion supports the approach that lower courts *should* look to see if the factual allegations contained in the complaint either directly, or inferentially, touch on all the elements of the claim to be pleaded.

CONCLUSION

The importance of understanding the Seventh Circuit's federal pleading standard should be apparent to practitioners. Although the new standard does not represent a shift to fact-pleading, the Seventh Circuit courts are clearly requiring attorneys to provide more information in the complaint. Per *Bell Atlantic*, the complaint must plausibly raise the plaintiff's right to relief above a speculative level, as well as put the defendant on notice of the claims against him and

[259] *Id.*
[260] *Id.*
[261] *Id.*
[262] *Id.* at *10-16.

the grounds upon which they rest. In order to ensure satisfaction of these requirements, plaintiffs' attorneys should, to the extent possible, provide factual or inferential allegations respecting all elements of the claims that they plead. Through the pleadings, a plaintiff should seek to convince the court that the allegations of the complaint, if taken as true, entitle the plaintiff to recovery. As Judge Cudahy suggests in *Concentra*, a plaintiff should plead all easily provided information that would serve to notify the defendant of the critical factual allegations against him.[263] Until the Supreme Court weighs in on the matter again, practitioners in the Seventh Circuit would be wise to follow Judge Cudahy's advice.

[263] EEOC v. Concentra Health Servs., Inc., 496 F.3d 773, 780 (7th Cir. 2007).