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Kendall W. Hannon

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MUCH ADO ABOUT *TWOMBLY*? A STUDY ON THE
IMPACT OF *BELL ATLANTIC CORP. V.*
TWOMBLY ON 12(b)(6) MOTIONS

*Kendall W. Hannon**

[E]very man who is injured will be sure to find a method of relief, exactly adapted to his own case, described in the compass of a few lines

—William Blackstone¹

I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings

—Judge Charles E. Clark²

INTRODUCTION

Serving as the gate through which all disputes must pass, pleadings are fundamental to the operation of the federal judiciary. The standards that federal courts employ to evaluate the sufficiency of these pleadings can frame issues, control access to the promised land of liberal discovery, and shape settlement proceedings. Thus, when the United States Supreme Court recently spoke on this issue in the

* Candidate for Juris Doctor, Notre Dame Law School, 2009; B.A., Arabic and Political Science, University of Notre Dame, 2006. I would like to thank Professor Jay Tidmarsh for his tireless assistance and encouragement throughout this project as well as Dean Margaret Brinig for her assistance with crafting the appropriate statistical analysis. I would also like to thank my wife, Kristin Hannon for her patience and support.

¹ WILLIAM BLACKSTONE, 3 COMMENTARIES *184. This is an example of Blackstone “marveling at the perfection of the common law writs.” Fred T. Hanson, *The Secured Creditor’s Share of an Insolvent Estate*, 34 MICH. L. REV. 309, 329 (1936).

² CHARLES E. CLARK, *Special Pleading in the “Big Case”?*, 21 F.R.D. 45, 46 (1957), reprinted in PROCEDURE, THE HANDMAID OF JUSTICE 147–48 (Charles A. Wright & Harry M. Reasoner eds., 1965).

case of *Bell Atlantic Corp. v. Twombly*,³ the American bar rightfully took notice.

Twombly is the latest chapter in an evolving American pleading system. At its early common law stage, pleading in the United States was formalistic to the point of “subordinat[ing] substance to form.”⁴ An individual desiring to bring a suit had to decide upon, and state by writ, the “*proper form of action*.”⁵ The forms of action required particular acts to be alleged, often in specific phraseology; failure to comply was an “incurable defect.”⁶ This pleading system proved unable to support a growing field of substantive law and rights. Expanding substantive law combined with a stagnant pleading system caused the pleadings to take on a character detached from the realities of the case.⁷ The ultimate result at common law was a complex, verbose, and convoluted pleading that did not make clear what, exactly, the suit was predicated on.⁸

In the face of such realities the state legislatures felt compelled to take action. Beginning with New York’s “Field Code” (named after its creator David Dudley Field), legislatures did away with the formalism that had come to characterize common law pleading and replaced it with a system of code pleading.⁹ By requiring that pleadings merely disclose the material facts of a dispute, the drafters hoped the Code

3 127 S. Ct. 1955 (2007).

4 CHARLES M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* 31 (Cincinnati, Ohio, W.H. Anderson & Co. 1897).

5 1 JOSEPH CHITTY, *A TREATISE ON PLEADING AND PARTIES TO ACTIONS* 94 (Springfield, Mass., G. & C. Merriam 15th American ed. 1874).

6 *See, e.g.*, JAMES GOULD, *A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS* 174 (Albany, William Gould, Jr., & Co. 5th ed. 1887) (describing how, to bring a suit for a forcible injury, the complaint had to allege that “the wrongful act [was] committed ‘with force and arms,’ and ‘against the peace’”).

7 *See* HEPBURN, *supra* note 4, at 20 (“The existing remedies became inadequate for the proper administration of primary rights . . .”). Attempting to shoehorn “new” law into the “old” pleading structure, attorneys and courts began to rely largely on “legal fiction[s]” that produced pleadings that bore little resemblance to the actual dispute. *See id.* at 25.

8 *See id.* at 58; *see also* FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* § 3.3, at 185 (5th ed. 2001) (stating that “wholly fictional recitals prefaced the real punch line” and that “[i]n many situations . . . there was often little or no correspondence between the facts alleged and those that appeared at trial”).

9 *See* JAMES ET AL., *supra* note 8, § 3.5, at 186. The changes wrought by the Field Code included an abolition of distinctions between suits in equity and law and the “substitution of concise and plain statements of the substantive facts of a case for the technical and verbose pleadings of the older systems.” HEPBURN, *supra* note 4, at 92.

would serve the end of reaching just determinations on the merits.¹⁰ Pleadings under the early codes required that only “material operative facts” be pleaded; conclusions of law and “evidential facts” were not to be included.¹¹ Unfortunately, making these distinctions proved difficult, and a “whole new corpus of legal technicality at the pleading stage” developed.¹²

The Federal Rules of Civil Procedure, largely drafted by (future federal judge) Charles Clark in the 1930s, instituted the concept of notice pleading throughout the federal judicial system.¹³ Among the Federal Rules is Rule 8(a)(2), which defines some of the requirements of a complaint. It states that the pleader must provide a “short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁴ Rule 8 was designed both to move away from the “semantic quibbling” that existed under code pleading systems and to ease the pleader’s burden.¹⁵ In one of its earliest evaluations of Rule 8’s requirements, the Supreme Court in *Conley v. Gibson*¹⁶ held that a challenge to the sufficiency of a complaint should only be upheld if “it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to relief.”¹⁷ With this decision, the Supreme Court articulated a liberal test for judging the sufficiency of plead-

10 See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 11, at 28 (1928).

11 *Id.* § 38, at 150

12 JAMES ET AL., *supra* note 8, § 3.5, at 187 (citing CLARK, *supra* note 10, § 38, at 150).

13 See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 5.1, at 253 (4th ed. 2005); Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976). “Notice pleading” follows Judge Clark’s reasoning that pleadings should “not be objectionable . . . so long as reasonably fair notice of the pleader’s cause of action is given.” CLARK, *supra* note 10, § 38, at 157. Notice pleading existed within the federal system prior to the Federal Rules of Civil Procedure. Federal Equity Rule 25, adopted by the United States Supreme Court in 1912, required a plaintiff before an equity court to state “a short and simple statement of the ultimate facts upon which the plaintiff asks relief.” FED. EQUITY R. 25. Rule 8 took this principle and applied it beyond the limited scope of the equity rules. See FED. R. CIV. P. 8.

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

15 JAMES ET AL., *supra* note 8, § 3.6, at 187. Rule 8(f) also is indicative of the “liberal” pleading standard under the Federal Rules. It states that “all pleadings shall be so construed as to do substantial justice.” FED. R. CIV. P. 8(f). American pleading, therefore, had moved from a system where substance was sacrificed for form to a system where the opposite was true.

16 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007). For an in-depth discussion on *Conley*, see *infra* Part I.A.

17 *Conley*, 355 U.S. at 46.

ings—a test that would dominate the federal judiciary for the next fifty years.¹⁸

And then came *Twombly*. In discussing this case, only one thing is certain: practicing attorneys must learn new language for their motions, briefs, and oral arguments. The fifty-year-old *Conley* “no set of facts” language has, apparently, “earned its retirement”—replaced with a general requirement that the pleader’s claim be “plausible.”¹⁹ Carefully scrutinizing the decision, legal academics have attempted to define the scope and possible effects of this new plausibility language, often reaching different conclusions. For the practicing attorney, however, it is ultimately the judge’s interpretation, not the professor’s, which will decide the fate of their complaint or motion to dismiss.

Unfortunately, faced with interpreting *Twombly*, many judges have found uncertainty and confusion.²⁰ As a result, neither *Twombly* nor its progeny provide a clear statement as to the substantive, practical requirements a complaint must meet. Attorneys filing complaints or responding to motions to dismiss thus face a considerable challenge as they attempt to plead through equivocal judicial precedents. This Note, an empirical study, seeks to inject concrete facts into this abstract reality. The question behind this study is a simple one: does *Twombly* simply bring a linguistic reformulation of a familiar standard or is it imposing its own, new standard? To answer this question, this study looks at how the district courts, the frontline interpreters of any pleading language, have treated the nascent *Twombly* decision. The 12(b)(6) motion to dismiss provides a convenient medium to evaluate *Twombly*’s effect.²¹ Generally, any substantive alteration to the pleading standard would have an effect on the dismissal rate under 12(b)(6), while mere semantic changes would leave the dismissal rate largely unchanged.²²

The results of this study lead to three conclusions. First, while some commentators have suggested that *Twombly* will only apply in the antitrust context, this study shows that courts have applied the

18 See Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 143 (2006) (showing *Conley* to be the fourth most cited case in the federal judiciary).

19 *Twombly*, 127 S. Ct. at 1966, 1969.

20 See, e.g., *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007); *Temple v. Circuit City Stores, Inc.*, Nos. 06 CV 5303(JG), 06 CV 5304(JG), 2007 WL 2790154, at *3 (E.D.N.Y. Sept. 24, 2007).

21 Federal Rule of Civil Procedure 12(b) states: “Every defense . . . to a claim for relief in any pleading . . . shall be asserted in the responsive pleading . . . except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . .” FED. R. CIV. P. 12(b).

22 An exception to this general premise is discussed *infra* Part IV.C.

decision in every substantive area of law governed by Rule 8. Antitrust cases comprised only 3.7% (40 out of 1075) of all cases citing *Twombly* in this study; the remainder is representative of every substantive area of law. Second, despite sweeping language and the “retirement” of fifty-year-old language, the new linguistic veneer that the Court has placed on Rule 8(a) and 12(b)(6) appears to have had *almost* no substantive impact. Third, the one area in which this study *does* show a significant departure from previous dismissal practice is the civil rights field. The rate of dismissal in civil rights cases has spiked in the four months since *Twombly*.

This Note proceeds in four parts. Part I provides context for the study by examining the important Supreme Court precedents both before and after *Twombly* as well as the response to *Twombly* in the legal literature. Part II discusses the methodology of the empirical study, while Part III presents the findings of the study in a variety of ways. Finally, Part IV seeks to advance various hypotheses that could each serve to explain the findings encountered in the study.

I. THE HISTORICAL AND ACADEMIC CONTEXT

The Federal Rules, with their basic pleading standard embodied in Rule 8, were promulgated in 1938.²³ They were not, however, self-executing—the federal district courts were charged the task of interpreting and applying them. The actual text of Rule 8(a)(2) does not differ greatly from what was required under code pleading systems.²⁴ In fact, in the early years of the Federal Rules, some federal courts resisted accepting that the Federal Rules required a more liberal pleading standard.²⁵ Overwhelmingly, however, the Federal Rules were successful in ushering in a liberal, less technical pleading standard that allowed for a “great variety of pleading techniques.”²⁶

23 See Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 572 (2006).

24 See FRIEDENTHAL ET AL., *supra* note 13, § 5.7, at 267.

25 See *id.* § 5.8, at 269. Friedenthal cites two early district court cases: *Employers' Mutual Liability Insurance Co. of Wisconsin v. Blue Line Transfer Co.*, 2 F.R.D. 121 (W.D. Mo. 1941) and *Washburn v. Moorman Manufacturing Co.*, 25 F. Supp. 546 (S.D. Cal. 1938). These cases explicitly required that plaintiffs plead facts with specificity and found the sample pleading forms in the Federal Rules to be nonbinding. In *Washburn*, the complaint was dismissed despite the fact the complaint was based on the form complaint. See *id.* at 546; see also *Employers' Mut. Liab. Ins. Co.*, 2 F.R.D. at 123 (“[T]hese forms do not dispense with the necessity, as occasion may require, for a statement of certain details or particulars which would enable the defendant more readily to prepare and file a responsive pleading.”).

26 See Smith, *supra* note 13, at 917.

In 1957, the Supreme Court spoke on Rule 8 in *Conley*. To understand the context of *Twombly*, this Part proceeds to describe *Conley* as well as two of its more recent progeny—*Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*²⁷ and *Swierkiewicz v. Sorema N.A.*²⁸ It will then review the *Twombly* case as well as another pleading-related case decided during the 2006–2007 Supreme Court Term, *Erickson v. Pardus*.²⁹ Finally, it provides a snapshot of select academic and practical articles in the legal literature in the wake of the *Twombly* decision.

A. *Conley and Its Progeny*

Conley involved a case brought under the Railway Labor Act³⁰ by African American employees against their local railway union.³¹ The plaintiffs alleged that the railroad had “abolished” their jobs, enabling the railroad to replace them with Caucasians.³² The crux of the complaint against the union, the designated bargaining agent under the Railway Act, was that it had done nothing to protect them from the discriminatory conduct of the railroad and that the union had thus failed in its duty to represent African American employees.³³

The defendants moved to dismiss on a number of grounds, including that the complaint had “failed to state a claim upon which relief could be given.”³⁴ The Supreme Court rejected this claim in a single paragraph. The Court adopted 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.”³⁵ The Court also explicitly rejected the claim that “specific facts” were needed “to support . . . general allegations”; all that was needed, according to the Court, was that “fair notice” be given to the defendants.³⁶

In arriving at this “accepted rule,” the Supreme Court cited three court of appeals decisions that had articulated the requirements of Rule 8. The earliest case cited by the Court, *Leimer v. State Mutual Life*

27 507 U.S. 163 (1993).

28 534 U.S. 506 (2002).

29 127 S. Ct. 2197 (2007).

30 45 U.S.C. §§ 151–188 (2000).

31 *Conley v. Gibson*, 355 U.S. 41 (1957), *abrogated by* *Bell Atl. v. Twombly*, 127 S. Ct. 1955 (2007).

32 *Id.* at 43.

33 *See id.*

34 *Id.*

35 *Id.* at 45–46.

36 *Id.* at 47–48.

Assurance Co.,³⁷ involved a plaintiff suing an insurance company for recovery of benefits following the death of her husband.³⁸ The Eighth Circuit found that the district court had “misconceived” the purpose of a motion to dismiss by focusing on whether the “plaintiff had a meritorious claim upon which [he] was entitled to prevail.”³⁹ Instead, the court found that the correct question was “whether the . . . complaint, construed in the light most favorable to the plaintiff and with all doubt resolved in favor of its sufficiency, stated a claim upon which relief could be granted.”⁴⁰ Rule 8, according to the Eighth Circuit, required only “simpl[e] and inform[al]” pleading with “few factual averments.”⁴¹

The *Conley* Court also cited *Continental Collieries, Inc. v. Shober*.⁴² The district court had dismissed a breach of contract complaint on two grounds. First, the court chose to give a greater weight to certain averments and on the basis of those averments found that the statute of frauds had not been satisfied.⁴³ Second, the court found that certain necessary facts had not been averred.⁴⁴ The Third Circuit reversed.⁴⁵ Finding that under the Federal Rules “[t]echnicalities are no longer of their former importance,” the court stated that Rule 8 only required “a short statement which fairly gives notice of the nature of the claim.”⁴⁶ Under this standard, the complaint was found to be sufficient as it was not clear “to a certainty from the complaint” that the plaintiff was not “entitled to relief under any state of facts which could be proved.”⁴⁷

Finally, the *Conley* Court cited the Second Circuit’s decision in *Dioguardi v. Durning*⁴⁸—a decision written by Judge Clark, the drafter of the Federal Rules. The plaintiff, proceeding pro se, sought to recover damages from the Collector of Customs for the loss of his property.⁴⁹ The key assertions in the complaint stated that the plaintiff’s “‘medicinal extracts’ were given to the Springdale Distilling Company ‘with [his] betting . . . price of \$110; and not their price of

37 108 F.2d 302 (8th Cir. 1940).

38 *See id.* at 304.

39 *Id.*

40 *Id.*

41 *Id.* at 305.

42 130 F.2d 631 (3d Cir. 1942).

43 *See id.* at 633.

44 *See id.*

45 *See id.*

46 *Id.* at 635.

47 *Id.*

48 139 F.2d 774 (2d Cir. 1944).

49 *See id.* at 774–75.

\$120' and 'It isnt [sic] so easy to do away with two cases with 37 bottles of one quart. Being protected, they can take this chance.'⁵⁰ Judge Clark sustained the complaint and found that "however inartistically they may be stated, the plaintiff has disclosed his claims."⁵¹ The Supreme Court read and accepted the liberal pleading standard these three appellate decisions established.

The *Conley* Court understood that a liberal pleading standard would create a risk of unmeritorious claims taking up valuable judicial resources. However, the Court ultimately concluded that this risk could be amply addressed by other pretrial procedures. Specifically, the Court stated that such "simplified 'notice pleading'" was made possible by "liberal opportunit[ies] for discovery and the other pre-trial procedures."⁵² Those provisions, and not the Rule 8 requirements, were to weed out unmeritorious claims. The pleadings were merely "to facilitate a proper decision" and not to serve as a trap for lawyers where one misstep could prove decisive.⁵³ The *Conley* decision, and the circuit decisions cited by the Court, established a liberal pleading standard for the federal courts and a correspondingly strict standard for Rule 12(b)(6) motions.

In two more recent opinions, a unanimous Supreme Court reaffirmed this simple, liberal pleading standard by rejecting separate attempts by lower courts to impose heightened pleading standards. In *Leatherman*, landowners sought to impose liability on Tarrant County, Texas, for alleged forcible entries by its law enforcement officers in violation of the Fourth Amendment.⁵⁴ The district court and the Fifth Circuit dismissed on the grounds that the plaintiffs had failed to meet the "heightened pleading standard" the Fifth Circuit required for civil rights actions brought against municipalities.⁵⁵

The Supreme Court reversed the Fifth Circuit and found that it was "impossible to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules."⁵⁶

50 *Id.* at 775 (quoting plaintiff's amended complaint).

51 *Id.*

52 *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

53 *See id.* at 48.

54 *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165 (1993).

55 *Id.* The heightened standard was justified on two grounds. The first justification was based on the risk of municipal functions being disrupted by time-consuming litigation. *See id.* at 166-67. The second justification was the belief that the Federal Rules mandated a varying degree of factual specificity based on the complexity of civil rights actions. *See id.*

56 *Id.* at 168.

The Court found two structural elements of the Federal Rules persuasive. First, it was acknowledged that Rule 9(b) imposed a requirement of particularity pleading in specific circumstances and, in the words of the Court, “*expressio unius est exclusio alterius*”—the express mention of one thing excludes others.⁵⁷ Additionally, the Court acknowledged that had the Rules been drafted later in the twentieth century, policy considerations might have led to different Rules 8 and 9.⁵⁸ The Court concluded, however, that such policy considerations would have to be effected through amendment of the Rules, not through judicial interpretation.⁵⁹ Though addressing only the specific question of pleading in municipality civil rights cases,⁶⁰ the Court had firmly stated that policy considerations would not trump the liberal standard created by the Federal Rules.

In *Swierkiewicz*, a former employee brought a lawsuit under Title VII of the Civil Rights Act of 1964⁶¹ and the Age Discrimination in Employment Act⁶² against his employer.⁶³ The plaintiff, a fifty-three-year-old Hungarian man, alleged that he had been demoted by his employer, a predominantly French corporation, and replaced with a younger, French native.⁶⁴ The district court and court of appeals dismissed the complaint on the ground that the petitioner had failed to plead a *prima facie* case of discrimination.⁶⁵ This standard required

57 *Id.* Federal Rule of Civil Procedure 9(b) provides: “In all averments of fraud or mistake, the circumstances . . . shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” FED. R. CIV. P. 9(b).

58 *Leatherman*, 507 U.S. at 168.

59 *Id.*

60 Speaking for the Court, Chief Justice Rehnquist explicitly stated that the decision did not extend to the question of whether heightened pleading could be required in civil rights actions brought against individual government officials. *See id.* at 166–67. The Ninth Circuit, Fifth Circuit, and Eleventh Circuit have all maintained a heightened pleading standard for civil rights actions against individual government officials (where qualified immunity is able to be asserted). *See, e.g.,* Epps v. Watson, 492 F.3d 1240, 1242–43 (11th Cir. 2007); Nunez v. Simms, 341 F.3d 385, 388 (5th Cir. 2003); Mendocino Envtl. Ctr. v. Mendocino County, 14 F.3d 457, 460 (9th Cir. 1994).

61 42 U.S.C.A. §§ 2000e to 2000e-17 (West 2003 & Supp. 2007).

62 29 U.S.C.A. §§ 621–624 (West 2000 & Supp. 2007).

63 *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508–10 (2002).

64 *See id.*

65 The *prima facie* case (what lower courts held had to be alleged) is (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. *See id.* at 510.

more than simply giving the adversary “fair notice” of the claim and required the plaintiff to advance the factual basis of the claim.⁶⁶

The Supreme Court reversed. Drawing a distinction between evidentiary standards and pleading requirements, the Court held that a pleader could have the burden of presenting evidence on an element at trial without having to allege it in the pleading.⁶⁷ The Court also reaffirmed *Conley*'s reliance on flexible discovery provisions, other pretrial provisions, and summary judgment to bring “‘the gravamen of the dispute . . . frankly into the open for the inspection of the court.’”⁶⁸

As these precedents show, the Supreme Court throughout the latter half of the twentieth century largely embraced a liberal pleading standard and allowed a case to proceed so long as the adversary had “fair notice” of the claim. Policy considerations and concerns regarding unmeritorious claims were, under this regime, properly addressed at the discovery and summary judgment stage.

B. *Twombly's Interpretation*

The Supreme Court replaced the oft-cited *Conley* language in *Twombly*. *Twombly* involved allegations brought on behalf of a putative class of telephone customers against Incumbent Local Exchange Carriers (ILECs)—telecommunication companies that were given monopolies over regional telephone service but were excluded from long distance service.⁶⁹ The Telecommunications Act of 1996⁷⁰ eliminated these monopolies and imposed “‘a host of duties intended to facilitate market entry.’”⁷¹ The Act required the ILECs to share their networks with competitors (known as CLECs—Competitive Local Exchange Carriers) by giving CLECs the option to: (1) purchase local telephone services at wholesale rates for resale to end users; (2) lease elements of the ILEC's network on an “unbundled basis”; or (3) interconnect its own facilities with the ILEC's network.⁷²

66 *Id.*

67 *See id.* at 511–12.

68 *Id.* at 512–13 (quoting 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 76 (2d ed. 1990)).

69 *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1961 (2007).

70 Pub. L. No. 104-114, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

71 *Twombly*, 127 S. Ct. at 1961 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999)).

72 *See id.* (citing *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402 (2004); *Iowa Utils. Bd.*, 525 U.S. at 371).

The complaint alleged that the ILECs had conspired to restrain trade and inflate local telephone charges in violation of section 1 of the Sherman Act.⁷³ Specifically, it was alleged that the ILECs, based on a “compelling common motivatio[n] to thwart the CLECs’ competitive efforts,” chose to “engag[e] in parallel conduct” in their service areas in order to inhibit the growth of CLECs.⁷⁴ Additionally, the complaint alleged that the ILECs agreed to refrain from competing against each other.⁷⁵ The complaint stated that these agreements could be inferred from the ILECs’ failure meaningfully to pursue attractive business opportunities in markets where they possessed “substantial competitive advantages” and from a statement of the CEO of one ILEC that competing in an area formerly within a competitor’s monopoly “might be a good way to turn a quick dollar but that doesn’t make it right.”⁷⁶

The Supreme Court granted certiorari to “address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.”⁷⁷ The Court, in an opinion by Justice Souter, held that Rule 8(a), while requiring only a short and plain statement that gives notice to the defendant, also requires that the factual allegations “be enough to raise a right to relief above the speculative level.”⁷⁸ In “applying [this] general standard[] to a § 1 claim” the Court held that complaints must contain enough factual matter to establish “plausible grounds” for relief, leading to “a reasonable expectation that discovery [would] reveal evidence of illegal agreement.”⁷⁹ The Court, turning to the complaint, found it deficient—it alleged only parallel conduct, allegations insufficient to establish a conspiracy.⁸⁰ This plausibility requirement only requires that the complaint, taken as true, establish plausible grounds for relief—it is ultimately irrelevant if “it

73 15 U.S.C. § 1 (2000).

74 *Twombly*, 127 S. Ct. at 1962 (internal quotation marks omitted) (alteration in original) (quoting the complaint). Among the specific conduct alleged was that the ILECs “ma[de] unfair agreements with the CLECs . . . , provid[ed] inferior connections to the networks, overcharg[ed], and bill[ed] in ways designed to sabotage the CLECs’ relations with their own customers.” *Id.* (citing the complaint).

75 *See id.*

76 *Id.* (quoting the complaint).

77 *Id.* at 1963.

78 *Id.* at 1965 (citing 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004)).

79 *Id.*

80 *See id.*

strikes a savvy judge that actual *proof* of those facts is improbable”⁸¹ or “that a recovery is very remote and unlikely.”⁸²

Significantly, the Court justified this “plausibility requirement” by breaking in two ways with earlier pleading precedents. First, the Court found policy considerations persuasive. Recognizing that “proceeding to antitrust discovery can be expensive,” the Court found that “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”⁸³ Second, the Court decided that other procedural tools could not adequately address such policy concerns, finding in fact that it “has been a common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.”⁸⁴ Additionally, it was “self-evident that the problem of discovery abuse cannot be solved by ‘careful scrutiny of evidence at the summary judgment stage.’”⁸⁵ A half century of practical experience had apparently shaken the Supreme Court’s confidence in “liberal opportunit[ies] for discovery and the other pretrial procedures.”⁸⁶

The Court’s articulated plausibility language was expressly directed at what Rule 8 required of complaints brought under the Sherman Act. The Court, however, appeared to speak more broadly when discussing the 12(b)(6) standard articulated in *Conley*. The Court cited four court of appeals decisions and two law review articles that critically explored *Conley*’s “no set of facts” language before expressly rejecting a “focused and literal reading of *Conley*’s” language.⁸⁷ In effect, the Court found that the federal judiciary had misapplied *Conley* for fifty years. The Court found the language as having

81 *Id.* (emphasis added).

82 *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

83 *Id.* at 1967 (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983)).

84 *Id.* (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989)).

85 *Id.* (quoting *id.* at 1975 (Stevens, J., dissenting)).

86 *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957), *abrogated by Twombly*, 127 S. Ct. 1955.

87 *Twombly*, 127 S. Ct. at 1968 (citing *Ascon Props., Inc. v. Mobile Oil Co.*, 886 F.2d 1149, 1155 (9th Cir. 1989); *McGregor v. Indus. Excess Landfill, Inc.*, 856 F.2d 39, 32–43 (6th Cir. 1988); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984); *O’Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665 (1988); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986)).

“earned its retirement” and that it was “best forgotten as an incomplete, negative gloss on an accepted pleading standard.”⁸⁸

The “no set of facts” language articulated in *Conley* and as applied by the federal judiciary would have seemingly allowed a complaint to survive a 12(b)(6) motion to dismiss even if the complaint articulated less than “plausible” grounds for relief. All that was required, at least from a literal reading of the language, was that the pleader raise the *possibility* of relief and give fair notice to the defendant. Arguably, shifting away from 12(b)(6)’s language that requires mere possibility towards language that requires plausibility implies that the pleading bar has been raised. However, *Twombly* and a subsequent Supreme Court case challenge this implication and suggest that *Twombly* may be a simple linguistic reformulation of the old standard. First, the *Twombly* Court expressly disclaimed that they were requiring a heightened pleading standard.⁸⁹ The Court stated they had not affirmed the dismissal of the complaint on the grounds that the facts were not particularized, but rather because it “failed *in toto* to render plaintiffs’ entitlement to relief plausible.”⁹⁰

Second, a week after *Twombly*, the Supreme Court issued a decision in *Erickson*. The case involved a prisoner proceeding pro se against prison officials alleging violations of the Eighth Amendment’s prohibition on cruel and unusual punishment.⁹¹ The prisoner, Erickson, was diagnosed with hepatitis C and was receiving treatment from the Colorado Department of Corrections.⁹² Prison officials suspected that Erickson was misappropriating the treatment syringes for drug use; as a result, Erickson was cut off from treatment.⁹³ The complaint alleged that this removal of treatment endangered his life.⁹⁴ The court of appeals affirmed the dismissal of the complaint on the grounds that it contained only “conclusory allegations to the effect that he has suffered a cognizable independent harm.”⁹⁵

88 *Id.* at 1969. The Court viewed the *Conley* Court not as setting the minimum pleading standard, but rather as “describ[ing] the breadth of opportunity to prove what an adequate complaint claims.” *Id.* Once a claim was adequately stated, the pleader could support the claim by “showing any set of facts consistent with the allegations in the complaint.” *Id.*

89 *See id.* at 1973 n.14.

90 *Id.*

91 *See* *Erickson v. Pardus*, 127 S. Ct. 2197, 2198 (2007).

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.* at 2199 (quoting *Erickson v. Pardus*, 198 F. App’x 694, 698 (10th Cir. 2006)).

The Supreme Court reversed. The Court, citing *Twombly*, again stated that Rule 8 does not require the pleading of specific facts and that the statement need only give “the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”⁹⁶ The Court found that the petitioner’s allegation that the removal of treatment was endangering his life was sufficient to satisfy Rule 8(a)(2).⁹⁷ The Tenth Circuit’s “departure from the liberal pleading standards set forth by Rule 8(a)(2)” was “even more pronounced . . . because petitioner . . . proceed[ed] without counsel.”⁹⁸

The Supreme Court has sent two distinct messages. First, the Court rejected the well-established language used for evaluating the sufficiency of a complaint. After *Twombly*, complaints apparently must establish grounds for relief that are *plausible*, not only *possible*, to survive a 12(b)(6) motion to dismiss. At the same time, however, in both *Twombly* and *Erickson*, the Court rejected any heightened pleading standard and reaffirmed the “liberal pleading standard” under Rule 8(a)(2).

C. *The Response in the Literature*

In analyzing *Twombly* and *Erickson*, the commentator response to the decision has run the gamut.⁹⁹ On one end, a number of writers have concluded that *Twombly* is best understood as a decision extending only to pleading in antitrust contexts. At the other end, writers believe that *Twombly* signals a revolutionary overhaul of the entire concept of notice pleading. This subpart illustrates how commentators, operating without empirical data, have reached fundamentally different conclusions regarding *Twombly*’s effect and significance.

On one point the writers appear to be in agreement—*Twombly* means an increase in the litigation over pleadings before federal district courts. Many believe that “one thing is certain after *Twombly*,” namely that defendants will be encouraged to test the meaning and limits of the decision by filing motions to dismiss.¹⁰⁰ Writers outside of the academic context have also subscribed to this view, remarking

96 *Id.* at 2200 (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007)).

97 *See id.*

98 *Id.*

99 A third decision was also mentioned by some commentators—*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007). This case, decided one month after *Twombly*, involved the pleading standard for cases brought under § 10(b) of the Securities Exchange Act of 1934. *See id.* at 2505.

100 Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 142 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>.

that *Twombly* is “sparking a wave of paperwork, as defense lawyers file new motions to dismiss in a wide swath of lawsuits.”¹⁰¹

On the more fundamental question—what influence *Twombly* will have on how courts evaluate the sufficiency of pleadings—there is division. While admitting that the *Twombly* decision was “poorly crafted and include[d] an abundance of contradictory dicta” capable of multiple interpretations,¹⁰² Professor Ides concludes that *Twombly* is subject to a “better” reading. *Twombly*, in his view, is better understood as not having changed the law on pleading, but as simply applying “long-accepted pleading standards to a unique body of law under which the . . . complaint failed to include . . . facts or plausible inferences supportive of a material element of the claim.”¹⁰³ Professor Ides believes that any disagreement with the decision properly rests not with any issue relating to pleading, but rather with the substantive requirements of the Sherman Act.¹⁰⁴

Professor Ides provides a number of rationales for why a “heightened pleading” reading of *Twombly* should be rejected. First, the Court in *Twombly* explicitly states it is *not* imposing a heightened standard.¹⁰⁵ Second, the decision was not based on any supposed insufficiency of the plaintiffs’ allegations of a conspiracy, but rather their staking their claim of conspiratorial agreement solely on parallel conduct—an inadequate allegation under section 1 of the Sherman Act.¹⁰⁶ Third, Professor Ides finds that any reading of *Twombly* that imposes a heightened pleading requirement could be sustained only if the Court’s holding in *Swierkiewicz* had been overruled—a conclusion Professor Ides believes should not be reached lightly in the

101 Wendy N. Davis, *Just the Facts, but More of Them*, A.B.A. J., Oct. 2007, at 16, 18; see also John H. Bogart, *The Supreme Court Decision in Twombly: A New Federal Pleading Standard?*, UTAH B.J., Sept.-Oct. 2007, at 20, 22 (“There will be, and already are, a flurry of motions requesting district courts to give closer scrutiny to Section 1 complaints.”).

102 Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 606 (2007).

103 *Id.* at 635–36. Specifically, Professor Ides believes that the Supreme Court was applying “simplified pleading” within the context of a section 1 Sherman Act claim. See *id.* at 634–35. The Court found, appropriately according to Professor Ides, that the complaint had failed to independently allege an actual agreement; it only alleged parallel conduct—allegations which do not state a claim for a section 1 Sherman Act violation. See *id.* at 635.

104 See *id.* at 635.

105 See *id.*

106 See *id.*

absence of an express overruling.¹⁰⁷ Finally, he believes that *Erickson*, by upholding a complaint for simply giving fair notice and rejecting specific fact pleading, sends both explicit and implicit messages that *Twombly* should not be read as imposing a heightened pleading standard.¹⁰⁸

Other commentators believe that *Twombly* will have an effect, but one likely confined to antitrust litigation.¹⁰⁹ From this view, attempting to read in *Twombly* a universally applicable heightened pleading standard conflicts with the major reasoning of the decision. The Court found both the excessive costs of antitrust discovery and the difficulty confronting district courts when trying to control antitrust litigation to be compelling.¹¹⁰ To the extent that these concerns do not apply to every type of case or substantive area of the law, *Twombly*'s reasoning may not be able to be easily applied beyond the antitrust field.¹¹¹ Finally, as with Professor Ides, these commentators believe that *Erickson* may serve as an affirmation of traditional pleading standards more broadly.¹¹²

Other writers, however, do not believe that the *Twombly* decision should be so narrowly construed. Wendy Davis, writing for the American Bar Association Journal, states that the "decision effectively changed the standard for pleadings in civil lawsuits" and remarks that lower courts have cited the case in a vast array of cases outside the antitrust field.¹¹³ She concludes that plaintiffs' lawyers will, at minimum, "have to include more information in their pleadings if they want to survive a motion to dismiss under Rule 12(b)6."¹¹⁴ Ms. Davis does not believe the decision itself offers any rigid test that compels this result. Rather, she believes this change has been effected by granting increased discretion to district court judges—judges who are under competing pressures to advance worthwhile cases to discovery but also to clear their busy calendars of cases that "don't appear likely to go anywhere."¹¹⁵

Professor Dodson is more direct. He firmly believes that the best reading of *Twombly* is one that holds that notice pleading is dead for

107 *See id.*

108 *See id.* at 636–39.

109 *See, e.g.,* Bogart, *supra* note 101, at 22.

110 *See supra* notes 83–86 and accompanying text.

111 *See* Bogart, *supra* note 101, at 22.

112 *See, e.g., id.*

113 Davis, *supra* note 101, at 16. The finding that *Twombly* has been cited widely outside of the antitrust context was amply supported by my study. *See infra* Part III.

114 Davis, *supra* note 101, at 16.

115 *Id.* at 18 (paraphrasing Columbia Law School Professor Michael Dorf).

“all cases and causes of action.”¹¹⁶ While he acknowledges the importance the *Twombly* majority placed on the expense of antitrust discovery, in his view, the repudiation of the *Conley* “no set of facts standard” is “not cabined by the costs and expenses that might accrue.”¹¹⁷ Because the decision revoked a generally applied standard, the effects of the decision must sweep beyond the factual circumstances underlying the case. Nor does Professor Dodson believe that *Erickson* somehow rescues notice pleading. According to him, *Erickson* fails to trump *Twombly* for two reasons. First, *Erickson* is a case in which the plaintiff was proceeding pro se. The Court acknowledged in *Erickson* that pro se complaints are subject to a pleading standard that is “more liberal”—consequently, the two decisions were so fundamentally different that their apparent discrepancy is “perfectly consistent.”¹¹⁸ Second, *Erickson*’s rejection of the need to plead “specific facts” is the same as the rejection of the necessity of “specific facts” in *Twombly*—both serve merely as statements that the complaints were not subject to “particularized pleading” under Rule 9. In this view, *Twombly* is not significant for requiring specific facts to be pled, but rather for altering the definition of what constitutes *sufficient* facts under Rule 8.¹¹⁹

Professor Spencer agrees that *Twombly* has brought a new pleading standard. He articulates *Twombly*’s significance as bringing a “new, more stringent pleading standard.”¹²⁰ The critical element behind this shift is a change in how the Court has treated inferences deriving from a complaint. Under *Conley*, as long as the complaint contained factual allegations that were consistent with liability it “passed muster because courts were required to draw any permissible inference in the plaintiff’s favor.”¹²¹ According to Professor Spencer, the key in *Twombly*’s plausibility pleading standard is that it deprives plaintiffs of these beneficial inferences.¹²² Professor Spencer also agrees with Professor Dodson on the role of *Erickson* in evaluating *Twombly*. He refers to *Erickson* as a “brief homage” to notice pleading that “ring[s] hollow” due to the pro se status of the plaintiff, the fact that the complaint was subject to less stringent scrutiny, and the real-

116 Dodson, *supra* note 100, at 138.

117 *Id.*

118 *Id.* at 140.

119 *See id.*

120 A. Benjamin Spencer, *Plausibility Pleading* 16 (Wash. & Lee Pub. Legal Studies Research Series, Paper No. 2007-17, 2007), available at <http://ssrn.com/abstract=1003874>.

121 *Id.*

122 *See id.* at 16–17.

ity that the issues involved in the case were substantively “clear-cut.”¹²³ *Twombly* is, therefore, best understood as being left undiluted by the opinion in *Erickson*.

The broadest view of *Twombly* ascribes to the decision constitutional implications. Professor Suja Thomas asserts that *Twombly* has altered “significantly” the pleading requirements in such a way that courts can more easily dismiss complaints. Specifically, she believes that the motion to dismiss is now qualitatively similar to the summary judgment standard.¹²⁴ Professor Thomas believes, however, the importance of the decision goes much farther. She believes that the motion to dismiss is now an unconstitutional device, one that violates the Seventh Amendment.¹²⁵ In her view, *Twombly* now allows a court to “assess critically the facts alleged by the plaintiff, including determining the inferences that favor the defendant” and thus violates the right to a trial by jury.¹²⁶ Along similar grounds, she claims that the motion to dismiss is no longer comparable to the common law demurrer, adding to its constitutional infirmity.¹²⁷

Professor Ides best summed up the state of the academic response to *Twombly* when he stated, correctly, that “reasonable and intelligent minds can and will arrive at different interpretations.”¹²⁸ However, even if it were accepted that one view was the “correct” reading of *Twombly*, the academic debate would be able to tell a practicing attorney only how district courts *should* apply the new decision. It would not answer the important question of how the lower courts actually *have* applied the decision. This empirical study seeks to address this important question.

II. METHODOLOGY

The question behind this study is simple: have the federal district courts applying *Twombly* required more from pleadings than they did prior to the decision? The vehicle for analyzing the effect of the deci-

123 *Id.* at 24.

124 See Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. (manuscript at 4, 7) (forthcoming 2008), available at <http://ssrn.com/abstract=1010062>.

125 See *id.* (manuscript at 25–27). The Seventh Amendment of the United States Constitution provides: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII.

126 Thomas, *supra* note 124 (manuscript at 27).

127 See *id.*

128 Ides, *supra* note 102, at 606.

sion is the 12(b)(6) motion to dismiss.¹²⁹ Three considerations motivate this choice. First, the 12(b)(6) motion is used to test the legal sufficiency of a claim. Under 12(b)(6), a court takes the allegations in the complaint as true, and simply asks whether the allegations state a valid claim under the law.¹³⁰ One would expect that if the pleading standard was altered to require additional facts, a certain set of claims that would have survived a 12(b)(6) motion before this alteration would subsequently be dismissed under the more stringent standard. Second, it was in affirming a grant of a 12(b)(6) motion that the *Twombly* Court made its most sweeping pronouncements regarding Rule 8.¹³¹ Finally, the 12(b)(6) motion lends itself to empirical analysis as it has a finite set of possible outcomes: for any given 12(b)(6) motion that a court rules on, the motion must either be granted, denied, or granted-in-part/denied-in-part.¹³² This study is thus built around an analysis of the respective granted, denied, or “mixed” rates under both *Conley* and *Twombly*.

The study is centered around federal district court cases retrieved from the commercial database server Westlaw.¹³³ This study is not interested in establishing the absolute rates of dismissal in federal district courts; it is a comparison of the relative 12(b)(6) dismissal rates between pre-*Twombly* and post-*Twombly* reported district court cases. While relative dismissal rates based on reported cases may not perfectly correspond with the relative dismissal rates in all federal district court cases,¹³⁴ the fact that any “reported case bias” is equally present in both the pre- and post-*Twombly* case set allows for a meaningful comparison and analysis of any change. Additionally, no sampling was

129 Rule 12(c) motions for judgment on the pleadings were also included because of their almost identical nature to 12(b)(6) motions. See *infra* note 159.

130 See FRIEDENTHAL ET AL., *supra* note 13, § 5.22, at 313.

131 See *supra* note 88 and accompanying text.

132 The 12(b)(6) motions that have a “mixed” outcome are the result of the prevalence of multiple claims for relief brought in a single complaint. See, e.g., *Ritter v. City of Jacksonville*, No. 3:07-cv-506-J-16HTS, 2007 WL 2298347, at *2–3 (M.D. Fla. Aug. 7, 2007) (involving a 12(b)(6) motion against a complaint that had a tort-based excessive force and negligent hiring claim as well as a claim brought under 42 U.S.C. § 1983; the court dismissed the tort-based claim but refused to dismiss the § 1983 claim).

133 All cases in this study were obtained via the Westlaw federal district court database (DCT).

134 See, e.g., Douglas D. McFarland, *Drop the Shoe: A Law of Personal Jurisdiction*, 68 MO. L. REV. 753, 777 n.113 (2003) (“[T]hose statistics that exist count only reported cases. These numbers severely underreport the number of personal jurisdiction challenges because the heavy lifting on motions to dismiss for want of personal jurisdiction occurs in unreported trial court decisions.”).

done to arrive at the set of cases; any cases that met the substantive standards articulated below were included in the study.

It was also important to decide upon the time frame of the case set. This was straightforward for the experimental group (i.e., those district court cases that cite *Twombly* in ruling on a 12(b)(6) motion) as *Twombly* was handed down on May 14, 2007. Every case that had cited *Twombly* in the context of a 12(b)(6) motion from June 2007 to December 2007 (which, at the time of the study, represented all such reported citations of *Twombly*) were included and divided into two groups: June through September 2007 (“Summer 2007”) and October through December 2007 (“Winter 2007”).¹³⁵ The control group (those cases that cite *Conley* in the context of a 12(b)(6) motion) required a more substantive decision with regard to the time frame. *Conley* was handed down in 1957—an analysis of every reported case that cited *Conley* in a 12(b)(6) context would be beyond the scope of this study. Four sets of 12(b)(6) *Conley* cites were chosen as a control: June through September 2006 (“Summer 2006”), October through December 2006 (“Winter 2006”), February through May 2007 (the four months immediately prior to *Twombly*, “Spring 2007”), and June through September 2007¹³⁶ (“Summer 2007”). These time frames were selected as they allowed for an examination of any differences in how courts had applied Rule 12(b)(6) both immediately prior to and one year before the *Twombly* decision.

The fact that this study is analyzing only the immediate impact (the first seventh months) of *Twombly* is both a curse and a benefit. It is a curse because it is possible that the courts have not had sufficient time to analyze and decide what *Twombly* should actually mean. Additionally, it may be that the *Twombly* decision has not fully trickled down to the district courts; the hundreds of cases that cite *Conley*’s overruled language without mentioning that it is no longer good law would suggest this may be the case. With that said, the short time

¹³⁵ These groups did not include the limited number of cases that cited *Twombly* in May.

¹³⁶ There were numerous court opinions that cited *Conley* without mentioning *Twombly* or the fact that *Conley*’s “no set of facts” language had been overruled. See, e.g., *MSD Energy, Inc. v. Gognat*, 507 F. Supp. 2d 764 (W.D. Ky. 2007) (“Denial of the [12(b)(6)] motion is proper ‘unless it can be established beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” (quoting *Achterhof v. Selvaggio*, 886 F.2d 826, 831 (6th Cir. 1989))). For this fourth control, I crafted the Westlaw search in such a way as to only include those decisions that were apparently oblivious to the overturning of the *Conley* standard. I was primarily interested in being able to compare what the district courts that applied *Twombly* did with 12(b)(6) motions to what district courts that applied the defunct *Conley* standard at the same time did with the same type of motions.

frame has two major advantages. First, based on those cases in the set that had docket information on Westlaw, the vast majority of cases in this study involved a complaint that was filed before the *Twombly* decision.¹³⁷ This means that the lawyers drafted these complaints with the previous *Conley* standard in mind. Similarly, the majority of the 12(b)(6) motions in the study set were brought before *Twombly*. Thus, if the commentators are correct and *Twombly* means that more motions to dismiss will be filed,¹³⁸ any confounding effects should be kept to a minimum, especially in comparing the control group results to the Summer 2007 *Twombly* results. The short time frame helps ensure, in short, that the study is examining whether there is any difference in the 12(b)(6) granted rate by courts applying *Twombly* to complaints and 12(b)(6) motions that were conceived and drafted with the *Conley* standard in mind.

Having made these preliminary decisions, it became necessary to eliminate three classes of cases. Most generally, it was necessary to eliminate those cases where the complaint was evaluated under Federal Rule 9(b) rather than Rule 8. Federal Rule 9(b) requires that averments of fraud or mistake be stated “with particularity.”¹³⁹ *Twombly* dealt with the requirements of pleading under Rule 8. Including cases based on fraud or mistake in the set of cases would potentially hide or distort any effect *Twombly* has had on Rule 8 pleadings.

Additionally, there were two more narrow categories of cases eliminated from the set. First, actions brought under section 10(b) of the Securities Exchange Act (SEA) of 1934¹⁴⁰ were removed. In 1995, Congress passed the Private Securities Litigation Reform Act (PSLRA)¹⁴¹ seeking to end “abusive practices committed in private

137 Filing date of the complaint was attained through the docket information possessed by Westlaw. For the Summer 2007 months, every case was filed prior to the *Twombly* decision. The months of October and November 2007 began to see the presence of cases which had been initiated following *Twombly*. See, e.g., *Stanley ex rel. L.B. v. Bullock County Bd. of Educ.*, No. 2:07cv681-WHA, 2007 WL 4105149 (M.D. Ala. Nov. 15, 2007) (complaint filed July 26, 2007).

138 See *supra* notes 100–01 and accompanying text.

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

140 15 U.S.C. § 78j (2000) (“It shall be unlawful for any person . . . by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities Exchange Commission] may prescribe . . .”).

141 Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15, 18 U.S.C.).

securities litigation” which, in Congress’ findings, included “the routine filing of lawsuits against issuers of securities . . . whenever there [was] a significant change in . . . stock price, without regard to any underlying culpability . . . and with only faint hope that the discovery might lead eventually to some plausible cause of action.”¹⁴² A core element of this reform was the imposition of a heightened pleading requirement: First, any plaintiff is required to state “with particularity all facts on which [the belief that the defendant engaged in deceptive conduct] is formed.”¹⁴³ Second, the plaintiff must also “state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind.”¹⁴⁴ The PSLRA, therefore, imposes stringent pleading requirements that go beyond those required under Rule 8. Thus, for the same reason that Rule 9 cases were eliminated, actions brought under section 10(b) of the SEA were not included in the case set.

The remaining category of cases removed from the set was cases where the plaintiff proceeded either in forma pauperis or pro se. Pursuant to 28 U.S.C. § 1915, federal courts may authorize commencement of a suit without requiring payment of filing fees, provided the individual can show the requisite need (termed by the statute as “proceeding[] in forma pauperis”).¹⁴⁵ As a consequence of proceeding in forma pauperis, a plaintiff’s complaint is “screened” by the district court. Subsection (e)(2) provides, in part, that the court *shall* dismiss the complaint if the court determines that the complaint fails to state a claim on which relief may be granted.¹⁴⁶ This standard applied by the courts pursuant to subsection (e)(2)(B)(ii) is the same as the standard applied by courts pursuant to a 12(b)(6) motion.¹⁴⁷ These

142 H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 730.

143 15 U.S.C. § 78u-4(b)(1) (2000).

144 *Id.* § 78u-4(b)(2) (emphasis added).

145 28 U.S.C. § 1915(a)(1) (2000). Interestingly, the statute appears to be targeted solely at prisoner suits. The text of the section states that “[a]ny court of the United States may authorize the commencement . . . of any suit . . . without prepayment of fees or security therefor, by a person who submits an affidavit that includes a state of all assets such *prisoner* possesses.” *Id.* (emphasis added). The courts, however, have not applied this statute literally, choosing instead to apply the apparent congressional intent reflected in the use of the word “person” earlier in the clause. *See, e.g.,* *Smith v. Cinema 7 Corp.*, No. C 07-04586 CRB, 2007 WL 3168944, at *1 (N.D. Cal. Oct. 29, 2007) (granting a motion to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 in a nonprisoner case).

146 *See* 28 U.S.C. § 1915(e)(2)(B)(ii).

147 *See* *Wolfson v. Carlucci*, 232 F. App’x 849, 850 n.1 (10th Cir. 2007) (“We recognize . . . that the language of § 1915(e)(2)(B)(ii) regarding the failure to state a legal

screening actions are not, however, 12(b)(6) motions and were thus eliminated so as to exclude any confounding effects these screening effects may have had. A further study may show that *Twombly* has had a unique effect on how courts have applied this screening function.

Cases in which the plaintiff proceeded pro se were removed for similar considerations. It has been routinely held by courts at every level of the federal judiciary that pro se complaints are to be construed liberally.¹⁴⁸ This liberal standard subjects such complaints to a “less stringent standard[] than formal pleadings drafted by lawyers.”¹⁴⁹ In order to ensure that the study was examining a uniform standard, these cases were removed from the set of cases. As with the in forma pauperis cases, it is possible that a future study will demonstrate that *Twombly* (understood in light of *Erickson*) has had an independent impact on how courts approach pro se cases. In a more general sense, this study was conceived of as an attempt to provide practicing attorneys with some concrete context regarding *Twombly*. In order to best accomplish this goal, it is necessary to limit the focus of the study to how courts have treated complaints filed by attorneys.

Compiling these various criteria, I ran five Westlaw searches (one for each control group and the experimental groups)¹⁵⁰ in the federal district court database that encompassed all cases that: (1) cited either *Conley* or *Twombly* (either by name or by case citation); (2) included the phrase “failure to state a claim” or “12(b)(6)” within a paragraph of the *Conley* or *Twombly* citation; but that (3) did not have the attorney listed as “pro se”; (4) did not include the phrase “Private Securities Litigation Reform Act” or its abbreviation PSLRA; and (5) did not include a mention of Rule 9 (drafted a number of ways, reflecting the differing ways Rule 9 can be cited).¹⁵¹ The result of these searches was to obtain four individual lists of cases, which combined for around 3287 district court cases.

claim tracks with Fed. R. Civ. P. 12(b)(6) such that review of dismissals under those two provisions should be the same.”).

148 See, e.g., *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007); *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007); *Nedab v. Neal*, No. 06-07 Erie, 2007 WL 2407284, at *2 (W.D. Pa. Aug. 20, 2007).

149 *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (per curiam).

150 These searches were run on September 5, 2007, September 10, 2007, September 14, 2007, October 12, 2007, and January 8, 2008. A Microsoft Excel spreadsheet listing the name and citation of every case included in this study is on file with author.

151 Utilizing this method of searching carries with it the inevitable side effect of being overinclusive or underinclusive depending on the parameter. For example, there undoubtedly are cases that cite Federal Rule 9 not to apply it, but to merely contrast it with Rule 8. Any overinclusiveness was corrected by removing any case that does not in fact meet with the above criteria in *both* the experimental and control sets.

Having obtained this presumptive set of cases, each case was read and a variety of information was recorded. Besides the citation of the case, the following was recorded: the date of the case; the district court issuing the ruling; the circuit in which the district court sits; a general description of the causes of action;¹⁵² whether the motion to dismiss was, considering all causes of action, granted, denied, or “mixed” (granted-in-part/denied-in-part); and whether the motion to dismiss was granted, denied, or “mixed” as to each claim category. In the process of reading through these cases, fifteen percent of the cases Westlaw provided had to be removed for not meeting the “spirit” of the search parameters. Cases were removed, for example, for being decisions on summary judgment motions,¹⁵³ motions to amend,¹⁵⁴ motions for reconsideration,¹⁵⁵ motions to dismiss for lack of subject matter jurisdiction,¹⁵⁶ or for being cases in which the plaintiff was proceeding *pro se*,¹⁵⁷ or where the complaint was predicated on fraud or mistake (and thus subject to Rule 9).¹⁵⁸ Having removed these cases, a total of 3287 district court cases (1075 *Twombly* cases and 2212 *Conley*

152 If the case had more than one cause of action, all were separately defined. The general categories used were “Antitrust,” “Civil Rights” (focusing on 42 U.S.C. §§ 1981, 1983, 1985, *Bivens* claims, as well as generalized claims brought for “due process” or “equal protection” violations), “Torts,” “Contracts” (including general business litigation), “Consumer” (primarily encompassing consumer protection laws), “Federal Other” (covering miscellaneous actions brought under federal statutory law), and “State Other” (covering miscellaneous actions brought under state statutory law). This grouping of cases, however, eventually proved largely unworkable. *See infra* note 160.

153 *See, e.g.*, *Mayne v. Dennis Stubbs Plumbing, Inc.*, No. RDB 05-774, 2006 WL 1997398, at *5 (D. Md. July 13, 2006) (converting a 12(b)(6) motion into a Rule 56 summary judgment motion).

154 *See, e.g.*, *Parra v. Markel Int’l Ins. Co.*, No. L-06-59, 2007 WL 2363013, at *1 (S.D. Tex. Aug. 16, 2007) (involving a plaintiff moving for leave to file an amended complaint).

155 *See, e.g.*, *Martinez v. Donna Indep. Sch. Dist.*, No. M-03-377, 2007 WL 2446814, at *1 (S.D. Tex. Aug. 23, 2007) (denying plaintiff’s motion for reconsideration of a court order dismissing a political association claim).

156 *See, e.g.*, *Gilmore v. Nw. Airlines, Inc.*, 504 F. Supp. 2d 649, 653 (D. Minn. 2007) (involving a motion for judgment on the pleadings properly understood as a motion to dismiss pursuant to 12(b)(1) and thus applying that standard).

157 *See, e.g.*, *Brathwaite v. Holman*, No. CIV. A. 04-1542(GMS), 2006 WL 1995137, at *1 (D. Del. July 17, 2006) (“Brathwaite filed this *pro se* civil rights action . . .”).

158 *See, e.g.*, *Ferron v. Zoomego, Inc.*, No. 2:06-CV-751, 2007 WL 1974946, at *3 (S.D. Ohio July 3, 2007) (“[T]he elevated standards of Rule 9(b) will be applied to Plaintiff’s claims . . .”).

cases) remained.¹⁵⁹ The following results were calculated from these 3287 cases.

III. FINDINGS

The first analysis was to examine the granted, denied, and mixed rates for the control groups (the cases citing *Conley* in a 12(b)(6) context, over four separate time frames). The results were calculated for each separate control group. This allowed for the consistency among the *Conley*-citing cases to be evaluated. The results of this analysis are recorded in Table 1 (total number of cases in parenthesis).

TABLE 1. OVERALL RESULTS FOR CASES CITING *CONLEY*

	<i>Denied</i>	<i>Granted</i>	<i>Mixed</i>
<i>TOTAL (2212)</i>	34.1% (755)	36.8% (813)	29.1% (644)
<i>Summer 2006* (683)</i>	33.5% (229)	37.9% (259)	28.6% (195)
<i>Winter 2006** (439)</i>	33.3% (146)	36.0% (158)	30.8% (135)
<i>Spring 2007*** (769)</i>	35.4% (272)	35.8% (275)	28.9% (222)
<i>Summer 2007 (321)</i>	33.6% (108)	37.7% (121)	28.7% (92)

* Note that "Summer" includes the months of June through September

** Note that "Winter" includes the months of October through December

*** Note that "Spring" includes the months of February through May

These results show a great deal of consistency among the control groups. The denial rate fluctuated within a roughly 2.0% band (between 35.4% at the high end and 33.3% at the low end). The granted rate saw fluctuation within a similar, albeit higher, 2.1% band (between 37.9% on the high end and 35.8% on the low end). Similarly, the "mixed" rate fluctuated within a rough 2.0% band (between 30.8% on the high end and 28.6% on the low end). Based on these results, it appears that among reported cases, 12(b)(6) motions were granted at a rate higher (on average by only 2.7%) than they were denied. Having calculated these results, the critical analysis was to compare them to the rates for cases that cited *Twombly* in the 12(b)(6) context. These results are shown in Table 2, along with the *Conley* results for comparison.

¹⁵⁹ It should be noted that there was one subset of cases that, while not technically a 12(b)(6) motion, I chose to include—12(c) motions for judgment on the pleadings. While not a 12(b)(6) motion, it applies the 12(b)(6) standard, *see* *Guidry v. Am. Pub. Life Ins. Co.*, 412 F.3d 177, 180 (5th Cir. 2007), and unlike other mechanisms that apply a 12(b)(6)-like standard (such as the in forma pauperis screening standard or the motion to amend standard), a 12(c) motion is filed at the discretion of the parties. FED. R. CIV. P. 12(c). The *only* difference between a 12(b)(6) and 12(c) motion is when it is filed.

TABLE 2. OVERALL RESULTS FOR CASES CITING *TWOMBLY*

	<i>Denied</i>	<i>Granted</i>	<i>Mixed</i>
TOTAL <i>Twombly</i> (1075)	32.6% (350)	39.4% (424)	28.0% (301)
Summer 2007 (571)	33.8% (193)	40.6% (232)	25.6% (146)
Winter 2007 (504)	31.2% (157)	38.1% (192)	30.8% (155)
TOTAL <i>Conley</i> (2212)	34.1% (755)	36.8% (813)	29.1% (644)
Summer 2006 (683)	33.5% (229)	37.9% (259)	28.6% (195)
Winter 2006 (439)	33.3% (146)	36.0% (158)	30.8% (135)
Spring 2007 (769)	35.4% (272)	35.8% (275)	28.9% (222)
Summer 2007 (321)	33.6% (108)	37.7% (121)	28.7% (92)

At first glance, the difference between the total *Conley* and *Twombly* granted rates might not appear significant—under three points. However, these numbers *are* almost three points over the average *Conley* granted rate and a full one-and-a-half points over the highest granted rate under the *Conley* control groups. These results indicate that *Twombly* has had at least a slight impact in how courts have approached 12(b)(6) motions to dismiss.

My next inquiry was to examine whether the application of *Twombly* was uniform across substantive law areas. This analysis revealed significant results. Analysis as to most of the substantive areas proved impossible given the extremely small representation those cases had in the overall set.¹⁶⁰ The “civil rights”¹⁶¹ category (the largest and most clearly defined category of cases), however, could be analyzed meaningfully. The results of just the civil rights causes of action are listed in Table 3.

160 For example, antitrust cases—cases that should be examined in the wake of *Twombly*—comprised only 2.3% (seventy-five cases) of my set of cases, making any *meaningful* analysis impossible. Additionally, the broad categories employed (such as “Torts” or “Contracts”) proved *too* broad; as I read farther, it became apparent that there were causes of action I had not anticipated and had difficulty classifying. Consequently, the lines between these general categories blurred. The civil rights category, however, remained clearly defined. See *infra* note 161. This, combined with the fact that there were ample civil rights cases in the set, allowed for analysis of that category.

161 The civil rights category did not include actions brought under certain statutes such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, or the Age Discrimination in Employment Act. Cases brought under these statutes were categorized as “Federal Other.” The “Civil Rights” label applied to claims brought under 42 U.S.C. §§ 1981, 1982, 1983 (and § 1983’s counterpart against federal officials—so-called *Bivens* actions), and 1985 as well as generalized claims of due process or equal protection violations.

TABLE 3. OVERALL RESULTS FOR CIVIL RIGHTS CLAIMS

	<i>Denied</i>	<i>Granted</i>	<i>Mixed</i>
<i>TOTAL Twombly (278)</i>	16.9% (47)	52.9% (147)	30.2% (84)
<i>Summer 2007 (149)</i>	19.5% (29)	52.3% (78)	28.2% (42)
<i>Winter 2007 (129)</i>	14.0% (18)	53.5% (69)	32.6% (42)
<i>TOTAL Conley (686)</i>	23.6% (162)	41.7% (286)	34.7% (238)
<i>Summer 2006 (212)</i>	25.9% (55)	42.0% (89)	32.1% (68)
<i>Winter 2006 (139)</i>	23.0% (32)	41.7% (58)	35.3% (49)
<i>Spring 2007 (220)</i>	22.3% (49)	40.5% (89)	37.3% (82)
<i>Summer 2007 (115)</i>	22.6% (26)	43.5% (50)	33.9% (39)

As this table demonstrates, there was a pronounced change in the granted and denial rates of 12(b) (6) motions between the *Conley* cases and the *Twombly* cases. While the rates for the *Conley* cases remained fairly consistent between control groups, the granted rate in the *Twombly* group jumped by over eleven points while the denial rate fell by almost seven points. In light of this finding, the “overall” numbers in Table 2 were recalculated by removing all civil rights causes of action from each group of cases. If a given case was entirely a civil rights action, the case was subsequently removed from the set. If a case contained multiple causes of action, only some of which were civil rights–based, the “granted,” “denied,” or “mixed” label was recomputed without considering the civil rights claim. The results obtained by this recalculation are found in Table 4.

TABLE 4. OVERALL RESULTS FOR NON–CIVIL RIGHTS CLAIMS

	<i>Denied</i>	<i>Granted</i>	<i>Mixed</i>
<i>TOTAL Twombly (906)</i>	37.9% (343)	37.4% (339)	24.7% (224)
<i>Summer 2007 (471)</i>	39.9% (188)	38.0% (179)	22.1% (104)
<i>Winter 2007 (435)</i>	35.6% (155)	36.8% (160)	27.6% (120)
<i>TOTAL Conley (1787)</i>	38.7% (692)	36.9% (659)	24.4% (436)
<i>Summer 2006 (554)</i>	37.2% (206)	38.6% (214)	24.2% (134)
<i>Winter 2006 (359)</i>	38.7% (139)	36.2% (130)	25.1% (90)
<i>Spring 2007 (628)</i>	40.0% (251)	35.8% (225)	24.2% (152)
<i>Summer 2007 (246)</i>	39.0% (96)	36.6% (90)	24.4% (60)

The results are striking. By removing the civil rights causes of action from the set completely, the total difference between the granted rate for the *Conley* control groups and the *Twombly* experimental groups is, on average, half a point.

Having apparently found an area of substantive law where *Twombly* was effecting change, I sought to discover whether the

change was statistically significant. This was accomplished by coding all the variables into SPSS and running regression analysis on the data.¹⁶² The results of this regression analysis confirmed what the percentages suggested: civil rights cases that cited *Twombly* served to explain the change in the motion to dismiss granted rate. The regression analysis showed that the *Twombly* variable and the civil rights variable, taken alone, could not explain the granted rate in a statistically significant way. When the variables were combined into a single variable, comprising only the *Twombly* civil rights cases, the relationship between this variable and the granted rate did serve to explain the results—a *Twombly* civil rights action was 39.6% more likely to be dismissed than a random case in the set. This result was statistically significant to the 0.05 level.

IV. EXPLAINING THE RESULTS

It would appear that those commentators who believe that *Twombly* requires a uniform heightened pleading requirement are incorrect. The results suggest, at this early date, that *Twombly* has not affected how courts have adjudicated the sufficiency of complaints in a majority of substantive legal areas. The question remains: why has *Twombly*'s impact been focused on civil rights cases? This Part puts forward three hypotheses: (1) *Twombly*'s effects are being hidden by the realities of pleading practice; (2) district courts are refusing to alter their longstanding practice in the absence of a more unequivocal statement by the Supreme Court; or (3) the practice of the lower courts in relation to 12(b)(6) motions changed well before the *Twombly* decision.

A. Hypothesis One: *Twombly*'s Hidden Effects

The first possible explanation is that *Twombly* has, in fact, imposed a more stringent review of pleadings across the board, but that this fact is hidden from the above study because of the pleading realities. Rule 8 requires that a pleading contain a “short and plain statement.”¹⁶³ To reinforce the degree to which a complaint may be “short and plain,” the drafters included a series of sample complaints. Form 15, the form complaint for conversion provides:

(Statement of jurisdiction.)

162 SPSS database on file with author.

163 FED. R. CIV. P. 8(a).

On *date*, at *place*, the defendant converted to the defendant's own use property owned by the plaintiff. The property converted consists of *describe*.

The property is worth \$____.

Therefore, the plaintiff demands judgment against the defendant for \$____, plus costs.¹⁶⁴

This form complaint encompasses forty-three words—half the length of the two quotes that open this Note. This is the essence of notice pleading—if it gives notice, it is sufficient.

Compare, however, Form 15 to recent complaints involving conversion claims. The complaint involved in *Doll v. Chicago Title Insurance Co.*¹⁶⁵ is fourteen pages long and comprises close to 3000 words.¹⁶⁶ The complaint in *Peskoff v. Faber*¹⁶⁷ is over thirty-two pages long with a 6418 word count.¹⁶⁸ It appears that lawyers in practice have used Rule 8's requirement of a "short and plain" statement as a "guideline" rather than a mandatory requirement. Complaints in the federal judiciary are neither short nor plain—in fact it appears that there is a habitual practice among attorneys to overplead.

Not only are lawyers pleading far beyond the necessities of Rule 8, but judges are well aware of the practice. In *American Nurses' Ass'n v. Illinois*,¹⁶⁹ Judge Posner, trying to decipher what the plaintiffs were "complaining about," remarked that the task "would be easier if the complaint had been drafted with the brevity that the Federal Rules of Civil Procedure envisag[d]."¹⁷⁰ Judge Posner also recognized the strategic considerations motivating the lawyers' tendency to overplead:

[L]awyers, knowing that some judges read a complaint as soon as it is filed in order to get a sense of the suit, hope by pleading facts to "educate" . . . the judge with regard to the nature and probable merits of the case, and also hope to set the stage for an advantageous settlement by showing the defendant what a powerful case they intend to prove.¹⁷¹

In the case before the court of appeals, the twenty page complaint (with a one hundred page appendix) was found to be sufficient

164 *Id.* FORM 15.

165 517 F. Supp. 2d 1273 (D. Kan. 2007).

166 *See* First Amended Complaint—Class Action, *Doll*, 517 F. Supp. 2d 1273 (No. 06-CV-2416-JWL), 2006 WL 4015291.

167 244 F.R.D. 54 (D.D.C. 2007).

168 *See* Complaint, *Peskoff*, 244 F.R.D. 54 (No. 1:04CV00526), 2004 WL 2683820.

169 783 F.2d 716 (7th Cir. 1986).

170 *Id.* at 723.

171 *Id.* at 723–24.

and the lower court's dismissal reversed.¹⁷² Thus, while judges seem to complain about the length and complexity of pleading,¹⁷³ they rarely take action against the excessive complaint.¹⁷⁴

This tradition of overpleading in the pre-*Twombly* federal court system could be masking *Twombly*'s true effect. This can be explained in a simplified hypothetical: assume that Rule 8(a) pre-*Twombly* required x . Also assume for the majority of cases, the average complaint pleads $x + 50\%$ while for a smaller subset of cases, for a number of reasons, the average complaint is pled merely at $x + 15\%$. If *Twombly* alters the Rule 8(a) standard to now require $x + 15\%$, the average complaint in most substantive areas would be largely, if not completely, unaffected. For that small subset of cases however, the change brought by *Twombly* would have a dramatic and readily apparent impact.

It is possible that *Twombly* has raised the pleading bar higher, but set it at a point in which the change goes unnoticed in most substantive areas. Commentators have argued that a heightened pleading standard would create a particularly heavy burden on civil rights plaintiffs, one that most would be unable to bear.¹⁷⁵ An example of the disproportionate burden a heightened pleading standard could impose on civil rights cases can be evidenced in failure to train cases brought pursuant to § 1983. In order to prevail in holding a municipality liable under this section for failing to train its personnel, a plaintiff must be able to show a deficiency in a city's training program that is closely related to the injury suffered.¹⁷⁶ A heightened pleading requirement that required concrete examples of the deficient training program to be provided in the pleading would effectively shut out those claims at the motion to dismiss stage for a fundamental reason—evidence pertaining to a city's training program would be wholly within the knowledge of the defendant and inaccessible to the plain-

172 See *id.* at 724, 730.

173 See *Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 776 (7th Cir. 1994) (describing the complaint as “confusing, redundant, and seemingly interminable”).

174 See *id.* (addressing the merits of the complaint despite the “‘egregious violation of Rule 8(a)’” (quoting *Hartz v. Friedman*, 919 F.2d 469, 471 (7th Cir. 1990))); see also THOMAS D. ROWE, JR. ET AL., *CIVIL PROCEDURE* 47 (2004) (“Occasionally courts grumble about excessively long complaints and threaten to strike them for failing to comply with the Rule 8(a), but they rarely do so in fact.”).

175 See Elaine M. Korb & Richard A. Bales, *A Permanent Stop Sign: Why Courts Should Yield to the Temptation to Impose Heightened Pleading Standards in § 1983 Cases*, 41 BRANDEIS L.J. 267, 292 (2002).

176 See *City of Canton v. Harris*, 489 U.S. 378, 391 (1989).

tiff without discovery.¹⁷⁷ Civil rights cases may thus fall into the category of cases that many commentators believe will be most affected by *Twombly*—those where the defendant's state of mind is at play or where crucial elements of the claim are completely in the knowledge of the defendant.¹⁷⁸

The quality of the lawyering in civil rights cases could also explain why more searching review of a complaint would have a disproportionate impact on civil rights pleading. Civil rights plaintiffs are overwhelmingly poor.¹⁷⁹ It follows that such a class of impoverished litigants would be unable to afford the same caliber of counsel as more affluent plaintiffs. It is not clear that an attorneys' fee provision or tort-like contingency fee system would alleviate this problem. First, civil rights actions tend to be either for no monetary reward—in the case of injunctive relief—or very small awards.¹⁸⁰ Second, Congress' attorneys' fees act applicable to civil rights actions—the Civil Rights Attorneys' Fees Awards Act of 1976¹⁸¹—awards attorneys' fees only to the “prevailing party.”¹⁸² Prevailing in a civil rights action can be quite difficult; plaintiffs not only must show a violation of their constitutional rights, but they also must overcome any assertion on the part of the defendant of absolute or qualified immunity.¹⁸³ A plaintiff could establish that her rights had been violated, and still not be a “prevailing party” under § 1988; without prevailing party status, she would be ineligible for attorneys' fees.¹⁸⁴ Civil rights actions, therefore, have difficulty attracting capable lawyers due to the inherent

177 See Nancy J. Bladich, Comment, *The Revitalization of Notice Pleading in Civil Rights Cases*, 45 MERCER L. REV. 839, 843–44 (1994).

178 See, e.g., Davis, *supra* note 101, at 17.

179 See Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory That Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289, 1304 n.60 (2005) (“Congress and commentators [recognize] that civil rights plaintiffs are disproportionately poor.”); Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171, 174 (1994) (describing civil rights litigants as “resource-poor”).

180 JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS 387 (2d ed. 2007).

181 42 U.S.C. § 1988 (2000).

182 *Id.* § 1988(b).

183 See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that, in order to hold an executive officer defendant liable, the plaintiff must show not only the presence of a constitutional or statutory rights violation, but also that the right was not “clearly established” at the time of the incident).

184 See, e.g., *Hill v. McKinley*, 311 F.3d 899, 905 (8th Cir. 2002) (“Because we hold that defendants are entitled to qualified immunity on the federal claim, Hill is not a prevailing party . . . and thus the section 1988 award of attorney's fees necessarily fails.”).

risks involved in receiving compensation. A dearth of qualified counsel could easily be affecting the quality of the pleadings being filed.

This hypothesis suggests that it is possible that *Twombly* has imposed a heightened pleading standard, but one that is hidden by the widespread pleading practices of lawyers. Given the inherent pleading difficulties that face a civil rights plaintiff, however, civil rights complaints are vulnerable to any increased burdens at the pleading stage. If this hypothesis is correct, it is likely that as there are more cases citing *Twombly*, a similar effect will be observed in other substantive areas of law that have traditionally posed unique problems for plaintiffs' attorneys.

B. *Hypothesis Two: Institutional Inertia*

Whereas hypothesis one accepts, *arguendo*, the claim that *Twombly* imposes a heightened pleading standard, this hypothesis accepts at face value the results of the study: district courts have refused to read in *Twombly* a heightened pleading standard for the vast majority of causes of action but have raised the pleading bar for civil rights cases. The critical starting point to this hypothesis is the claim that *Twombly* gives greater discretion to district court judges ruling on motions to dismiss.¹⁸⁵ Even a test that employs bright-line distinctions gives a judge discretion—the judge's reading of the factual situation will inform her decision as to which side of the bright line the case falls. The "no set of facts" test that prevailed under *Conley* was highly restrictive of a judge's discretion. A judge could only dismiss a complaint under that standard if it appeared "beyond doubt" that the plaintiff could prove "no set of facts that would entitle him to relief."¹⁸⁶ Taking the language literally, this would only allow for dismissal if the plaintiff pled himself out of court (pled facts that facially contradicted his legal theory) or failed even to give fair notice. The *Twombly* plausibility standard, however, invites judicial discretion. There is no scientific definition of "plausibility"; what one judge finds plausible another might find fanciful.

The question thus becomes how a judge would apply a Supreme Court standard that, at best, created "some uncertainty" as to the extent to which it broke with the previous standard.¹⁸⁷ A judge facing that level of uncertainty could be expected (perhaps based on the fear

185 See Davis, *supra* note 101, at 18.

186 See *supra* notes 34–36 and accompanying text.

187 See *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007).

of being reversed)¹⁸⁸ to err on the side of applying the standard in a familiar way—in other words, to apply the new standard in a way that closely resembles the previous standard. The Court in *Twombly* retired the “no set of facts” standard after finding that it had “puzzl[ed] the profession for 50 years.”¹⁸⁹ While the *Conley* standard may have puzzled first-year law students for fifty years, the judges who have been applying the standard have seemingly mastered it—applying it so often, in fact, that it has become the fourth most cited case in the federal judiciary.¹⁹⁰ It is not a stretch to believe that a judge, facing a decision that, while unarguably jettisoning the *language* of the previous standard, was unclear as to the proper *substance* of the standard, would require a more unequivocal statement from the Supreme Court before she altered her longstanding practices.

This serves to explain why the *Twombly* decision has not had a wide-ranging effect. It does not explain, and even may contradict, the apparent effect in the civil rights cases. However, the federal judiciary’s treatment of civil rights cases has always been unique. Despite specific Supreme Court holdings that disclaimed any heightened pleading standard for civil rights cases, numerous circuits applied, and continue to apply, a heightened standard to cases brought under various civil rights statutes.¹⁹¹ The Second Circuit, in a recent case applying *Twombly*, articulated a major policy consideration that has motivated some courts to apply a heightened pleading standard to these complaints. Government officials, the majority of civil rights defendants, are afforded a qualified immunity from suit that is intended to allow them to “carry out their public roles effectively without fear of undue harassment by litigation.”¹⁹² A liberal pleading standard that could allow government officials to be haled into court on a “thin” complaint would defeat the important policy concerns behind qualified immunity. Thus, it may be that district court judges, having recently obtained a mandate from the Supreme Court to exercise discretion more liberally than in the past, are exercising that discretion in a focused manner to effect an important policy consideration.

188 See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 77–78 (1994) (finding that judges dislike being reversed because of: (1) the fear that their colleagues and scholars will disrespect their legal abilities; (2) the fear that a high reversal rate will impede professional recognition or advancement; and (3) the perception that high reversal rates will undercut their judicial power).

189 *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007).

190 See Steinman, *supra* note 18, at 143.

191 See *supra* notes 55–60 and accompanying text.

192 *Iqbal*, 490 F.3d at 158.

C. *Hypothesis Three: Twombly as Post-Hoc Approval*

The final hypothesis draws an analogy with another major set of precedents from the Supreme Court in the civil procedure realm. In 1986, the Supreme Court issued three opinions that have become known as the *Celotex* Trilogy.¹⁹³ In these three cases the Supreme Court appeared “intent on overcoming any hesitancy in the use of summary judgment.”¹⁹⁴ These three cases have been “widely viewed as a turning point in the use of summary judgment.”¹⁹⁵ Joe Cecil, Rebecca Dye, Dean Miletich, and Professor Rindskopf, however, in their study of summary judgment practice in six district courts over twenty-five years (1975–2000) found that the filing of summary judgment motions increased in the years *before* the Trilogy and changed very little following the decisions.¹⁹⁶ This study suggests, therefore, that whatever changes were occurring in the judicial approach to summary judgment motions were the result of other factors and not of a sudden pronouncement by the Supreme Court.¹⁹⁷

It is certainly plausible that an effect similar to that which prevailed before and immediately following the *Celotex* Trilogy is repeating itself twenty-one years later with 12(b)(6) motions. Certainly, district court and appeals court judges have grappled with applying heightened pleading standards for a variety of policy rationales in a number of circumstances, as the case histories of *Leatherman* and *Swierkiewicz* demonstrate.¹⁹⁸ Specifically, the policy concerns found persuasive by the Supreme Court in *Twombly* (namely the risk of expensive and abusive discovery when there is little hope of finding factual support)¹⁹⁹ have always been a concern of the federal judiciary.²⁰⁰

193 The Trilogy is made up of the cases *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

194 Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 866 (2007).

195 *Id.* at 862.

196 *See id.* at 881.

197 *See id.* at 904. The authors suggest that “the trend beginning in the late 1970s of greater judicial involvement in civil case management, and the growing focus on motion practice” may explain the changes they observed. *Id.*

198 *See supra* notes 54–68 and accompanying text.

199 *See supra* notes 83–86 and accompanying text.

200 *See, e.g.*, FED. R. CIV. P. 26(c) (providing for protective orders to prevent “annoyance, embarrassment, oppression, or undue burden”); *see also* FRIEDENTHAL ET AL., *supra* note 13, § 7.15, at 443–45 (detailing steps taken over the years to discourage discovery abuse).

It is possible, in light of the above, that the district courts, faced with growing dockets and ever more complex cases, have gradually succumbed to policy considerations of efficiency and speed. If this has happened, it is likely that the *Conley* standard the district courts have been applying to test the sufficiency of pleadings in the years immediately prior to *Twombly* differ from the *Conley* standard applied by the courts in its first decades. A larger, longitudinal study would be required to test the viability of this hypothesis. If this is, in fact, what has been occurring, *Twombly* is not a Supreme Court statement of a changed standard, but rather the Supreme Court feeling the pressure from lower courts and finally giving its approval to an ongoing practice.

CONCLUSION

So is *Twombly* worthy of the debate and discussion it has engendered? On one hand, it is possible to answer this question negatively by citing the relatively focused effect of the decision. To write off the *Twombly* decision, however, as little more than a linguistic reformulation of the previous standard would be shortsighted. This decision is, in terms of Supreme Court precedent, a newborn. The understanding and application of the sufficiency standard articulated by *Conley* were the result of fifty years of academic and judicial development. The language of *Twombly*, hinging on amorphous principles such as “plausibility,” provides great leeway to judicial interpretation. There is no predicting how the next generation of judges, who will have “puzzled” over this language instead of the *Conley* language, will read “plausibility.”

In 1947, Judge Learned Hand handed down the decision in *United States v. Carroll Towing Co.*²⁰¹ in which he articulated a standard for determining negligence that factored in the probability of injury, the gravity of the injury should it occur, and the burden on the defendant of acting with due care.²⁰² This decision did not garner a lot of attention at the time. However, eighteen years later, the second *Restatement of Torts* adopted this standard,²⁰³ and it is now a bedrock of tort law in the United States.²⁰⁴ That a Supreme Court precedent has not had a far-reaching immediate impact on the lower courts does not mean that it will not eventually. If left without further instruction

201 159 F.2d 169 (2d Cir. 1947).

202 See *id.* at 173.

203 See RESTATEMENT (SECOND) OF TORTS § 291 (1965).

204 See Patrick J. Kelley, *The Carroll Towing Company Case and the Teaching of Tort Law*, 45 ST. LOUIS U. L.J. 731, 732–33 (2001).

from the Court, lower courts may eventually exercise the discretion inherent in the *Twombly* plausibility language to trade away the liberal ethos motivating the Federal Rules to further efficiency concerns. If, as Judge Clark stated in the epigraph to this Note, every generation struggles with the temptation to impose a heightened pleading standard, what *Twombly* may do is provide the next generation with a mandate to succumb to that temptation.

In a more immediate sense, the results of this study demonstrate that there is reason to be wary of the *Twombly* decision *right now*. Congress since the Civil War has not only articulated broad swaths of civil rights that are protected from intrusion, it has also sought, through instrumentalities like 42 U.S.C. § 1988, to encourage the enforcement of these rights. Without access to courts, these broad civil protections are not worth the paper they are printed on. If the lower courts are, as this study suggests, applying the *Twombly* language in such a way as to impose a higher burden on civil rights plaintiffs, the practical effect of this reality is to close the courts to a large number of plaintiffs. Ultimately, therefore, this study suggests that this procedural, linguistic alteration is having the same effect, though comparatively under the radar, as a legislative rolling back of civil rights.

This Note is a first step in an empirical evaluation of *Twombly*'s effects. It is also a call for expansive, continued study of the decision as time progresses. Regardless of judicial disagreement on how to word the standard, it is beyond debate that the major goal of the Federal Rules' approach to pleading was to prevent pleading technicalities from preventing the enforcement of the substantive law. It cannot be forgotten that substance and procedure are inexorably intertwined.