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# PLAUSIBILITY PLEADING

A. BENJAMIN SPENCER\*

**Abstract:** Last Term, in *Bell Atlantic Corp. v. Twombly*, the U.S. Supreme Court dramatically reinterpreted Federal Rule of Civil Procedure 8(a)(2), which requires a “short and plain” statement of a plaintiff’s claim. The Court was unabashed about this change of course: it explicitly abrogated a core element of its 1957 decision in *Conley v. Gibson*, which until recently was the bedrock case undergirding the idea that ours is a system of notice pleading in which detailed facts need not be pleaded. Departing from this principle, the Court in *Twombly* required the pleading of facts that demonstrate the plausibility of the plaintiff’s claim. This Article explicates and offers a critique of the Court’s new jurisprudence of plausibility pleading. The Court’s new understanding of civil pleading obligations does not merely represent an insufficiently justified break with precedent and with the intent of the drafters of Rule 8. It is motivated by policy concerns more properly vindicated through the rule amendment process, it places an undue burden on plaintiffs, and it will permit courts to throw out claims before they can determine their merit. Ultimately, the imposition of plausibility pleading further contributes to the civil system’s long slide away from its original liberal ethos towards an ethos of restrictiveness more concerned with efficiency and judicial administration than with access to justice.

*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 . . . .*

—Charles E. Clark<sup>1</sup>

## INTRODUCTION

Notice pleading is dead.<sup>2</sup> Say hello to plausibility pleading. In a startling move by the U.S. Supreme Court, the seventy-year-old liberal

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<sup>1</sup> Charles E. Clark, *Special Pleading in the “Big Case,”* 21 F.R.D. 45, 46 (1957).

<sup>2</sup> A similar pronouncement has been made by another commentator. See Scott Dodson, *Pleading Standards After Bell Atlantic v. Twombly*, 93 VA. L. REV. IN BRIEF 121, 124 (2007), [www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf](http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf).

pleading standard of Federal Rule of Civil Procedure 8(a)(2) has been decidedly tightened (if not discarded) in favor of a stricter standard requiring the pleading of facts painting a "plausible" picture of liability. In 2007, in *Bell Atlantic Corp. v. Twombly*<sup>3</sup>—a case involving allegations of wrongdoing under section 1 of the Sherman Antitrust Act—the Supreme Court wrote that "[f]actual allegations must be enough to raise a right to relief above the speculative level," thus moving a claim across "the line between possibility and plausibility."<sup>4</sup> These statements are quite at odds with the Court's position heretofore, represented most clearly in the classic 1957 case of *Conley v. Gibson*,<sup>5</sup> in which the Court intoned, "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim"<sup>6</sup> and "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."<sup>7</sup> Nevertheless, the *Twombly* Court determined that *Conley's* admonition had outlived its usefulness and thus dismissed its "no set of facts" language from the realm of citable precedent by stating, "[A]fter puzzling the profession for 50 years, this famous observation has earned its retirement."<sup>8</sup>

Although the Court's move in this direction is consistent with long-held sentiment among the lower federal courts,<sup>9</sup> the *Twombly* decision represents a break from the Court's previous embrace of notice pleading. Several questions emerge in the wake of such a remarkable departure from established doctrine. What is plausibility pleading and how is it distinguished from its more liberal predecessor? Is the Court's interpretation of Rule 8 accurate (or at least defensible) or has the Court effectively rewritten the rule? Was the Court right to reinterpret Rule 8 as it did given the language and history of the Federal Rules? Do sound policy reasons support the imposition of plausibility pleading? Should

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<sup>3</sup> 127 S. Ct. 1955 (2007).

<sup>4</sup> *Id.* at 1965, 1966.

<sup>5</sup> 355 U.S. 41 (1957), *abrogated by Twombly*, 127 S. Ct. 1955.

<sup>6</sup> *Id.* at 47.

<sup>7</sup> *Id.* at 45–46; *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) ("Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984))).

<sup>8</sup> *Twombly*, 127 S. Ct. at 1969.

<sup>9</sup> Christopher Fairman has done an excellent job collecting cases from across the years that favored heightened pleading outside of the circumstances covered by Rule 9(b). *See Christopher M. Fairman, The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1011–59 (2003) (discussing the heightened pleading standards imposed among the circuits for various types of claims, including antitrust, civil rights, RICO, conspiracy, and defamation claims).

the Court have relied on the formal rules amendment process rather than judicial interpretation to effect this change in federal civil pleading standards?<sup>10</sup> What are the likely implications of plausibility pleading for plaintiffs? These questions and others are explored below.

This Article offers a thorough examination of the Court's new plausibility pleading standard and concludes that it is an unwarranted interpretation of Rule 8 that will frustrate the efforts of plaintiffs with valid claims to get into court. Indeed, the Court's new standard is a direct challenge to the liberal ethos of the Federal Rules more generally. In the wake of the tightening of summary judgment standards<sup>11</sup> and a narrowing of the scope of discovery,<sup>12</sup> as well as the advent of strong judicial case management,<sup>13</sup> the *Twombly* decision has dealt what may be a death blow to the liberal, open-access model of the federal courts espoused by the early twentieth century law reformers.<sup>14</sup> A judicial administration model, or what one may term a "restrictive" or "efficiency-oriented" ethos, now seems firmly established in its place.

Part I of this Article provides a brief sketch of the state of pleading doctrine pre-*Twombly*.<sup>15</sup> Part II analyzes the *Twombly* opinion, breaking out the essential aspects of plausibility pleading and scrutinizing the Court's rationale for tightening pleading standards.<sup>16</sup> Part II also explores the question of whether the Court has truly abandoned notice pleading and whether *Twombly's* impact might be confined to antitrust cases.<sup>17</sup> Part III presents a critique of plausibility pleading, both from an interpretive perspective and from a policy perspective.<sup>18</sup> Part IV concludes with a vision of what pleading doctrine under the Federal Rules

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<sup>10</sup> See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (stating that different pleading standards "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation").

<sup>11</sup> See generally *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>12</sup> In 2000, Rule 26 was amended to limit the scope of discovery to any matter relevant to the "claim or defense of any party" rather than the "subject matter" involved in the action. See FED. R. CIV. P. 26(b)(1) advisory committee's note to the 2000 amendments.

<sup>13</sup> Rule 16 was amended in 1983 to permit courts to formulate and simplify the issues in a case and eliminate frivolous claims or defenses. See FED. R. CIV. P. 16(c)(1) advisory committee's note to the 1983 amendments.

<sup>14</sup> For a very useful account of the efforts of the early twentieth century civil procedure reformers, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 943-75 (1987).

<sup>15</sup> See *infra* notes 20-53 and accompanying text.

<sup>16</sup> See *infra* notes 54-131 and accompanying text.

<sup>17</sup> See *infra* notes 132-156 and accompanying text.

<sup>18</sup> See *infra* notes 157-300 and accompanying text.

should look like, presenting a standard referred to as *functional pleading*, under which a complaint is judged at the pleading stage solely by its successful fulfillment of specific instigation, framing, and limited filtering functions.<sup>19</sup>

### I. PLEADING PRE-TWOMBLY: NOTICE PLEADING

Since the enactment of the Federal Rules of Civil Procedure in 1938, notice pleading has been the watchword for the system of pleading in federal civil courts. Supplanting the cumbersome and inelegant code pleading system<sup>20</sup> that required the pleading of "ultimate facts" rather than mere "evidentiary facts" or "conclusions,"<sup>21</sup> the Federal Rules ushered in a simplified pleading system in which all that was needed was "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>22</sup> This simplified approach to pleading was part of a liberal ethos pervading the rules more generally, an ethos in which, as Professor Richard L. Marcus has succinctly described, "the preferred disposition is on the merits, by jury trial, after full disclosure through discovery."<sup>23</sup>

Under the new rules, pleadings were no longer to be a substantial hurdle to be overcome before plaintiffs could gain access to the courts. Rather, the complaint simply would initiate the action and notify the parties and the court of its nature<sup>24</sup> while subsequent stages of the litigation process would enable the litigants to narrow the issues and test the validity and strength of asserted claims. As Charles E.

<sup>19</sup> See *infra* notes 301-315 and accompanying text.

<sup>20</sup> The code pleading system itself supplanted the common law pleading system, which Charles E. Clark once described as, in part, "a system of specialized allegation which has always been viewed as the glory of the technician and the shame of the lover of justice." Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458 (1943).

<sup>21</sup> 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1216 (3d ed. 2004).

<sup>22</sup> FED. R. CIV. P. 8(a)(2).

<sup>23</sup> Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986).

<sup>24</sup> Charles Clark explained the proper understanding of notice pleading as follows:

It cannot be defined so literally as to mean all the details of the parties' claims, or else the rule is no advance. The notice in mind is rather that of the general nature of the case and the circumstances or events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or transaction to be litigated—but not of details which he should ascertain for himself in preparing his defense—and to tell the court of the broad outlines of the case.

Clark, *supra* note 20, at 460-61.

Clark—a key architect of the Federal Rules and reporter of the committee that drafted the rules—put it when writing in defense of the new rules:

[T]hrough the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate function. . . . There is certainly no longer reason to force the pleadings to take the place of proof, and to require other ideas than simple concise statements, free from the requirement of technical detail.<sup>25</sup>

Although there was early resistance among bench and bar to the simplified pleading system of the Federal Rules,<sup>26</sup> the U.S. Supreme Court gave a clear endorsement of the system in 1957, in *Conley v. Gibson*.<sup>27</sup> *Conley* laid the foundation for pleading doctrine, affirming that the new regime imposed by the Federal Rules left only the notice-giving function intact.<sup>28</sup> Although such notice had to include both the nature of the claim and the grounds upon which it rests, the Court definitively stated that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”<sup>29</sup> Further, the Court indicated that complaints should not be dismissed unless it is “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>30</sup> The immediate effect of *Conley* was to put an end to the murmurs of

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<sup>25</sup> Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

<sup>26</sup> For example, the Ninth Circuit Judicial Conference adopted a resolution proposing that Rule 8(a)(2) be amended to read, “(2) a short and plain statement of the claim showing that the pleader is entitled to relief, which statement shall contain the facts constituting a cause of action.” *Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253, 253 (1953). Richard Marcus does a good job of describing some of this resistance. See Marcus, *supra* note 23, at 445; see also WRIGHT & MILLER, *supra* note 21, § 1216 (describing resistance to the rule).

<sup>27</sup> 355 U.S. 41 (1957), *abrogated by* Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007).

<sup>28</sup> *Id.* at 47. In fact, it was the *Conley* Court that coined the term “notice pleading.” *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 45–46. In support of this proposition, the Court cited *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), the famous decision authored by Charles E. Clark, father of the Federal Rules, when he was a judge serving on the Second Circuit. *Conley*, 355 U.S. at 46 n.5.

opposition to the new pleading standard of the Federal Rules and to clarify that yes, the new liberal rules mean what they say.<sup>31</sup>

Over the next fifty years, the Supreme Court never wavered from these principles. Although the Court made some statements that could be read as challenges to the pure notice pleading standard announced in *Conley*,<sup>32</sup> there can be no doubt that the Court's binding precedents speaking directly to the issue remained committed to the doctrine in its original form.<sup>33</sup> Two cases reflected the Court's continued and unanimous commitment to the liberal notice pleading ideal initially laid down in *Conley*. First, in 1993, in *Leatherman v. Tarrant County Narcotics*

<sup>31</sup> See Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1750 (1998) ("[T]his decision [*Conley*] was apparently intended to put the matter of deciding cases on the pleadings to rest, and proposals to tighten the pleading rules ceased.").

<sup>32</sup> *Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("The petitioners . . . allege no actual facts in support of their assertion that they have been deprived of a minimally adequate education."); *Hoover v. Ronwin*, 466 U.S. 558, 565 n.13 (1984) ("The adequacy of these conclusory averments of *intent* is far from certain. The Court of Appeals, however, found the complaint sufficient."); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 149 n.3 (1984) ("Although the Federal Rules of Civil Procedure do not require a claimant to set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" (quoting *Conley*, 355 U.S. at 47)); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) ("Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.").

Christopher Fairman offers a brief mention of this point as well. See Fairman, *supra* note 9, at 997 ("The Court's rigid defense of notice pleading and Rule 8 is not always so clear. There is certainly dicta, as well as separate opinions, showing support for greater fact-based pleading." (citations omitted)).

One could also cite the 1998 Supreme Court case *Crawford-El v. Britton* as a nod in favor of requiring more detailed fact pleading. 523 U.S. 574, 597-98 (1998). In that case, however, requiring the plaintiff to provide more detail was merely an accommodation allowed for the protection of qualified immunity claims:

When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. . . . Thus, the court may insist that the plaintiff "put forward specific, nonconclusory factual allegations" that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.

*Id.* (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)).

<sup>33</sup> *Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.").

*Intelligence & Coordination Unit*, handed down over thirty years after *Conley*, the Supreme Court provided a brief but unambiguous reaffirmation of the *Conley* decision.<sup>34</sup> It was critical to do so at the time because the lower federal courts had increasingly embraced heightened pleading standards for certain types of claims without shame.<sup>35</sup> It was thus in response to the U.S. Court of Appeals for the Fifth Circuit's heightened pleading standard for municipal liability cases<sup>36</sup> that the Supreme Court in *Leatherman* wrote, "We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules."<sup>37</sup> After quoting *Conley's* admonition that the Federal Rules "do not require a claimant to set out in detail the facts upon which he bases his claim,"<sup>38</sup> the *Leatherman* Court added that the fact that Rule 9(b) imposes heightened pleading in two specific instances means that all other matters are subject only to the ordinary, liberal standard of Rule 8.<sup>39</sup> For good measure, the Court admonished the lower courts that they were not empowered to impose pleading standards that varied from those required by the Federal Rules. Rather, different pleading standards "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."<sup>40</sup> Until such time, said the Court, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."<sup>41</sup>

The Supreme Court's rejection of heightened pleading in *Leatherman*, however, was apparently too tepid to be taken by lower courts as a broad admonition against applying heightened pleading under any circumstances not covered by Rule 9(b) because lower courts contin-

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<sup>34</sup> *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

<sup>35</sup> See Fairman, *supra* note 9, at 1011-59.

<sup>36</sup> This heightened pleading standard was adopted by the Fifth Circuit in 1985, in *Elliot v. Perez*, and described in that case as follows:

In cases against governmental officials involving the likely defense of immunity we require of trial judges that they demand that the plaintiff's complaint state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity.

751 F.2d 1472, 1473 (5th Cir. 1985).

<sup>37</sup> *Leatherman*, 507 U.S. at 168.

<sup>38</sup> *Id.* (quoting *Conley*, 355 U.S. at 47).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 168-69.



ued to impose heightened pleading in many cases.<sup>42</sup> Thus, in 2002, in *Swierkiewicz v. Sorema N.A.*, the second case to revisit heightened pleading, the Supreme Court reached the same conclusion: imposing heightened pleading is impermissible beyond the two circumstances identified in Rule 9(b).<sup>43</sup> Specifically, the Court wrote, "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts."<sup>44</sup> The Court went further, however. Without hesitation, it reasserted the *Conley* rule that dismissal is only appropriate in the most extreme case: "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."<sup>45</sup> Under such a standard, whether the possibility of recovery is likely or remote was rendered irrelevant;<sup>46</sup> what mattered was whether the statement of the claim gave the defendant "fair notice" of the claim and its basis.<sup>47</sup>

Synthesizing the cases, the key aspects of pleading doctrine pre-*Twombly* were fourfold. First, the statement of the claim in the complaint served a notice function, informing the defendant of the claim and its basis.<sup>48</sup> Second, and relatedly, factual detail was unnecessary at the pleading stage;<sup>49</sup> subsequent phases of the litigation would elicit such details and frame the issues in the case.<sup>50</sup> Third, only certainty of

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<sup>42</sup> Christopher Fairman also discusses and cites to this group of cases. See Fairman, *supra* note 9, at 1011-59.

<sup>43</sup> 534 U.S. 506, 508 (2002).

<sup>44</sup> *Id.* at 513 (citations omitted).

<sup>45</sup> *Id.* at 514 (quoting *Hishon v. King & Spakling*, 467 U.S. 69, 73 (1984)).

<sup>46</sup> *Id.* at 515 ("Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." (citation and internal quotation marks omitted)).

<sup>47</sup> *Id.* at 512 ("Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" (quoting *Conley*, 355 U.S. at 47)).

<sup>48</sup> See, e.g., *Mayle v. Felix*, 545 U.S. 644, 655 (2005) ("Under Rule 8(a), applicable to ordinary civil proceedings, a complaint need only provide 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" (quoting *Conley*, 355 U.S. at 47)).

<sup>49</sup> *Conley*, 355 U.S. at 47 ("[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."); see also *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 568 n.15 (1987) ("Under the Federal Rules of Civil Procedure, respondent had no duty to set out all of the relevant facts in his complaint.").

<sup>50</sup> *Conley*, 355 U.S. at 47-48 ("[S]implified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the

the absence of a claim warranted dismissal; when one could say that it remained possible for the plaintiff to adduce facts that could prove liability, dismissal was inappropriate.<sup>51</sup> Finally, the pleadings were not the proper vehicle for screening out unmeritorious claims. Rather, other pretrial procedures—namely broad discovery<sup>52</sup> and summary judgment—were the proper vehicles for ferreting out claims lacking merit.<sup>53</sup> As expounded in the next Part, each of these pillars of notice pleading were called into doubt by *Twombly*.

## II. PLEADING IN THE WAKE OF *TWOMBLY*: PLAUSIBILITY PLEADING

In 2007, the U.S. Supreme Court decided *Bell Atlantic Corp. v. Twombly* in the context of an action asserting liability under section 1 of the Sherman Act.<sup>54</sup> The plaintiffs, William Twombly and Lawrence Marcus, filed a complaint on behalf of a putative class consisting of “subscribers of local telephone and/or high speed internet services . . . from February 8, 1996 to present.”<sup>55</sup> The defendants in the case were a group of regional telephone service monopolies created in the wake of the AT&T divestiture (referred to as incumbent local exchange carriers (“ILECs”)) who, under the Telecommunications Act of 1996, were subjected to a host of duties designed to facilitate the entry of competitors (referred to in the case as competitive local exchange carriers (“CLECs”)) into the local market.<sup>56</sup>

The defendants were accused of conspiring to stifle CLEC competition thereby restraining trade in violation of the Sherman Act in two ways. First, the plaintiffs alleged that the ILECs “engaged in parallel

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Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”).

<sup>51</sup> *Id.* at 45–46 (“[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.”); see also *Hishon*, 467 U.S. at 73 (“A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”).

<sup>52</sup> *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.”), *superseded in part by* FED. R. CIV. P. 26(b)(3).

<sup>53</sup> *Swierkiewicz*, 534 U.S. at 514 (stating that “claims lacking merit may be dealt with through summary judgment under Rule 56”); *Leatherman*, 507 U.S. at 168–69 (stating that “federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later”).

<sup>54</sup> 127 S. Ct. 1955, 1962 (2007).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1961.

conduct in their respective service areas to inhibit the growth of upstart CLECs.<sup>57</sup> The defendants' conduct "allegedly included making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers."<sup>58</sup> Second, the plaintiffs charged that ILECs restrained trade by agreeing not to compete with one another.<sup>59</sup> These agreements were to be inferred from the ILECs' common failure to meaningfully pursue attractive business opportunities in certain markets and from a statement of the chief executive officer of the ILEC Qwest that competing in the territory of another ILEC "might be a good way to turn a quick dollar but that doesn't make it right."<sup>60</sup> The plaintiffs summed up their claim as follows:

Plaintiffs allege that Defendants entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another.<sup>61</sup>

The U.S. District Court for the Southern District of New York dismissed the complaint because it read it to allege mere conscious parallelism, which taken alone did not state a claim under section 1 of the Sherman Act. As the district court explained, "Plaintiffs have . . . not alleged facts that suggest[] that refraining from competing in other territories as CLECs was contrary to defendants' apparent economic interests, and consequently have not raised an inference that their actions were the result of a conspiracy."<sup>62</sup> The U.S. Court of Appeals for the Second Circuit reversed, however, because it concluded that the district court applied the wrong standard. Applying the Supreme Court's "no set of facts" language from the 1957 case of *Conley v. Gibson*, the Second Circuit held that for dismissal to be appropriate, "a court

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Twombly*, 127 S. Ct. at 1961.

<sup>60</sup> *Id.* (quoting Consolidated Amended Class Action Complaint ¶ 42, *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 Civ. 10220)).

<sup>61</sup> Consolidated Amended Class Action Complaint ¶ 4, *Twombly*, 313 F. Supp. 2d 174 (No. 02 Civ. 10220).

<sup>62</sup> *Twombly*, 313 F. Supp. 2d at 188, *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007).

would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."<sup>63</sup>

The Supreme Court reversed the Second Circuit by holding that "stating [a section 1] claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made."<sup>64</sup> The sections that follow describe how the Court reached this conclusion and the contours of the pleading doctrine that the Court articulated in the process.

### A. *Plausibility Pleading: Pleading "Suggestive" Facts*

The most striking aspect of the Supreme Court's opinion in *Twombly* is its insistence that a complaint must allege facts that render the liability asserted "plausible."<sup>65</sup> The Court got to this point by starting with *Conley's* statement that Rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"<sup>66</sup> The Court took the key word in this excerpt to be "grounds." Thus, although "detailed factual allegations" are not necessary, the Court stated that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."<sup>67</sup> The Court elaborated by referring to Rule 8(a)(2), which requires a "showing" rather than a mere assertion of entitlement to relief.<sup>68</sup> For the Court, providing "grounds" "showing . . . entitlement to relief" meant that factual allegations were essential in a complaint: "Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests."<sup>69</sup>

Although the Court is correct that some facts will by necessity appear in a complaint, the Court's attempt to assign centrality to factual

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<sup>63</sup> *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007).

<sup>64</sup> *Twombly*, 127 S. Ct. at 1965.

<sup>65</sup> *Id.* at 1974.

<sup>66</sup> *Id.* at 1964 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *abrogated by Twombly*, 127 S. Ct. 1955).

<sup>67</sup> *Id.* at 1964–65.

<sup>68</sup> *Id.* at 1965 n.3.

<sup>69</sup> *Twombly*, 127 S. Ct. at 1965 n.3.

allegations in the complaint is a new and dubious step. Requiring factual allegations that make a "showing . . . of entitlement to relief" runs counter to the understanding of the original drafters of the rules<sup>70</sup> that in order to state a claim of liability, conclusory legal allegations coupled with skeletal, contextual facts would suffice and detailed fact pleading would no longer be required.<sup>71</sup> Although it is true that something more than "labels and conclusions" is required—complaints reading simply "defendant committed a tort" or "defendants violated the Sherman Act," for example, would be completely inadequate—the Official Forms in the Appendix to the Federal Rules do endorse the use of conclusory legal allegations to a certain extent.<sup>72</sup> Former Form 9, now Form 11, itself identifies the date and location of the alleged collision but relies on the conclusory term "negligently" to assert liability.<sup>73</sup> Thus, the type of skeletal facts contemplated by the Official Forms needed only to convey a general sense of the transaction, occurrence, act or omission, and so forth, that was being alleged as the basis for the claim so that responding parties and the court would have an understanding of what the plaintiff was talking about.<sup>74</sup>

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<sup>70</sup> In this Article, the term "drafters" refers to the members of the Committee that drafted the original Federal Rules of Civil Procedure. This Committee included former Attorney General William Mitchell as Chair and Charles Clark, the Dean of Yale Law School, as Reporter. For a full listing of the Committee's membership, see Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 534–35 & n.30 (2001).

<sup>71</sup> See WRIGHT & MILLER, *supra* note 21, § 1216. Writing on the significance of "claim for relief," Charles Alan Wright and Arthur R. Miller wrote:

Conspicuously absent from Federal Rule 8(a)(2) is the requirement found in the codes that the pleader set forth the "facts" constituting a "cause of action." The substitution of "claim showing that the pleader is entitled to relief" for the code formulation of the "facts" constituting a "cause of action" was intended to avoid the distinctions drawn under the codes among "evidentiary facts," "ultimate facts," and "conclusions" and eliminate the unfortunate rigidity and confusion surrounding the words "cause of action" that had developed under the codes.

*Id.* (citations omitted).

<sup>72</sup> See, e.g., FED. R. CIV. P. Form 11 (alleging that "defendant negligently drove a motor vehicle against . . . plaintiff"); FED. R. CIV. P. Form 9, 28 U.S.C. app. (2000) (amended 2007) (same); see also Clark, *supra* note 20, at 460 (speaking of "the mandate of simplicity and directness . . . which are made real and compelling by illustrative forms showing what this simplicity means in actual experience").

<sup>73</sup> FED. R. CIV. P. Form 11; FED. R. CIV. P. Form 9, 28 U.S.C. app. (2000) (amended 2007).

<sup>74</sup> Clark, *supra* note 20, at 460–61 ("The notice in mind is rather that of the general nature of the case and the circumstances or events upon which it is based, so as to differenti-

What was permitted to turn these skeletal factual allegations into a stated claim were conclusory labels—such as “negligently”—that asserted wrongdoing and liability on the part of the defendant. Such terms did not have to be unpacked element by element<sup>75</sup> as Form 9 reveals.<sup>76</sup> The hypothetical pleader in Form 9 is not required to explain the underlying “misdeeds—speed signals, position on the highway, failure to look, and so on”<sup>77</sup> that the defendant committed in driving “negligently.” Indeed, the defendant’s specific misdeeds may be reflected in facts that the plaintiff *ex ante* cannot know.<sup>78</sup> In short,

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ate it from other acts or events, to inform the opponent of the affair or transaction to be litigated . . . and to tell the court of the broad outlines of the case.”).

<sup>75</sup> The old case of *Garcia v. Hilton Hotels Int'l, Inc.* provides an example:

In the instant case, it is true that Paragraph 4, of the complaint, fails to state, in so many words, that there was a publication of the alleged slanderous utterance and, to that extent, the cause of action is defectively stated. However, it does not follow that the allegations do not state a claim upon which relief can be granted. It is alleged that plaintiff was “violently discharged” and was “falsely and slanderously accused” of procuring for prostitution. While in a technical sense, this language states a conclusion, it is clear that plaintiff used it intending to charge publication of the slanderous utterance and it would be unrealistic for defendant to claim that it does not so understand the allegations . . . Clearly, under such allegations it reasonably may be conceived that plaintiff, upon trial, could adduce evidence tending to prove a publication. If the provisions of rule 8(a) are not to be negated by recourse to rule 12(b), the statement in Paragraph 4 of the complaint must be deemed sufficient.

97 F. Supp. 5, 8 (D.P.R. 1951) (citations omitted).

<sup>76</sup> After the restyling of the Federal Rules, Form 9 has been slightly redrafted and appears as Form 11. The revised form reads, in relevant part, “On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.” FED. R. CIV. P. Form 11.

<sup>77</sup> Clark, *supra* note 20, at 462. In explaining the sufficiency of pleading only skeletal facts coupled with the conclusory term “negligently” in Form 9, Clark wrote as follows:

That this affords adequate basis for *res judicata* is clear; plaintiff will not have many accidents of that kind at that time and place. But to a trained mind the kind of case it is, with respect to trial or calendar practice, is quite clear; and there are only certain kinds and numbers of misdeeds—speed, signals, position on the highway, failure to look, and so on—which either party can commit. These each party should prepare himself to face; even if they be unstated, a wise counsel will not face trial without considering their contingency.

*Id.*

<sup>78</sup> Although an injured plaintiff may, prior to discovery, know certain facts—for example, that the defendant was driving on the wrong side of the road—there are others that the plaintiff cannot know—such as the defendant’s speed, whether the defendant was required but failed to wear his spectacles, or whether the vehicle suffered from some malfunction. See Charles E. Clark, *Pleading Under the Federal Rules*, 12 Wyo. L.J. 177, 183 (1958) (“[The level of detail in Form 9] isn’t something a lawyer is going to feel unduly pressed for, as he would as to such details as speed, defective headlights, and the like. He may not know all those details.”).

no factual allegations that would show the "grounds" for an allegation of negligence had to be pleaded; the assertion that the defendant acted "negligently" itself stated the claim. The Court's not-so-subtle effort to shift the need for factual allegations into the heartland area of the elements of legal "labels and conclusions"—for example, facts pertaining to duty and breach in a negligence claim—is something that should be noted.

But the *Twombly* Court did much more than simply endorse the idea that a complaint must contain factual allegations. It held that the factual allegations must paint a plausible picture of liability, a notion that the Court had never suggested in the past. Specifically, the Court wrote: "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."<sup>79</sup> In the antitrust context, this means that the complaint must offer "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement" and "identify[] facts that are suggestive enough to render a § 1 conspiracy plausible."<sup>80</sup> Applied in *Twombly*, this standard meant that the complaint was insufficient:

Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.<sup>81</sup>

What becomes apparent then is that the Court is reading Rule 8(a)(2) not only to require the pleading of facts that state the claim, but the pleading of facts that demonstrate the plausibility of a claim. Such a system of plausibility pleading requires that the complaint set forth facts that are not merely consistent with liability; rather, the facts must demonstrate "plausible entitlement to relief."<sup>82</sup> Elsewhere the Court indicated that plausibility pleading requires that the complaint make a "showing of a 'reasonably founded hope' that a plaintiff would

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<sup>79</sup> *Twombly*, 127 S. Ct. at 1965 (citations omitted).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1966.

<sup>82</sup> *Id.* at 1967.

be able to make a case.”<sup>83</sup> The *Twombly* Court explained this requirement in the section 1 context as follows:

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the “plain statement” possess enough heft to “sho[w] that the pleader is entitled to relief.” A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant’s commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of “entitle[ment] to relief.”<sup>84</sup>

Thus, a plaintiff may no longer survive a motion to dismiss if she pleads facts that are equivocal, meaning the allegations are consistent both with the asserted illegality and with an innocent alternate explanation. The Court made this clear at several points in its opinion. First, the Court wrote, “[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct *that could just as well be independent action*.”<sup>85</sup> Later in the opinion, the Court reiterated this sentiment by asserting that parallel conduct was not suggestive of conspiracy because “sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation.”<sup>86</sup> Thus it seems that under plausibility pleading, a complaint that sets forth facts painting a picture that is equally consistent with liability and nonliability will not suffice.<sup>87</sup>

The problem with this view of Rule 8(a)—the view that a “showing . . . of entitlement to relief” requires the pleading of suggestive facts

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<sup>83</sup> *Id.* at 1969 (citation omitted).

<sup>84</sup> *Twombly*, 127 S. Ct. at 1966 (citation omitted).

<sup>85</sup> *Id.* (emphasis added).

<sup>86</sup> *Id.* at 1972.

<sup>87</sup> *Id.* at 1964 (“[P]arallel conduct or interdependence . . . [is] consistent with conspiracy, but [is] just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”).



rendering liability plausible—is that it significantly raises the pleading bar beyond where *Conley* had placed it long ago.<sup>88</sup> *Conley* spoke of “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.”<sup>89</sup> This statement was rooted in and consistent with the even more established rule concerning the treatment of motions to dismiss for failure to state a claim that obligates courts to assume the truth of the plaintiff’s factual allegations and to draw all inferences in the plaintiff’s favor.<sup>90</sup> The Supreme Court has stated this latter rule thusly:

The plaintiff was not bound to have joined in the demurrer without the defendant’s having distinctly admitted, upon the record, every fact which the evidence introduced on his behalf conduced to prove; and that when the joinder was made, without insisting on this preliminary, the Court is at liberty to draw the same inferences in favour of the plaintiff, which the jury might have drawn from the facts stated. The evidence is taken most strongly against the party demurring to the evidence. This is the settled doctrine in this Court . . . .<sup>91</sup>

A plausibility requirement at the pleading stage that rejects equivocal allegations is inconsistent with this tradition. The Court in *Twombly* expressly stated that allegations that are “merely consistent with” liability leave only a depiction that “stays in neutral territory” and “stops short of the line between possibility and plausibility.”<sup>92</sup> Under the traditional rule, factual allegations that were consistent with liability passed muster because courts were required to draw any permissible inferences in the plaintiff’s favor, permissible here meaning those inferences simply con-

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<sup>88</sup> *Id.* at 1965 n.3.

<sup>89</sup> *Conley*, 355 U.S. at 45–46.

<sup>90</sup> *See, e.g.*, *Cal. Pub. Employees’ Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 143 (3d Cir. 2004) (“A motion to dismiss pursuant to [FED. R. CIV. P. 12(b)(6)] may be granted only if, accepting all well pleaded allegations in the complaint as true, and drawing all reasonable factual inferences in favor of the plaintiff, it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would warrant relief.”).

<sup>91</sup> *Columbian Ins. Co. v. Catlett*, 25 U.S. (12 Wheat.) 383, 389 (1827). Circuit courts have articulated the rule as obligating courts to draw all *reasonable* inferences in favor of the plaintiff. *See, e.g.*, *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 196 (2d Cir. 2005) (“On review of a Rule 12(b)(6) dismissal, we accept the facts alleged in the complaint as true, and draw all reasonable inferences in favor of the plaintiff.”).

<sup>92</sup> *Twombly*, 127 S. Ct. at 1966.

sistent with the stated allegations.<sup>93</sup> Thus, in the *Twombly* case, the courts should have been able—at the pleading stage—to infer from parallel conduct and the lack of competition among the ILECs, coupled with the statement of one of the ILEC presidents regarding the impropriety of such competition, that there was some agreement among the ILECs to restrain trade in violation of the Sherman Act.<sup>94</sup> This is especially so given the Court's own acknowledgement that "a showing of parallel 'business behavior is admissible circumstantial evidence from which the fact finder may infer agreement.'"<sup>95</sup> At a minimum, it could not be said in the face of such allegations that the plaintiff would not be able to prove any set of facts that would establish liability.

The inconsistency of plausibility pleading with the tradition of drawing inferences in favor of the plaintiff on a motion to dismiss and *Conley's* "no set of facts" language obligated the Court to take the dramatic step of abrogating the very statement from *Conley* that stood in its way.<sup>96</sup> The Court rejected the language by citing to the criticism the statement has received from courts and commentators, stating that "*Conley's* 'no set of facts' language has been questioned, criticized, and explained away long enough" and that "this famous observation has earned its retirement."<sup>97</sup> Obviously, this is an insufficiently articulated justification for rejecting a fifty-year-old statement providing the bedrock understanding of the general pleading standard in our system. I critique this aspect of the opinion in detail below.<sup>98</sup> The point to understand here is that the Court's rejection of *Conley's* "no set of facts" standard is a clear indication of the fact that the Court's plausibility pleading is a new, more stringent pleading standard that deprives plaintiffs the benefits of inferences in their favor when the pleaded facts are consistent with alternate explanations that do not involve wrongdoing.<sup>99</sup>

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<sup>93</sup> Any higher standard for "permissive"—for example, one that only permits plausible inferences—would stray from the notice-giving purpose of pleading into the realm permitting more onerous screening at the pleading stage. It is my contention that such scrutiny inappropriately moves forward summary judgment-like screening to the pleading phase. See *infra* notes 288–297 and accompanying text.

<sup>94</sup> See *Twombly*, 127 S. Ct. at 1962.

<sup>95</sup> *Id.* at 1964 (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540–41 (1954)).

<sup>96</sup> See *id.* at 1969.

<sup>97</sup> *Id.*

<sup>98</sup> See *infra* notes 159–195 and accompanying text.

<sup>99</sup> See *Twombly*, 127 S. Ct. at 1966 ("[W]hen allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a

### B. *The Zones of Pleading*

The *Twombly* Court distinguished plausibility pleading from its predecessor by describing three *zones of pleading*.<sup>100</sup> That is, in the Court's pleading schema, there are three different zones into which one's pleading may fall, with the third alone being sufficient. The first zone consists of largely conclusory pleading.<sup>101</sup> The second zone consists of factually neutral pleading.<sup>102</sup> The third zone consists of factually suggestive pleading.<sup>103</sup> Only those complaints that plead facts suggestive of liability satisfy the Rule 8(a) obligation to state a claim that shows entitlement to relief.<sup>104</sup>

The Court first suggested the idea of distinct pleading zones when it spoke of the "line" between possibility and plausibility: "An allegation of parallel conduct . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'"<sup>105</sup> In support of this statement, the Court offered a reference to the U.S. Court of Appeals for the First Circuit's 1999 case, *DM Research, Inc. v. College of American Pathologists*,<sup>106</sup> and then elaborated on the reference as follows: "The border in *DM Research* was the line between the conclusory and the factual. Here it lies between the factually neutral and the factually suggestive. Each must be crossed to enter the realm of plausible liability."<sup>107</sup> It is here then that the existence of three distinct zones of pleading separated by two thresholds becomes clear. There is a threshold between conclusory pleading and factual pleading that supports the possibility of a claim but could also support a scenario not involving liability. The second threshold is between such "factually neutral" pleading and the "factually suggestive," the latter moving the claim from being merely possible to plausible. Figure 1 illustrates these zones.<sup>108</sup>

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preceding agreement, not merely parallel conduct that could just as well be independent action.").

<sup>100</sup> *Id.* n.5.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Twombly*, 127 S. Ct. at 1966.

<sup>105</sup> *Id.*

<sup>106</sup> 170 F.3d 53 (1st Cir. 1999).

<sup>107</sup> *Twombly*, 127 S. Ct. at 1966 n.5.

<sup>108</sup> This illustration merely intends to represent the *Twombly* Court's apparent pleading schema, not to challenge or supplant Christopher Fairman's useful figure of the pleading circle. See Fairman, *supra* note 9, at 998 (showing pleading to be a circular continuum from

Figure 1: The Zones of Pleading

<p><b>Conclusory Zone</b> (insufficient)</p> <p>No facts breaking down legal conclusions alleged.</p>	<p><b>Neutral Zone</b> (insufficient)</p> <p>Factual allegations are pleaded but those facts are consistent both with liability and with innocent alternative explanations.</p>	<p><b>Zone of Plausibility</b> (sufficient)</p> <p>Facts are alleged that paint a plausible picture of liability thereby "showing" that the pleader is "entitled to relief."</p>
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How may a plaintiff seeking to assert liability under the Sherman Act get its pleadings into the zone of plausibility when it is relying on allegations of parallel anticompetitive and noncompetitive conduct? In *Twombly*, the Court indicated that it is possible to make parallel conduct allegations that would state a claim by offering the following cursory explanation:

Commentators have offered several examples of parallel conduct allegations that would state a § 1 claim under this standard. See, e.g., 6 Areeda & Hovenkamp ¶ 1425, at 167–185 (discussing “parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties”); Blechman, Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws, 24 N.Y.L. S. L. Rev. 881, 899 (1979) (describing “conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement”). The parties in this case agree that “complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for

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wholly conclusory pleading to prolix pleading, both of which would be inappropriate under Rule 8). Fairman offers “I want you to answer in tort” as an example of a completely conclusory allegation to which a defendant could not respond. See *id.* at 999. On the undesirability of prolix pleading, see *Frantz v. U.S. Powerlifting Fed’n*, 836 F.2d 1063, 1068 (7th Cir. 1987) (“It is not only unnecessary but also undesirable to plead facts beyond limning the nature of the claim. . . . Bloated, argumentative pleadings are a bane of modern practice.”).

no other discernible reason” would support a plausible inference of conspiracy.<sup>109</sup>

However, it is not clear how outside of these not-so-well-described circumstances a plaintiff relying on parallel conduct can make it past the pleading stage to determine whether there is indeed evidence of an agreement. Thus, it seems that the Court in reality held that the additional evidence that will be required at trial (and at the summary judgment stage) to prove an agreement based on parallel conduct—evidence that must tend to exclude the possibility of independent action<sup>110</sup>—must be alleged at the pleading stage. In effect, then, the Court has moved forward the burden that plaintiffs must carry at later stages in the litigation up front to the pleading stage.

A more general question remains respecting the Court’s articulation of the three zones of pleading. Although these zones may aptly classify the types of pleadings that courts may confront, the real issue is whether the Court was correct in holding that pleadings falling within the first two zones are insufficient under Rule 8(a). As will be taken up below in Part III, the understanding of Rule 8(a)(2) among the drafters of the rule was that the pleadings in each of these zones would suffice under the new liberal pleading regime, a view shared by the *Conley* Court.<sup>111</sup>

### C. Pleading Policy: The Screening of Frivolous Claims

An interesting aspect of the Supreme Court’s reinterpretation of Rule 8(a)(2) in *Twombly* is its explicit and unabashed reliance on policies of efficiency and sound judicial administration to justify its new reading of the rule.<sup>112</sup> The Court explained the “practical significance” of Rule 8(a)(2)’s “entitlement requirement” by referring to one of its previous pleadings decisions, *Dura Pharmaceuticals, Inc. v. Broudo*,<sup>113</sup> a securities fraud case decided in 2005:

[In *Dura Pharmaceuticals*] we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with “a largely groundless claim” be allowed to “take up the time of a number of other people, with the right

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<sup>109</sup> *Twombly*, 127 S. Ct. at 1966 n.4.

<sup>110</sup> *Id.* at 1964.

<sup>111</sup> See *infra* notes 157–300 and accompanying text.

<sup>112</sup> *Twombly*, 127 S. Ct. at 1966–67.

<sup>113</sup> 544 U.S. 336 (2005).

to do so representing an *in terrorem* increment of the settlement value."<sup>114</sup>

In other words, simply offering a complaint that sets forth facts that render liability *possible* must be treated as insufficient given the ability of high-dollar suits to coerce defendants into settlement in the interest of avoiding the expense and uncertainty of discovery.<sup>115</sup> As the Court explained, "proceeding to antitrust discovery can be expensive" and thus "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."<sup>116</sup> After concluding that neither judicial case management nor careful scrutiny at the summary judgment stage can adequately weed out groundless claims, the Court stated that in the antitrust context, "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a § 1 claim."<sup>117</sup>

From the above discussion, it becomes clear that the Court permitted concerns related to efficiency and sound judicial administration to shape its interpretation of Rule 8's pleading standard.<sup>118</sup> The central concern of the Court was the often prohibitive cost of modern large-case discovery; it did not want plaintiffs to be able to threaten defendants with such costs without having to demonstrate that a plausible claim exists at the very front-end of the system, the complaint. As the Court explained, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and

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<sup>114</sup> *Twombly*, 127 S. Ct. at 1966 (quoting *Dura Pharms.*, 544 U.S. at 347).

<sup>115</sup> *See id.* at 1967 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."). Christopher Fairman has noted that lower courts have used this rationale as a basis for imposing heightened pleading beyond the antitrust context. *See* Fairman, *supra* note 9, at 1059 ("[Q]uickly putting an end to meritless strike suits is used as a basis of heightened pleading in such varied substantive areas as CERCLA, civil rights, conspiracy, defamation, negligence, and RICO. This belief in categories of cases being presumptively frivolous, in itself a commonality, also fosters deviation from notice pleading.").

<sup>116</sup> *Twombly*, 127 S. Ct. at 1967 (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983)).

<sup>117</sup> *Id.* at 1967 (quoting *Dura Pharms.*, 544 U.S. at 347).

<sup>118</sup> *Id.* at 1989 (Stevens, J., dissenting) ("The transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of pretrial discovery.").

money by the parties and the court."<sup>119</sup> As this quotation reveals, the Court is looking for the pleadings to serve a strong *screening* function by eliminating groundless claims before costly discovery ensues.<sup>120</sup>

But the Court also made several references to discovery abuse, a phenomenon analytically distinct from the notion of costly discovery more generally. Beyond protecting defendants against the ordinary costs associated with responding to proper discovery requests in an antitrust suit against large corporations, the Court suggested that "checking discovery abuse" is a goal it sought to achieve through the pleading rules as well.<sup>121</sup> These references to discovery abuse are perplexing because, in *Twombly*, there was no indication simply from the complaint that the defendants would have been subjected to abusive, impositional discovery requests.

Further, and more importantly, discovery abuse in the form of impositional requests is not an evil unique to groundless or insufficiently pleaded claims. Such abuse can occur regardless of whether the underlying claims are legitimate or meritless, well-pleaded or not. Although it may be more difficult for a court to guard against impositional discovery requests in the context of a "sketchy complaint"<sup>122</sup> offering only skeletal factual allegations, it is not necessarily more likely that such complaints will result in more impositional requests being made. Abusive, impositional discovery requests are motivated by the desire to impose litigation expense on one's opponent rather than the desire for information (a practice one could curb more directly by abandoning or modifying the American Rule rather than through pleadings decisions).<sup>123</sup> There is no reason to suppose that plaintiffs filing complaints

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<sup>119</sup> *Id.* at 1966 (majority opinion) (citation and internal quotation marks omitted).

<sup>120</sup> *See id.*

<sup>121</sup> *Twombly*, 127 S. Ct. at 1967. The Court's references to discovery abuse appear in the following passage:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries . . . ."

*Id.* (citations omitted).

<sup>122</sup> *Id.* at 1967 n.6 (quoting Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989)).

<sup>123</sup> *See* Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 726 (1983) ("Perhaps the mightiest catalyst for discovery abuse is the so-called American Rule . . . . The effect of

with factual allegations that are merely consistent with rather than suggestive of liability will resort to impositional discovery requests with greater frequency than plaintiffs who cross the threshold of plausibility. Because discovery abuse has little to do with the distinction between plausibility pleading and conclusory notice pleading, it seems that the Court simply raised the specter of discovery abuse as a bugbear to bolster its case for the need to tighten pleading standards.

On top of the idea of discovery abuse and the previously mentioned high costs of complex litigation, the Court in *Twombly* alluded to a third concern warranting tightened pleading: heavy judicial caseloads.<sup>124</sup> The Court thus seemed to endorse the U.S. Court of Appeals for the Seventh Circuit's view that "the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint."<sup>125</sup>

Although this troika of policy concerns—litigation expense, discovery abuse, and overburdened caseloads—may be valid in some respects, the question is whether it was proper for the Court to rely on a judicial reinterpretation of Rule 8's pleading standard to vindicate them. After all, the Court has written in the past that different, more restrictive pleading standards, if desired, "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."<sup>126</sup> Such is the course of action the Court has approved in the past, for example, when it approved the 1983 amendment of Rule 16: "Given the significant changes in federal civil litigation since 1938 that are not reflected in Rule 16, it has been extensively rewritten and ex-

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this rule on discovery is profound: a party can have as much discovery as it wants by paying only the costs of *seeking* that discovery; the costs of compliance are generally borne without recompense by the opposing party.")

<sup>124</sup> See *Twombly*, 127 S. Ct. at 1967. Christopher Fairman has noted that lower courts frequently invoked docket control as a justification for imposing heightened pleading standards. See Fairman, *supra* note 9, at 1060 ("The perception of large numbers of potentially meritless claims clogging judicial dockets is also a familiar theme. Consequently, it is not surprising that in many areas courts offer docket control as another justification." (citations omitted)).

<sup>125</sup> *Twombly*, 127 S. Ct. at 1967 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

<sup>126</sup> *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); see also *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) ("To the extent that the court was concerned with this procedural issue, our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.").



panded to meet the challenges of modern litigation."<sup>127</sup> A similar approach would have been more appropriate to alter general pleading obligations in response to new challenges presented by complex litigation.

The reasons for requiring recourse to the formal rule amendment process are several. First and most basically, the Supreme Court has repeatedly reminded the rest of us that the only way to revise civil pleading standards to impose more stringent pleading requirements is to amend the rules formally.<sup>128</sup> But more importantly, the rule amendment process is preferable because it is a much more democratic, transparent, and accountable method of making changes to the Federal Rules. The process by which the Civil Rules Advisory Committee considers changes to the rules involves advanced notification to the legal community of the proposed changes and the opportunity to comment on its merits.<sup>129</sup> This notice and comment process shines more light on the proposals, meaning that any politically difficult changes will receive scrutiny and that opponents will have the opportunity to voice their concerns to the Committee or ultimately to Congress. Such participation gives the process more legitimacy than a change effected through judicial reinterpretation.<sup>130</sup> Finally, permitting the rulemakers to handle the process of revising federal civil pleading standards makes more sense because they are in a position to consider the impact any changes would have on the other rules and the system as a whole. The Advisory Committee would also be in a position to undertake studies in an effort to determine whether and to what extent the problems of extortionary settlements and discovery abuse identified by the Court do indeed exist and tailor any revision of the rules to address the concerns confirmed by such research.<sup>131</sup>

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<sup>127</sup> FED. R. CIV. P. 16 advisory committee's note to the 1983 amendments.

<sup>128</sup> See *Crawford-El*, 523 U.S. at 595; *Leatherman*, 507 U.S. at 168.

<sup>129</sup> See 28 U.S.C. § 2073; see also James C. Duff, Admin. Office of the U.S. Courts, *The Rulemaking Process: A Summary for the Bench and Bar* (Oct. 2007), <http://www.uscourts.gov/rules/proceduresun.htm>.

<sup>130</sup> See *Crawford-El*, 523 U.S. at 595; *Leatherman*, 507 U.S. at 168.

<sup>131</sup> A similar point was made in *The Supreme Court 2006 Term, Leading Cases, Pleading Standards*, 121 HARV. L. REV. 305, 313 (2007). For an example of such research requested by the Advisory Committee, see generally Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?* 81 NOTRE DAME L. REV. 591 (2006).

### D. Erickson v. Pardus: An Affirmation of Notice Pleading?

Before launching into a more systematic critique of *Twombly*, it is necessary first to determine whether all of this is much ado about nothing. That is, has *Twombly* really changed pleading doctrine fundamentally given that the Supreme Court shortly thereafter rendered another pleading decision in which most of the fundamentals of notice pleading were pronounced and reaffirmed?

In *Erickson v. Pardus*, decided in 2007, only two weeks after *Twombly*, the Supreme Court reversed a pleadings dismissal that the circuit court had affirmed in a case involving a pro se prisoner asserting a § 1983 claim.<sup>132</sup> The prisoner asserted that necessary treatment for hepatitis C had been initiated and then wrongfully terminated by prison officials and that such termination endangered his life.<sup>133</sup> The district court dismissed the prisoner's complaint and the U.S. Court of Appeals for the Tenth Circuit affirmed the dismissal on the ground that the complaint failed to allege whether the withdrawal of treatment exacerbated his health problems beyond the harm that the disease itself would present to the prisoner.<sup>134</sup>

The Supreme Court found dismissal in these circumstances to be error.<sup>135</sup> For its analysis, the Court began by quoting the classic statements regarding notice pleading that were still intact after *Twombly*:

Federal Rule of Civil Procedure 8(a) (2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.<sup>136</sup>

After this recitation, the Court reiterated the prisoner's allegations that the doctor's decision to terminate the hepatitis C treatment en-

<sup>132</sup> 127 S. Ct. 2197, 2199–200 (2007).

<sup>133</sup> *Id.* at 2199.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 2200 ("It was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered 'a cognizable independent harm' as a result of his removal from the hepatitis C treatment program." (citation omitted)).

<sup>136</sup> *Id.* (citations omitted).

dangered his life, that he was still in need of treatment, and that the prison officials continued to refuse treatment.<sup>137</sup> According to the Court, these allegations alone were enough to satisfy Rule 8(a)(2).<sup>138</sup> The Court concluded by emphasizing that Rule 8(a)(2) sets forth "liberal pleading standards" and that pleadings drafted by pro se litigants must be held to "less stringent standards than formal pleadings drafted by lawyers."<sup>139</sup>

The *Erickson* Court's nod to notice pleading, coupled with its assertion that "[s]pecific facts are not necessary" and affirmation that Rule 8(a)(2) sets forth "liberal pleading standards" do soften the edges of *Twombly*, seeming to assure readers that not all of *Conley's* legacy has been discarded.<sup>140</sup> But *Erickson's* brief homage to notice pleading and the liberal ethos ring hollow in the context of this clear-cut case for two reasons. First, under the relevant law governing the prisoner's claim, an Eighth Amendment violation occurs when delays in medical treatment involve life-threatening situations and when it is apparent that delay would exacerbate the prisoner's medical problems.<sup>141</sup> The prisoner pleaded that the termination of treatment endangered his life and thus it is clear that he had stated a claim.<sup>142</sup> Indeed, the prisoner's claim was plausible because he actually had hepatitis C and the fatal consequences of nontreatment were well documented.<sup>143</sup> Second, the prisoner in *Erickson* was proceeding pro se, which—consistent with long-standing precedent<sup>144</sup>—entitled him to less stringent scrutiny of his complaint.<sup>145</sup> Thus, *Erickson* is not a

<sup>137</sup> *Erickson*, 127 S. Ct. at 2200.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 2199.

<sup>142</sup> *Erickson*, 127 S. Ct. at 2197–98. At least one other commentator has agreed that *Erickson* was an easy case that cannot be used to detract from the impact of *Twombly*. See Dodson, *supra* note 2, at 126.

<sup>143</sup> *Erickson*, 127 S. Ct. at 2198.

<sup>144</sup> See, e.g., *Hughes v. Rowe*, 449 U.S. 5, 9–10 (1980) ("It is settled law that the allegations of [a pro se prisoner] complaint, 'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers.' Such 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." (citations omitted)).

<sup>145</sup> Indeed, the brief petition for certiorari submitted by William Erickson, the prisoner litigant, did not offer arguments pertaining to the interpretation and application of Rule 8(a)(2) as the basis for reversing the judgment of the Tenth Circuit. See *Petition for Writ of Certiorari* at i, *Erickson*, 127 S. Ct. 2197 (No. 06-7317), available at 2006 WL 4590561. Rather, it focused on the Supreme Court's cases indicating that pro se pleaders were held

proper case in which to test how the Court will apply *Twombly* in subsequent cases.<sup>146</sup>

### E. *Is Twombly Just an Antitrust Case?*

The final bit of brush clearing that must be done before moving to the critique of *Twombly* is answering the question of whether *Twombly* is only an antitrust case,<sup>147</sup> meaning that the Court's new pleading standard will not be applied to other cases or at least will not be applied to cases not presenting the efficiency and judicial administration concerns pointed to by the Court in *Twombly*. The short answer is no, *Twombly* is not merely an antitrust case.

The Federal Rules of Civil Procedure are on their face transsubstantive, meaning that Rule 8(a)'s pleading standard applies to all cases regardless of their substance, save for those covered by Rule 9(b) or claims covered by a statutorily imposed heightened pleading standard.<sup>148</sup> Thus, the Court cannot through judicial interpretation impose a special pleading rule for antitrust cases that will not apply to other cases; it can only do so through the rulemaking process. The *Twombly* opinion offers an interpretation of Rule 8(a), which it then proceeds to apply. This interpretation of Rule 8(a) must apply to all

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to a lower pleading standard. *Id.* The question presented on the pleading issue was: "Is a pro-se prisoner litigant entitled to liberal construction when a United States Court reviews his pleadings, and if so, did the lower courts abuse their discretion in Mr. Erickson's case?" *Id.* The answer Erickson offered was as follows: "This Court has always held that a pro-se prisoner litigant is entitled to liberal construction on his pro-se attempts [sic] presentation of his claims for relief, regardless of whether those claims are civil rights violations or requests for habeas relief. See *McNeil v. United States*, 508 U.S. 106, 113 (1993); *Estelle v. Gamble*, 429 U.S. 79 (1976); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)." *Id.* at 6.

<sup>146</sup> Indeed, more telling and more relevant will be how lower courts will apply *Twombly* going forward. Initial indications are that lower courts are interpreting *Twombly* to have articulated a new, more stringent pleading standard that requires more than had been required under notice pleading. See *infra* notes 150-152 and accompanying text.

<sup>147</sup> This is a question several scholars have already raised. See, e.g., Linda S. Mullenix, *Troubling "Twombly,"* NAT'L L.J., June 11, 2007, at 13 ("[W]ill *Twombly's* holdings be cabined only to Sherman Act § 1 antitrust claims, or will the court's rulings apply to all pleadings alleging conspiracy claims?").

<sup>148</sup> See FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81."). Scholars have debated whether the Federal Rules should be transsubstantive. See, e.g., Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 716-17 (1988) (arguing for procedural rules tailored to specific substantive areas).

claims subject to Rule 8(a) and thus it is hard to understand how the *Twombly* approach would not apply in other types of cases.<sup>149</sup>

The reaction of lower federal courts to *Twombly* is instructive. There are already hundreds of published lower federal court opinions that have read *Twombly* as announcing a new pleading standard that is generally applicable to cases in the federal system.<sup>150</sup> The Second Circuit, for example, has shied away from the notion that *Twombly* is only an antitrust case, summarizing its views as follows: "We are reluctant to assume that all of the language of *Bell Atlantic [v. Twombly]* applies only to section 1 allegations based on competitors' parallel conduct or, slightly more broadly, only to antitrust cases."<sup>151</sup> Indeed, the lower

<sup>149</sup> See FED. R. CIV. P. 1.

<sup>150</sup> See, e.g., *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) ("We look for plausibility in th[e] complaint." (quoting *Twombly*, 127 S. Ct. at 1970)); *Haas v. Rhody*, No. 07-1021, 2007 WL 2089282, at \*2 (S.D.N.Y. July 20, 2007) ("A complaint may be dismissed pursuant to Rule 12(b)(6) where the complaint fails to plead 'enough facts to state a claim to relief that is plausible on its face.'" (quoting *Twombly*, 127 S. Ct. at 1974)); *Semsroth v. City of Wichita*, No. 06-2376, 2007 WL 2091167, at \*1 (D. Kan. July 20, 2007) ("[P]laintiff must allege sufficient facts to state a claim which is plausible—rather than merely conceivable—on its face."); *Davis v. Babish*, No. 06-4638, 2007 WL 2088798, at \*2 (N.D. Ill. July 20, 2007) ("[I]n order to survive a motion to dismiss for failure to state a claim, the claim must be supported by facts that, if taken as true, at least plausibly suggest that he is entitled to relief."). A Westlaw search in mid-January 2008 of all reported federal court opinions revealed that at that point there were well over 3000 opinions citing *Twombly*.

One district court articulated the new pleading standard under *Twombly* as follows:

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." The United States Supreme Court has made clear, however, that a plaintiff is obligated to provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." "Factual allegations must be enough to raise a right to relief above the speculative level." "Rule 8(a)(2) still requires a showing, rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only fair notice of the nature of the claim, but also grounds on which the claim rests." When the Complaint contains inadequate factual allegations, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." "[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."

*Dell, Inc. v. This Old Store, Inc.*, No. 07-0561, 2007 WL 1958609, at \*1 (S.D. Tex. July 2, 2007) (citations omitted).

<sup>151</sup> *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007). The Second Circuit went on to state in a footnote that "it would be cavalier to believe that the Court's rejection of the 'no set of facts' language from *Conley*, which has been cited by federal courts at least 10,000 times in a wide variety of contexts . . . , applies only to section 1 antitrust claims." *Id.* at 157 n.7. It

courts have quickly grown quite comfortable with *Twombly's* plausibility pleading standard, articulating and applying its pronouncements outside of the antitrust context to declare borderline pleadings inadequate.<sup>152</sup>

Although *Twombly's* plausibility pleading standard does not just apply to antitrust cases, it is probably correct to say that the standard will be more demanding in the context of claims in which direct evidence supporting the wrongdoing is difficult for plaintiffs to identify at the complaint stage.<sup>153</sup> Thus, for example, although straightforward common law tort claims—such as those asserting conversion, battery, or negligence—might be easy to support with suggestive facts, plaintiffs may find that claims for which intent or state of mind is an element—such as discrimination or conspiracy claims—are more difficult to plead in a way that will satisfy the plausibility standard. The Second Circuit seemed to suggest this issue subtly when it wrote,

[T]he [Supreme] Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible “plausibility standard,” which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.<sup>154</sup>

In other words, the Court's plausibility standard may require different levels of factual detail depending upon the substantive context. Thus, a complaint with an antitrust claim rooted in conspiracies based on indirect inferential evidence will require more facts to traverse the threshold of plausibility than would be needed in a case asserting the conversion of personal property.

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should be noted that the court in *Iqbal v. Hasty* reached this conclusion after acknowledging that the *Twombly* Court sent mixed signals regarding whether its holding applied beyond the antitrust context. See *id.* at 155–57. The Seventh Circuit has also indicated its view that *Twombly* applies beyond the antitrust context. See *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litig.*, 491 F.3d 638, 649 (7th Cir. 2007) (“The present case is not an antitrust case, but the district court will want to determine whether the complaint contains ‘enough factual matter (taken as true)’ to provide the minimum notice of the plaintiffs’ claim that the Court believes a defendant entitled to.”).

<sup>152</sup> See, e.g., *Haspel v. State Farm Mut. Auto. Ins. Co.*, 241 F. App'x 837, 839 n.3 (3d Cir. 2007) (insurance benefits suit); *United States v. Ortho-McNeil Pharm., Inc.*, No. 03-8239, 2007 WL 2091185, at \*5 (N.D. Ill. July 20, 2007) (“piercing the corporate veil” context).

<sup>153</sup> This circumstance can be referred to as information asymmetry. See, e.g., Posting of Randy Picker to The University of Chicago Law School Faculty Blog, [http://uchicagolaw.typepad.com/faculty/2006/11/reading\\_twombly.html](http://uchicagolaw.typepad.com/faculty/2006/11/reading_twombly.html) (Nov. 28, 2006, 09:46 AM) (defining “information asymmetry” as “what I know that you don't know”). Professor Dodson has also identified this as a problem with *Twombly*. See Dodson, *supra* note 2, at 124–25.

<sup>154</sup> *Iqbal*, 490 F.3d at 157–58.

Such a fluid, form-shifting standard is troubling for two reasons. First, it is likely to impose a more onerous burden in those cases where a liberal notice pleading standard is needed most: actions asserting claims based on states of mind, secret agreements, and the like, creating a class of disfavored actions in which plaintiffs will face more hurdles to obtaining a resolution of their claims on the merits.<sup>155</sup> Second, a contextually-influenced rule violates the principle of transubstantivity alluded to above, and does so through judicial interpretation rather than via separate rules as was done for cases involving allegations of fraud or mistake.<sup>156</sup> Unfortunately, eroding the transubstantivity norm by announcing a rule whose requirements vary depending upon substantive context (and also upon cost/efficiency concerns), the Court has likely signaled to lower courts that it is permissible to interpret and apply any of the Federal Rules in such a manner.

### III. CRITIQUE

Although I have offered criticism of the U.S. Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*<sup>157</sup> as its contours were presented above, this Part turns to a more focused critique that divides into two general areas. First, the *Twombly* opinion can be faulted for propounding an untenable interpretation of Rule 8(a) that is wholly inconsistent with Supreme Court precedent and at odds with other rules of pleading and procedure applicable in the federal courts. The second line of attack questions the Court's abandonment of a notice pleading standard based on policies related to efficiency and judicial administration. In doing so the Court has seemingly turned its back on the liberal ethos of the rules and moved towards a more restrictive ethos. Such a state of affairs is unfortunate, particularly in light of the fact that the application of plausibility pleading is likely to stymie many valid claims in addition to the groundless claims that will not survive.

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<sup>155</sup> See Christopher Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 553-54 (2001) ("Whole categories of cases have been singled out for special procedural treatment, thereby limiting the substantive rights of certain plaintiffs. Erecting these procedural hurdles creates classes of disfavored cases and denies plaintiffs determination on the merits—a substantive effect masked as procedural.").

<sup>156</sup> See Fairman, *supra* note 155, at 621.

<sup>157</sup> 127 S. Ct. 1955 (2007).

### A. Interpretive Critique

The Supreme Court's interpretation of Rule 8(a)(2) in *Twombly* rankles because it is inconsistent with the liberal pleading regime established by the Federal Rules and previously embraced by the Court itself. No one can question that the Federal Rules promulgated in 1938 established a liberal notice pleading regime under which conclusory legal allegations were permissible. The Supreme Court blessed this understanding of the rules with its canonical statements in 1957, in *Conley v. Gibson*, and its subsequent steadfast intolerance of lower court attempts to erode the standard.<sup>158</sup> Below, this Section reviews the details of how the *Twombly* Court inappropriately rejected its own pleading precedents and offered an interpretation of Rule 8 that simply does not fit with the liberal provisions of the Federal Rules as a whole.

#### 1. Supreme Court Precedent and Stare Decisis

One of the greatest difficulties with the *Twombly* Court's novel interpretation of Rule 8(a)(2) is that it is wholly inconsistent with Supreme Court precedent. Ordinary principles of stare decisis were not followed in *Twombly*, permitting the overruling of a long-standing precedent in the absence of the "special justification"<sup>159</sup> that is usually required for such a move. The doctrine of stare decisis obligates the Court to adhere to precedent unless there is some "compelling justification,"<sup>160</sup> such as a determination that "governing decisions are unworkable or are badly reasoned."<sup>161</sup> Although the Court has indicated that considerations of stare decisis are lessened in cases involving procedural rules,<sup>162</sup> that admonition seems more descriptive of *judge-made*

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<sup>158</sup> See 355 U.S. 41, 45-46 (1957), *abrogated by Twombly*, 127 S. Ct. 1955; see also Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

<sup>159</sup> *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("[A]ny departure from the doctrine of *stare decisis* demands special justification.").

<sup>160</sup> *Hilton v. S.C. Public Rys. Comm'n*, 502 U.S. 197, 202 (1991); see also *Dickerson v. United States*, 530 U.S. 428, 429 (2000) ("[S]tare decisis carries such persuasive force that the Court has always required a departure from precedent to be supported by some special justification.").

<sup>161</sup> *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

<sup>162</sup> *Id.* at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules." (citations omitted)); see also *Hohn v. United States*, 524 U.S. 236, 251 (1998) ("The role of *stare decisis*, furthermore, is 'somewhat reduced . . . in the case of a procedural rule . . . which does not serve as a guide to lawful behavior.'" (citation omitted)).



procedural rules, not those reflected in statutes or formally promulgated rules.<sup>163</sup> Indeed, the Court has stated that “[c]onsiderations of *stare decisis* are particularly forceful in the area of statutory construction, especially when a unanimous interpretation of a statute has been accepted as settled law for several decades.”<sup>164</sup> The Court explained the force of *stare decisis* in this context when it wrote:

Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. . . . *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.<sup>165</sup>

Although here we are dealing with an interpretation of a Federal Rule of Civil Procedure—the content of which is more directly controlled by the Court itself<sup>166</sup>—the reasons articulated above for adhering to long-standing and unquestioned interpretations of those rules absent some “compelling justification” seem to apply with like force. Thus,

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<sup>163</sup> See, e.g., *Morse v. Frederick*, 127 S. Ct. 2618, 2642 (2007) (“Given that *Saucier* [*v. Katz*, 533 U.S. 194 (2001)] is a judge-made procedural rule, *stare decisis* concerns supporting preservation of the rule are weak.”).

<sup>164</sup> *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005). Interestingly, the Supreme Court has stated that *stare decisis* has less force with respect to interpretations of the Sherman Act:

[S]tare decisis is not an inexorable command. In the area of antitrust law, there is a competing interest, well represented in this Court’s decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.

*State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (citation and internal quotation marks omitted). This principle is inapplicable to *Twombly* because the interpretation at issue is an interpretation of Rule 8(a)(2), not an interpretation of a provision of the Sherman Act.

<sup>165</sup> *Hilton*, 502 U.S. at 202 (citation and internal quotation marks omitted); see also *Neal v. United States*, 516 U.S. 284, 295 (1996) (“Our reluctance to overturn precedents derives in part from institutional concerns about the relationship of the Judiciary to Congress. One reason that we give great weight to *stare decisis* in the area of statutory construction is that Congress is free to change this Court’s interpretation of its legislation.” (citation and internal quotation marks omitted)).

<sup>166</sup> See 28 U.S.C. §§ 2071, 2072 (2000) (providing for the rulemaking authority of the Supreme Court).

the questions for our consideration here are first, whether the Court in *Twombly* did in fact depart from its own long-standing interpretation of Rule 8(a)(2) and second, if so, whether the Court's justification for doing so was sufficient in light of its prior statements on the obligations of stare decisis.

Can it be fairly said that in *Twombly* the Court overruled its prior precedent regarding Rule 8(a)(2)? A critical step in the *Twombly* Court's reconfiguration of the ordinary pleading standard in federal civil cases was its abrogation of its admonition in *Conley* that a complaint could not be dismissed unless it was "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>167</sup> Without discarding this aspect of the standard, the Court's effort to impose a requirement of suggestive rather than equivocal facts would have been unsuccessful. Indeed, it is this very statement from *Conley* that permitted complaints containing only factual allegations consistent with, rather than suggestive of, a claim of liability to go forward in the past. Thus, the "no set of facts" language had to go. But what is interesting about *Twombly* is that the Court did not just come out and say that it was rejecting the *Conley* statement so that it could change the standard for pleading under Rule 8. Rather, the Court attempted to isolate and discredit only the "no set of facts" language while simultaneously purporting to retain the notice pleading system largely intact.<sup>168</sup>

Specifically, the *Twombly* Court attempted to discredit the "no set of facts" statement by characterizing it as an embattled aspect of the *Conley* opinion that had been "questioned, criticized, and explained away" by "a good many judges and commentators."<sup>169</sup> Although the Court is certainly free to accept the criticism of courts and commentators and alter its doctrine accordingly, it should admit that this criticism is convincing and thus it is *changing its view of the law*. Instead of doing so, the *Twombly* Court used the criticism as a basis for suggesting that the statement was not worth taking seriously and one that had not been taken seriously for fifty years. Of course, the Court only could cite to lower court precedent to build this aura of critique,<sup>170</sup> given that its own statements

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<sup>167</sup> *Conley*, 355 U.S. at 45-46.

<sup>168</sup> *Twombly*, 127 S. Ct. at 1969 (stating that *Conley*'s "no set of facts" language has earned its retirement). *But see id.* at 1964 (citing *Conley* for proposition that a complaint does not need detailed factual allegations).

<sup>169</sup> *Id.* at 1969.

<sup>170</sup> *Id.* (citing *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989); *McGregor v. Indus. Excess Landfill, Inc.*, 856 F.2d 39, 42-43 (6th Cir. 1988); *Car Carriers*,

on the matter had been nothing but confirmatory since the time the *Conley* Court first made the statement.<sup>171</sup>

In fact, until *Twombly*, the Court had consistently and repeatedly reaffirmed and applied *Conley*'s "no set of facts" admonition,<sup>172</sup> includ-

*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)). The Court neglected to cite to circuit precedent weighing in favor of the *Conley* approach. *See, e.g.*, *Vincent v. City Colls. of Chi.*, 485 F.3d 919, 923 (7th Cir. 2007) ("Factual detail comes later—perhaps in response to a motion for a more definite statement [or] in response to a motion for summary judgment. Until then, the possibility that facts to be adduced later, and consistent with the complaint, could prove the claim, is enough for the litigation to move forward." (citations omitted)); *Wetmore v. MacDonald, Page, Schatz, Fletcher & Co.*, 476 F.3d 1, 2 (1st Cir. 2007) (relying upon "the seminal teaching" of *Conley*'s "no set of facts" standard); *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006) ("Of course, a complaint should not be dismissed unless the plaintiff can prove no set of facts that would entitle the plaintiff to relief."); *In re Tower Air, Inc.*, 416 F.3d 229, 239 (3d Cir. 2005) ("Unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief, we must reverse the District Court." (citation and internal quotation marks omitted)); *Chosum Int'l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324, 329 (2d Cir. 2005) ("[A]t the Rule 12(b)(6) stage . . . a complaint will not be dismissed unless it is beyond peradventure that the plaintiff could prove no set of facts leading to success.").

<sup>171</sup> *See, e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993); *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976).

<sup>172</sup> *See Swierkiewicz*, 534 U.S. at 514 ("Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984))); *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999) ("On this complaint, we cannot say 'beyond doubt that [petitioner] can prove no set of facts in support of [her] claim which would entitle [her] to relief.'" (quoting *Conley*, 355 U.S. at 45-46)); *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("[I]f as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,' a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one." (citation omitted)), *superseded by statute*, Pub. L. No. 104-134, § 804(a), (c) to (e), 110 Stat. 1321-73 to -75 (1996); *Brower v. County of Inyo*, 489 U.S. 593, 598 (1989) ("In applying these principles to the dismissal of petitioners' Fourth Amendment complaint for failure to state a claim, we can sustain the District Court's action only if, taking the allegations of the complaint in the light most favorable to petitioners, we nonetheless conclude that they could prove no set of facts entitling them to relief for a 'seizure.'" (citation omitted)); *Hishon*, 467 U.S. at 73 (applying *Conley* standard to plaintiff's claim under Title VII); *Block v. Neal*, 460 U.S. 289, 297-98 (1983) (applying *Conley* standard to plaintiff's negligence claim); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (citing *Conley* standard), *abrogated by Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (citing *Conley* standard with regard to plaintiff's § 1983 claim); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (applying *Conley* standard to pro se prisoner's complaint under § 1983); *Jenkins v. McKeithen*, 395 U.S. 411, 422 (1969) (applying *Conley* standard to plaintiff's complaint alleging constitutional violations); *cf. Sparks v. England*, 113 F.2d 579, 581-82 (8th Cir. 1940) ("The Rules of Civil Procedure do not require that a plaintiff shall plead every fact essential to his right to recover the amount of which he claims. . . . If it is conceivable that, under the allegations of his complaint, a

ing in the antitrust context.<sup>173</sup> Looking at a couple of these instances is instructive. In 1993, in *Hartford Fire Insurance Co. v. California*, Justice Scalia, writing for the Supreme Court on the pleading issue, affirmed the sufficiency of pleadings that alleged a boycott by defendant reinsurers in the context of an antitrust suit.<sup>174</sup> He wrote as follows:

Many other allegations in the complaints describe conduct that may amount to a boycott if the plaintiffs can prove certain additional facts. . . . [Certain domestic reinsurers] are alleged to have “agreed to boycott the 1984 ISO forms unless a retroactive date was added to the claims-made form, and a pollution exclusion and a defense cost cap were added to both [the occurrence and claims made] forms.” Liberally construed, this allegation may mean that the defendants had linked their demands so that they would continue to refuse to do business on *either* form until *both* were changed to their liking. Again, that might amount to a boycott. Under [the *Conley*] standard, these allegations are sufficient . . . .<sup>175</sup>

These allegations, according to Justice Scalia, only “*may* amount to a boycott,” and whether they will be deemed to amount to a boycott depends on “if the plaintiffs can prove certain additional facts.”<sup>176</sup> The *Hartford Fire* Court did not require that these “certain additional facts” be pleaded.<sup>177</sup> Rather, because the allegations that were pleaded “might” amount to a boycott under the right factual circumstances, Justice Scalia read and applied *Conley* to require that the Court give the plaintiffs the opportunity to obtain those facts and prove their claims during a later stage of the litigation process.<sup>178</sup>

The Court has previously explained that the need to adhere to liberal notice pleading and to *Conley*'s “no set of facts” standard is more urgent in the antitrust context, not less.<sup>179</sup> This is because alle-

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plaintiff can, upon trial, establish a case which would entitle him to the relief prayed for, a motion to dismiss for insufficiency of statement ought not to be granted.”).

<sup>173</sup> *Hartford Fire*, 509 U.S. at 811 (quoting and applying *Conley*'s “no set of facts” language in an antitrust case); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) (stating that the *Conley* standard “applies with no less force to a Sherman Act claim”); *Hosp. Bldg. Co.*, 425 U.S. at 746 (quoting and applying *Conley*'s “no set of facts” language in an antitrust case).

<sup>174</sup> 509 U.S. at 800.

<sup>175</sup> *Id.* at 811 (citations omitted).

<sup>176</sup> *Id.* (emphasis added).

<sup>177</sup> *See id.*

<sup>178</sup> *Id.*

<sup>179</sup> *See Hosp. Bldg. Co.*, 425 U.S. at 746.

gations regarding a conspiracy will typically involve facts that plaintiffs cannot access before being afforded the opportunity for discovery.<sup>180</sup> As the Supreme Court stated in 1976, in *Hospital Building Co. v. Trustees of Rex Hospital*, regarding the *Conley* standard, "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly."<sup>181</sup> *Twombly's* rejection of a complaint that alleged facts that were indeed consistent with an unlawful conspiracy was thus out of step with the Court's previous position that such plaintiffs require discovery to develop support for their claims.

In light of the Court's previously unwavering embrace and application of *Conley's* "no set of facts" standard—both generally and with special force in antitrust cases—it cannot be gainsaid that, in announcing its new standard of plausibility, the Court has overhauled pleading doctrine in a way that represents a departure from its previously articulated views.<sup>182</sup> Although there is plenty of room to argue that the Court truly did not see itself as departing from the core notice pleading standard that has governed civil complaints under the Federal Rules, it seems that such an about-face respecting *Conley*, coupled with the Court's repeated and unprecedented emphasis that facts showing plausible entitlement to relief must be pleaded, provides more support for the view that *Twombly* indeed represents at least a *de facto* departure from notice pleading as that concept has heretofore been understood.

Was such a significant departure from long-standing precedent warranted under the Court's own standards governing *stare decisis*? The answer is clearly no. Ordinarily, the Court reverses prior holdings when they have been shown to be erroneous,<sup>183</sup> inconsistently applied,<sup>184</sup> or unworkable.<sup>185</sup> In a previous case, Justice Scalia noted that

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.* (citation omitted).

<sup>182</sup> Other commentators agree that *Twombly* represents a dramatic alteration of civil pleading standards. See, e.g., Mullenix, *supra* note 147, at 13 ("The U.S. Supreme Court on May 21 issued a decision that marks . . . a surprising departure from ingrained federal pleading rules.").

<sup>183</sup> *United States v. Gaudin*, 515 U.S. 506, 521 (1995) ("[W]e think *stare decisis* cannot possibly be controlling when . . . the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court.").

<sup>184</sup> *Hohn*, 524 U.S. at 253 (indicating that "the consistency with which [a rule] has been applied in practice" impacts the Court's determination of whether to overrule a previous holding).

<sup>185</sup> *Payne*, 501 U.S. at 827.

these special justifications still applied in procedural cases when he wrote,

[E]ven those cases cited by the Court as applying the “somewhat reduced” standard to procedural holdings still felt the need to set forth special factors justifying the overruling. *United States v. Gaudin* concluded that “the decision in question had been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court”; and *Payne v. Tennessee* noted that the overruled cases had been “decided by the narrowest of margins, over spirited dissents challenging [their] basic underpinnings,” had been “questioned by Members of the Court in later decisions,” and had “defied consistent application by the lower courts.”<sup>186</sup>

The *Twombly* Court did not suggest that *Conley*'s “no set of facts” language reflected an erroneous understanding of Rule 8.<sup>187</sup> Nor had there been any history of inconsistent application of the *Conley* standard in prior opinions of the Supreme Court, although the *Twombly* Court found relevant the purportedly mixed treatment of the statement by lower federal courts.<sup>188</sup>

Perhaps then the overruling of *Conley* was warranted because it was unworkable. After all, the Court relied heavily on the fact that discovery in antitrust cases was now quite an expensive proposition and that it was necessary to require more from complaints to prevent plaintiffs from being able to extort defendants into a settlement.<sup>189</sup> But such policy concerns, even if the product of changed circumstances such as the rising cost of modern discovery in complex cases, do not represent the kind of unworkability the Court has in mind as being sufficient to warrant the overruling of long-standing precedent.<sup>190</sup> Rather, a previous decision becomes “unworkable” when it is no longer compatible or consistent with the larger legal landscape or irreconcilable with important substantive legal policies. The Supreme Court's language in 1996, in *Neal v. United States*, stated the point well:

We have overruled our precedents when the intervening development of the law has “removed or weakened the concep-

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<sup>186</sup> *Hohn*, 524 U.S. at 259 (Scalia, J., dissenting) (citations omitted).

<sup>187</sup> See generally *Twombly*, 127 S. Ct. 1955.

<sup>188</sup> See *id.* at 1959.

<sup>189</sup> *Id.* at 1959, 1966.

<sup>190</sup> See *Neal*, 516 U.S. at 295; see also *Hohn*, 524 U.S. at 253; *Gaudin*, 515 U.S. at 521.

tual underpinnings from the prior decision,' or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies." Absent those changes or compelling evidence bearing on Congress' original intent, our system demands that we adhere to our prior interpretations of statutes.<sup>191</sup>

The Court offered nothing so compelling to justify the overruling of *Conley*. Rather, the *Twombly* Court simply reconsidered the wisdom of the *Conley* standard given its imposition of a bar so low that it would prove easy for plaintiffs with questionable claims to invoke the power of the court to impose high discovery costs on corporate defendants. Because the Court found this ability to coerce settlements based on these threatened expenses to be repugnant, the Court discarded the *Conley* standard and substituted a stricter one that would raise the bar for gaining access to valuable discovery.<sup>192</sup> Regardless of whether it makes good policy sense to alter the pleading rules to guard against the possibility of extortionary settlements and the lodging of groundless claims, such a motivation is not a proper basis for overruling an interpretation of a promulgated Federal Rule that had been accepted by Congress and remained unchallenged by Congress or the Court for fifty years.

Perhaps by ridiculing the statement in *Conley* as some crazy old relative that had long been viewed derisively by most members of the family, the Court was able to conceal the magnitude of what it was doing in abrogating *Conley* and to get away with not making any effort to articulate the compelling justification ordinarily required for departures from *stare decisis*. Alternatively, the Court could have convinced itself that it was not doing anything dramatic that warranted justification. Indeed, it attempted to distinguish what it did in *Twombly* from heightened pleading<sup>193</sup> and held on to the rhetoric of notice pleading both in *Twombly*<sup>194</sup> and in *Erickson v. Pardus*.<sup>195</sup> But as has been demon-

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<sup>191</sup> *Neal*, 516 U.S. at 295 (citations omitted).

<sup>192</sup> See *Twombly*, 127 S. Ct. at 1966-67.

<sup>193</sup> *Id.* at 1974 ("Here . . . we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."). The Second Circuit seemed to accept this distinction when it wrote, "[W]e believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007).

<sup>194</sup> 127 S. Ct. at 1964 ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to

strated above, the Court cannot disguise the fact that it has abruptly and radically revised pleading doctrine by burying the most critical component of notice pleading: the obligation of courts to allow complaints to proceed unless they could be confident that the plaintiff could not prove any set of facts that would establish its case. Thus, the Court owes both an acknowledgement of the dramatic nature of the change in doctrine that it has made and a better justification for overruling *Conley* than it offered in *Twombly*.

## 2. Plausibility Pleading and the Federal Rules of Civil Procedure

Apart from representing an insufficiently justified departure from the principles of stare decisis, the *Twombly* interpretation of Rule 8(a)(2) is out of step with the larger matrix of rules governing procedure in federal civil cases. Reading Rule 8(a)(2) to obligate plaintiffs to plead facts that paint a plausible picture of liability does not at all sit comfortably with an array of rules that govern pleading and procedure in the federal courts. Specifically, the Court's strict reading of Rule 8(a)(2) is at odds with former Rule 8(f)'s admonition to interpret pleadings liberally, Rule 9(b)'s reservation of particularized pleading for certain circumstances, Rule 11(b)'s allowance of pleadings that depend on future discovery for their validation, and Rule 12(e)'s provision for a device that offers a remedy for insufficiently detailed pleading short of dismissal.<sup>196</sup> These criticisms of the Court's opinion will be explored below.

### a. Rule 8(a)(2) and Generalized Pleading Under the Federal Rules

As the Court has previously emphasized, "Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard."<sup>197</sup> In other words, Rule 8(a)(2) cannot be read in isolation but must be seen as a component of a group of rules whose purpose was to establish a liberal pleading system in which the burdens placed on those asserting claims were minimal.

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'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" (quoting *Conley*, 355 U.S. at 47)).

<sup>195</sup> 127 S. Ct. 2197, 2200 (2007) ("[T]he statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" (quoting *Twombly*, 127 S. Ct. at 1964)).

<sup>196</sup> See FED. R. CIV. P. 9(b), 11(b), 12(e); FED. R. CIV. P. 8(f), 28 U.S.C. app. (2000) (amended 2007).

<sup>197</sup> *Swierkiewicz*, 534 U.S. at 513.



Beyond the language of Rule 8(a)(2) itself, which requires only a "short and plain statement of the claim,"<sup>198</sup> Rule 8 requires pleadings to be construed so as to do justice.<sup>199</sup> The Supreme Court has interpreted this provision to mean that "the complaint is to be liberally construed in favor of plaintiff."<sup>200</sup> Indeed it was with reference to former Rule 8(f) that the *Conley* Court intoned, "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."<sup>201</sup> Thus, the purpose of former Rule 8(f)—now numbered as Rule 8(e)—is to insure that judges make every effort to read a complaint in the light most favorable to the plaintiff, liberally construing it to state a claim unless it is clear that the plaintiff will be unable to make out a claim.<sup>202</sup> *Conley*'s "no set of facts" statement, then, must be understood to be a direct outgrowth of this obligation on the part of courts. If the *Twombly* Court's reading of Rule 8(a)(2) required the rejection of *Conley*'s "no set of facts" language, then plausibility pleading either implicitly repudiates or is simply incompatible with the liberal construction duty of former Rule 8(f) on which *Conley*'s statement was based.

Rule 11 offers the next accommodation of the rules in favor of generalized pleadings. Under Rule 11, attorneys certify that the claims presented in a complaint are warranted by the law and that the allegations "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."<sup>203</sup> This allowance is directly connected to the liberal pleading standard that is supposed to apply in the federal system. The Supreme Court seemed to make this connection in an earlier case when, in response to a plaintiff's concern that Rule 9(b)'s heightened pleading standard would frustrate fraud-based RICO claims, the Court wrote, "*Rotella* [the plaintiff below] has presented no case in which Rule 9(b) has effectively barred a claim like his, and

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<sup>198</sup> FED. R. CIV. P. 8(a)(2).

<sup>199</sup> FED. R. CIV. P. 8(e) ("Pleadings must be construed so as to do justice."). Interestingly, the December 1, 2007 amendments to Rule 8 omitted the word "substantial." See FED. R. CIV. P. 8(f), 28 U.S.C. app. (2000) (amended 2007) ("All pleadings shall be so construed as to do substantial justice.").

<sup>200</sup> *Jenkins*, 395 U.S. at 421 (citing FED. R. CIV. P. 8(f), 28 U.S.C. app. (2000) (amended 2007)); *Conley*, 355 U.S. 41).

<sup>201</sup> *Conley*, 355 U.S. at 48.

<sup>202</sup> See *Jenkins*, 395 U.S. at 421 (citing FED. R. CIV. P. 8(f), 28 U.S.C. app. (2000) (amended 2007)); *Conley*, 355 U.S. 41).

<sup>203</sup> FED. R. CIV. P. 11(b)(3) (emphasis added).

he ignores the flexibility provided by Rule 11(b)(3), allowing pleadings based on evidence reasonably anticipated after further investigation or discovery."<sup>204</sup> Lower federal courts have linked the flexibility of Rule 11(b)(3) with the liberal notice pleading standard as well.<sup>205</sup>

By moving from notice pleading to plausibility pleading requiring factual allegations, the Court seems to be precluding the very types of complaints contemplated and permitted by Rule 11(b). That is, although Rule 11(b) allows for the possibility that the pleader will require discovery to obtain supportive facts, plausibility pleading does not make such an allowance. Rather, plaintiffs are required to offer such facts at the pleading phase before discovery may occur.<sup>206</sup> Of course, requiring plaintiffs to offer factual allegations that plausibly suggest liability is a particular burden when key facts are likely obtainable only through discovery, such as when conspiracies are being alleged.

The provision for a motion for a more definite statement found in Rule 12(e) further affirms the intended liberality of the pleading rules by making repleading rather than dismissal the appropriate remedy for a complaint lacking sufficient detail.<sup>207</sup> The Supreme Court made this clear in 1959, in *Glus v. Brooklyn Eastern District Terminal*, when it wrote, "It may well be that petitioner's complaint as now drawn is too vague, but that is no ground for dismissing his action. His allegations are sufficient for the present. Whether petitioner can in fact make out a case calling for application of the doctrine of estoppel must await trial."<sup>208</sup> The necessary implication of Rule 12(e) is that a complaint that lacks enough factual detail does not fail to state a claim but rather states a claim without offering the defendant enough information to prepare a response.<sup>209</sup> Rule 12(e) then reaffirms the base standard of generalized pleading by testifying to the fact that complaints lacking factual detail are not condemnable as inadequate and worthy of dismissal. It is for subsequent stages of the litigation to require the plaintiff to adduce

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<sup>204</sup> *Rotella v. Wood*, 528 U.S. 549, 560 (2000).

<sup>205</sup> See, e.g., *Frantz v. U.S. Powerlifting Fed'n*, 836 F.2d 1063, 1068 (7th Cir. 1987) ("Rule 11 neither modifies the 'notice pleading' approach of the federal rules nor requires counsel to prove the case in advance of discovery.").

<sup>206</sup> See *Twombly*, 127 S. Ct. at 1966.

<sup>207</sup> See F.R.D. R. Civ. P. 12(e).

<sup>208</sup> 359 U.S. 231, 235 (1959) (citation omitted).

<sup>209</sup> *Swierkiewicz*, 534 U.S. at 514 ("If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding.").

supporting facts and prove its case.<sup>210</sup> By requiring the pleading of facts that support the conclusory legal assertions in a complaint in a way that plausibly shows liability, *Twombly's* plausibility pleading standard interprets Rule 8(a) (2) in a way that requires the very detail that Rule 12(e) suggests that a complaint may lack.

The Official Forms appended to the Federal Rules buttress the point and further contribute to the liberal generalized pleading system established by the rules. The Official Forms are riddled with complaints containing legal conclusions such as "owes,"<sup>211</sup> "negligently,"<sup>212</sup> "willfully,"<sup>213</sup> "recklessly,"<sup>214</sup> and "converted"<sup>215</sup> that are not unpacked into their constituent facts.<sup>216</sup> For example, what makes the defendant's driving reckless in Form 12? Excessive speed? Driving on the wrong side of the road? Driving at night without headlights illuminated? These pure legal conclusions—which are kin to the conclusory terms of antitrust claims such as "agreement" and "conspiracy" or those of civil rights claims such as "discriminatory"—are terms whose use the Official Forms clearly endorse. Certainly, to prove its claim it is expected that the plaintiff will subsequently have to offer factual support for these conclusory allegations. But the rules were not written to require the proffering of such support at the pleading stage. Rather, as Rules 8(f), 11(b) (3), 12(e), and the Official Forms show, the requirement of a "short and plain statement of the claim"<sup>217</sup> is a minimal duty, fully dis-

<sup>210</sup> See *id.* at 512 ("This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.").

<sup>211</sup> FED. R. CIV. P. Form 10.

<sup>212</sup> FED. R. CIV. P. Form 11, 12.

<sup>213</sup> FED. R. CIV. P. Form 12.

<sup>214</sup> *Id.*

<sup>215</sup> FED. R. CIV. P. Form 15.

<sup>216</sup> James William Moore, protégé of Charles Clark and an eminent authority on the Federal Rules, spoke of these conclusory legal terms in his original treatise on the rules:

The phrases "executed and delivered", "owes", "sold and delivered", "owes plaintiff \$10,000 for money lent", "owes plaintiff \$10,000 for money paid by plaintiff to defendant by mistake", "owes plaintiff \$10,000 for money had and received", "negligently drove", "willfully or recklessly or negligently drove", "converted" clearly do not fall within a scientific definition of "fact". They are mixed conclusions concerning propositions of fact and law, but they are succinct and have a definite meaning to the lawyer. Courts generally have regarded them as sufficient and all of them are to be found in the Official Forms which accompany the Federal Rules.

1 JAMES WM. MOORE & JOSEPH FRIEDMAN, MOORE'S FEDERAL PRACTICE § 8.07 (1st ed. 1938).

<sup>217</sup> FED. R. CIV. P. 8(a) (2).

chargeable via the use of conclusory legal terms and skeletal contextual facts sufficient to provide notice.

b. *Reading Rule 8(a)(2) Through Rule 9(b)*

The minimal pleading burden imposed by Rule 8(a)(2) is further underscored by its juxtaposition against the heightened pleading standard of Rule 9(b). Two aspects of Rule 9(b) give us confidence that Rule 8(a)(2) requires generalized notice pleading, not the plausibility pleading of the *Twombly* Court. First, Rule 9(b)'s first sentence requires particularized pleading in all averments of fraud or mistake.<sup>218</sup> As the Court has emphasized in the past, this singling-out of specific circumstances warranting heightened particularized pleading indicates that the rules meant to exclude all other cases from heightened pleading.<sup>219</sup> Second, Rule 9(b)'s second sentence then tells the reader that the alternative to the particularized pleading required for averments of fraud and mistake is pleading generally.<sup>220</sup> The sentence reads, "Malice, intent, knowledge, and other condition of mind of a person may be averred generally."<sup>221</sup> Averting matters "generally"—which is a reference to the pleading standard of Rule 8(a)(2)—is exactly the style of pleading exemplified by the conclusory allegations found among the Official Forms and implicitly sanctioned by Rule 12(e)'s refusal to impose dismissal on those complaints lacking sufficient detail.<sup>222</sup> Rule 9(b), therefore, sets out two clear tests for the validity of an interpretation of Rule 8(a)(2): first, Rule 8(a)(2) may not be interpreted to impose a heightened pleading requirement beyond the fraud or mistake context because such cases are not mentioned in Rule 9(b); and second, Rule 8(a)(2) may not be interpreted to require anything other than the pleading of matters "generally."<sup>223</sup>

The *Twombly* Court's declaration that Rule 8(a)(2) requires the pleading of factual allegations that paint a plausible picture of liability fails on both accounts. First, it is clear that *Twombly*'s plausibility pleading standard rejects the generalized pleading alluded to in the second

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<sup>218</sup> FED. R. CIV. P. 9(b).

<sup>219</sup> *Leatherman*, 507 U.S. at 168 ("[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*").

<sup>220</sup> FED. R. CIV. P. 9(b).

<sup>221</sup> *Id.*

<sup>222</sup> See FED. R. CIV. P. 12(e); FED. R. CIV. P. Form 10–13, 15.

<sup>223</sup> See FED. R. CIV. P. 9(b).

sentence of Rule 9(b). Any standard that requires “more than labels and conclusions” and explicitly calls for the pleading of suggestive facts supporting legal assertions such as the existence of an unlawful agreement or conspiracy fails to permit matters to be averred generally.<sup>224</sup>

Second, it is hard to distinguish the Court’s plausibility standard from the heightened pleading obligation of Rule 9(b). In the fraud context, courts have interpreted this rule to require the pleading of specific facts identifying misleading statements or omissions, the identity of the person making the statement, the time and place of the statement, and how the content of the statement misled the plaintiff.<sup>225</sup> Form 13 in the Appendix to the pre-December 1, 2007 version of the Federal Rules provides a whiff of what the rule drafters had in mind when crafting Rule 9(b)’s particularity requirement.<sup>226</sup> In alleging a fraudulent conveyance, former Form 13 asserts,

Defendant C. D. on or about \_\_\_\_ conveyed all his property, real and personal [or specify and describe] to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.<sup>227</sup>

Here there is an allegation that identifies who committed the fraud, the conduct that constituted the fraud, and how that fraud injured the plaintiff. The allegation, however, remains fairly conclusory and factless in character. It contains a bald assertion that the conveyance was for fraudulent purposes without offering any factual allegations in support of this assertion. Nevertheless, the rulemakers felt that the information offered sufficed even under the heightened particularity requirement of Rule 9(b) because it achieves notice—the defendant has a clear idea of the circumstances to which the plaintiff refers in alleging fraud and can prepare a defense characterizing the cited transaction as legitimate. Most lower courts have thus recognized that Rule 9(b)’s particularity requirement remains tempered by the general ethos of simplicity in the pleadings reflected in the Federal Rules.<sup>228</sup>

<sup>224</sup> See *Twombly*, 127 S. Ct. at 1965.

<sup>225</sup> See, e.g., *Ziembra v. Cascade Int’l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001); *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000).

<sup>226</sup> See FED. R. CIV. P. Form 13, 28 U.S.C. app. (2000) (amended 2007). The current version of this form is substantially similar. See FED. R. CIV. P. Form 21.

<sup>227</sup> FED. R. CIV. P. Form 13, 28 U.S.C. app. (2000) (amended 2007).

<sup>228</sup> See, e.g., *Saltire Indus., Inc. v. Waller, Lansden, Dortch & Davis, PLLC*, 491 F.3d 522, 526 (6th Cir. 2007) (“When deciding a motion to dismiss under Rule 9(b) . . . a court must also consider the policy favoring simplicity in pleading, codified in the short and plain

*Twombly's* plausibility pleading standard imposes on litigants a pleading obligation that approaches the particularity requirement of Rule 9(b). In describing a litigant's ordinary pleading burden under Rule 8(a), the *Twombly* Court wrote that stating a claim "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."<sup>229</sup> Further, the complaint must include factual allegations sufficient "to raise a right to relief above the speculative level."<sup>230</sup> In antitrust cases, that meant that the plaintiff had to offer a complaint with "enough factual matter (taken as true) to suggest that an agreement was made."<sup>231</sup> Clearly, requiring the pleading of enough facts that move a complaint from being conclusory and speculative to suggestive and plausible is tantamount to a particularity requirement.

The Court's attempt to disclaim the notion that it was in fact applying heightened pleading akin to that permitted under Rule 9(b) was unconvincing:

In reaching this conclusion, we do not apply any "heightened" pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished "by the process of amending the Federal Rules, and not by judicial interpretation." On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. Here, our concern is not that the allegations in the complaint were insufficiently "particular[ized]"; rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.<sup>232</sup>

The statement simply does not bear scrutiny. Why did the Court conclude that the plaintiffs' entitlement to relief was not plausible? According to the Court, "Although in form a few stray statements speak directly of agreement," "nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance."<sup>233</sup> In

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statement of the claim requirement of Federal Rule of Civil Procedure 8. Rule 9(b)'s particularity requirement does not mute the general principles set out in Rule 8; rather, the two rules must be read in harmony." (citation and internal quotation marks omitted).

<sup>229</sup> *Twombly*, 127 S. Ct. at 1965.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 1973 n.14 (citations omitted).

<sup>233</sup> *Id.* at 1970, 1971.

other words, even though the complaint alleged that an unlawful conspiracy was behind the challenged harmful conduct, the complaint lacked specific factual allegations that supported the allegation of conspiracy and discounted alternate explanations of the behavior. Requiring specific facts that back up a conclusory allegation of wrongdoing is the very definition of particularized pleading. Thus, it is unclear how the Court can view its holding in *Twombly* as imposing anything but a particularity requirement of the kind found in Rule 9(b).

That the new plausibility pleading of Rule 8(a) approaches the particularized pleading of Rule 9(b) becomes even more clear when one views the pleading standard rejected by the Supreme Court in 2001, in *Swierkiewicz v. Sorema N.A.*<sup>234</sup> In that case, the Court faced a lower court standard that required plaintiffs to plead enough facts that supported an inference of discrimination when asserting claims under the Civil Rights Act of 1964.<sup>235</sup> In the face of a complaint alleging that the plaintiff had been unlawfully terminated on account of his age and national origin, the district court concluded, and the Second Circuit panel agreed, that the plaintiff "ha[d] not adequately alleged circumstances that support an inference of discrimination" because he was not offering direct evidence of discrimination.<sup>236</sup> The Supreme Court had no trouble referring to the Second Circuit's requirement as a "heightened pleading standard" of the kind restricted to certain enumerated circumstances under Rule 9(b).<sup>237</sup> According to the Court, then, the Second Circuit rule, which called for more particulars supporting the allegation of discrimination, was inappropriate because Rule 9(b) makes no mention of employment discrimination claims.<sup>238</sup> Further, the Court wrote, "[a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"<sup>239</sup>

The plausibility pleading standard announced by the Court in *Twombly* is no different from the Second Circuit's heightened pleading standard that the Court rejected in *Swierkiewicz*.<sup>240</sup> Both standards require that specific facts supporting the inference of wrongdoing (dis-

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<sup>234</sup> 534 U.S. at 509.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 512-13.

<sup>238</sup> *Id.* at 513.

<sup>239</sup> *Swierkiewicz*, 534 U.S. at 515.

<sup>240</sup> See *Twombly*, 127 S. Ct. at 1982 (Stevens, J., dissenting) ("Most recently, in *Swierkiewicz*, we were faced with a case more similar to the present one than the majority will allow." (citation omitted)).

crimination or an unlawful conspiracy) be alleged in the complaint.<sup>241</sup> Both standards were motivated by a desire to make it more difficult for plaintiffs with groundless claims to move forward with burdensome litigation. And both cases involved plaintiffs who made conclusory allegations of wrongdoing (discrimination and an unlawful conspiracy) buttressed by factual allegations offering only indirect, inferential support for the central claims.<sup>242</sup> But if Rule 9(b) suggested the impropriety of a judicially crafted heightened pleading standard in the context of the Second Circuit's rule in *Swierkiewicz*, then the same analysis applies to the Court's judicially-crafted heightened pleading standard that emerges from *Twombly*. For the Court to promulgate the very class of pleading standard that it only recently rejected in *Swierkiewicz* simply underscores that the Court has clearly changed its views regarding the imperative of revising pleading standards to stave off frivolous claims and discovery abuse. In sum, plausibility pleading is heightened particularized pleading plain and simple.

### 3. Habeas Corpus Rule 2(c)

Before proceeding to the policy critique, it is worth noting another basis for doubting the accuracy of the Court's reading of Rule 8(a)(2). When one looks at Rule 2(c) of the Rules Governing Proceedings under § 2254<sup>243</sup> (the "Habeas Rules") and commentary surrounding that rule, it is clear that Rule 8(a)(2) should not be read to require plausibility pleading or even fact pleading. In 2005, in *Mayle v. Felix*, the Supreme Court compared Rule 8(a) with the heightened pleading requirement of Habeas Rule 2(c):

Under Rule 8(a), applicable to ordinary civil proceedings, a complaint need only provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Habeas Corpus Rule 2(c) is more demanding. It provides that the petition must "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground."<sup>244</sup>

Clearly, if Habeas Rule 2(c) is "more demanding" than Rule 8(a) because it requires a petition to "state the facts supporting each ground"

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<sup>241</sup> *Id.* at 1965 (majority opinion); *Swierkiewicz*, 534 U.S. at 509.

<sup>242</sup> *Twombly*, 127 S. Ct. at 1970; *Swierkiewicz*, 534 U.S. at 508–09, 514.

<sup>243</sup> Rules Governing Section 2254 Cases in the United States District Courts, Rule 2(c), 28 U.S.C. § 2254 (2000).

<sup>244</sup> *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (citations omitted).



for relief, then that suggests that it is improper to hold—as the *Twombly* Court did—that under Rule 8(a) (2) a complaint must make factual allegations that are “enough to raise a right to relief above the speculative level.”<sup>245</sup>

Reference to the Advisory Committee's Notes on the Habeas Rules makes the point even more clear. In explaining Habeas Rule 2(c)'s requirement that a petition state the facts supporting each ground, the Committee wrote that, in the past, petitions frequently contained mere conclusions of law, unsupported by facts.<sup>246</sup> The Committee explained that “[s]ince it is the relationship of the facts to the claim asserted that is important, these petitions were obviously deficient.”<sup>247</sup> The Committee went on to explain in its Note to Rule 4, concerning a judge's preliminary review of the petition, that “‘notice’ pleading is not sufficient, for the petition is expected to state facts that point to a ‘real possibility of constitutional error.’”<sup>248</sup>

What is interesting here is that the Advisory Committee explicitly distinguished the Habeas Rules from Rule 8(a)'s “notice” pleading.<sup>249</sup> Clearly, then, there must be some difference between Rule 8(a)'s standard and the standard of Habeas Rule 2(c). Further, the Committee indicated that the facts that are pleaded in a habeas petition must point to a “*real possibility* of constitutional error,” revealing that the facts must be highly suggestive of a meritorious petition, thus pushing the petition over the line from speculation to plausibility.<sup>250</sup> How then can the *Twombly* Court interpret Federal Civil Rule 8(a)'s pleading standard to require factual allegations that make a claim plausible? Such a standard is no different than that of Habeas Rule 2(c), even though the Advisory Committee distinguished the two, suggesting that *Twombly's* reading of Rule 8(a) was inappropriate.

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<sup>245</sup> *Twombly*, 127 S. Ct. at 1965.

<sup>246</sup> Rules Governing Section 2254 Cases in the United States District Courts, Rule 2, 28 U.S.C. § 2254 (2000) advisory committee's note to the 1976 adoption.

<sup>247</sup> *Id.*

<sup>248</sup> Rules Governing Section 2254 Cases in the United States District Courts, Rule 4, 28 U.S.C. § 2254 (2000) advisory committee's note to the 1976 adoption (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970)).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* (quoting *Aubut*, 431 F.2d at 689) (emphasis added).

## B. Policy Critique

### 1. From a Liberal to Restrictive Ethos

The featured rationale for the Supreme Court's revision of federal civil pleading standards under Rule 8(a)(2) was its concern that the former standard too easily allowed plaintiffs with groundless claims to impose on defendants the "enormous expense of discovery."<sup>251</sup> The Court also alluded to "the increasing caseload of the federal courts"<sup>252</sup> and a need to prevent "discovery abuse"<sup>253</sup> in support of its tighter standard. The *Twombly* standard is troubling because, in relying on such concerns, the Court appears to have exalted goals of sound judicial administration and efficiency above the original core concern of the rules: progressive reform in favor of expanding litigant access to justice. Thus I believe what we are witnessing is simply the latest and perhaps final chapter in a long saga that has moved the federal civil system from a liberal to a restrictive ethos.

The "liberal ethos" of the Federal Rules refers to the underlying policy toward which the rules as a whole incline: the facilitation of litigant access in the interest of reaching merits-based resolutions of cases.<sup>254</sup> We have already reviewed in detail those aspects of the rules that call for liberality in pleading.<sup>255</sup> But the rules as a whole—at least initially—reflected the liberal ethos:

The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but

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<sup>251</sup> See *Twombly*, 127 S. Ct. at 1967.

<sup>252</sup> *Id.* (quoting *Car Carriers, Inc.*, 745 F.2d at 1106).

<sup>253</sup> *Id.*

<sup>254</sup> Marcus, *supra* note 23, at 439 ("Sobered by the fate of the Field Code, Dean Clark and the other drafters of the Federal Rules set out to devise a procedural system that would install what may be labeled the 'liberal ethos,' in which the preferred disposition is on the merits, by jury trial, after full disclosure through discovery.")

<sup>255</sup> See *supra* notes 197–242 and accompanying text; see also *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) ("[O]rdinary pleading rules are not meant to impose a great burden upon a plaintiff." (citing *Swierkiewicz*, 534 U.S. at 513–15)).

should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.<sup>256</sup>

Because merits-based resolutions at trial were the overall goal of procedure, then, the pleadings were not intended to offer courts an opportunity to scrutinize the merits of the claim. Thus, as the Court has stated, "Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits."<sup>257</sup>

There is no question that over the past twenty-five years the liberal ethos of civil procedure has been challenged. Indeed, a series of reforms made in the wake of the Pound Conference of 1976,<sup>258</sup> have explicitly sought to curtail perceived litigation abuse through changes to the rules that give courts greater authority to eliminate frivolous issues<sup>259</sup> and control the bringing of baseless claims.<sup>260</sup> Summary

<sup>256</sup> *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); see also *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986) ("[T]he principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts." (citation and internal quotation marks omitted)), superseded by FED. R. CIV. P. 15.

<sup>257</sup> *Swierkiewicz*, 534 U.S. at 515; see also *Scheuer*, 416 U.S. at 236 ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."), abrogated by *Hurlow*, 457 U.S. 800.

<sup>258</sup> See generally THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (A. Leo Levin & Russell R. Wheeler eds., 1979).

<sup>259</sup> FED. R. CIV. P. 16(c)(1) (permitting courts to take action with respect to "the formulation and simplification of the issues, including the elimination of frivolous claims or defenses"). In its notes to the 1983 amendment of Rule 16, the Advisory Committee wrote:

The reference in Rule 16(c)(1) to "formulation" is intended to clarify and confirm the court's power to identify the litigable issues. It has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone. The notion is emphasized by expressly authorizing the elimination of frivolous claims or defenses at a pretrial conference.

FED. R. CIV. P. 16 advisory committee's note to the 1983 amendments (citations omitted).

<sup>260</sup> Rule 11 was amended in 1983 in an effort to reduce the number of "frivolous" claims brought into the system. See FED. R. CIV. P. 11 advisory committee's note to the 1983 amendments. The Advisory Committee wrote:

Experience shows that in practice Rule 11 has not been effective in deterring abuses. . . . The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation.

judgment has been reaffirmed (some would argue strengthened) as a screening device<sup>261</sup> and discovery has been tightened in its scope.<sup>262</sup> But heretofore, this move away from the liberal ethos had not reached the pleading stage, at least not from the Supreme Court's perspective.<sup>263</sup> As noted in Part I, the Court had been steadfast in its commitment to liberal pleading from *Conley* through its unanimous opinion in *Swierkiewicz*.<sup>264</sup>

*Twombly* runs counter to the liberal ethos that had still characterized the pleading stage because rather than "guarantee[ing] that bona fide complaints [are] carried to an adjudication on the merits"<sup>265</sup>—which is precisely what the *Conley* standard facilitated—plausibility pleading rejects potentially valid, meritorious claims. Under plausibility pleading, one has no confidence that a plaintiff's dismissed claim was frivolous or nonmeritorious because it permits the dismissal of complaints that assert wrongdoing, but merely offer supporting factual allegations consistent with—rather than factually suggestive of—liability. Thus, although discovery might reveal facts that prove liability, that opportunity is preemptively foreclosed and the investigation for supportive facts that the rules contemplate<sup>266</sup> never occurs.

Indeed, it is a greater shame that discovery is foreclosed for such complainants in circumstances where the needed supporting facts lie within the exclusive possession of the defendants, which can be the case in antitrust cases lacking direct evidence of a conspiracy. As the Court has noted on this score, "summary procedures should be used

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*Id.* (citations omitted). Rule 11 was revised again in 1993 to pull the rule back in the liberal direction, the sense being that the 1983 amendment had gone too far in restricting access by chilling the filing of valid claims. See generally Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171 (1994) (discussing in depth the 1983 and 1993 amendments to Rule 11).

<sup>261</sup> See generally *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>262</sup> See FED. R. CIV. P. 26 advisory committee's note to the 2000 amendments ("The scope of the disclosure obligation is narrowed to cover only information that the disclosing party may use to support its position.").

<sup>263</sup> Recall that lower courts had long departed from the liberal ethos in pleading as evidenced in their persistent imposition of heightened pleading standards over the past roughly thirty years. See Fairman, *supra* note 9, at 1011–59.

<sup>264</sup> See *supra* notes 20–53 and accompanying text; see also *supra* notes 173 & 174 and accompanying text.

<sup>265</sup> *Swowitz*, 383 U.S. at 373.

<sup>266</sup> See FED. R. CIV. P. 11(b)(3) (stating that counsel may make allegations that "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery").

sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.<sup>267</sup> A liberal pleading standard is thus particularly appropriate in such instances because the plaintiff has not yet had the opportunity to uncover decisive supporting information.<sup>268</sup> Professor Marcus well stated the point in response to the heightened pleading standards being imposed by lower federal courts when he wrote,

[W]here the plaintiff is unable to provide details because only the defendant possesses such information, no such confidence is possible. To the contrary, it may be that the defendant has so effectively concealed his wrongdoing that the plaintiff can unearth it only with discovery. To insist on details as a prerequisite to discovery is putting the cart before the horse.<sup>269</sup>

Rather than dismissing a complaint offering factual allegations that make a valid claim only a possibility, an action should progress until the point at which the court can determine that the claim is indeed meritless.<sup>270</sup> Plausibility pleading permits dismissal before that judgment can be made and in fact permits dismissal without requiring such a judgment to be made. By rejecting *Conley's* "no set of facts" formulation, courts no longer have to determine that no possible reading of the plaintiff's allegations would support a claim. Rather, courts may respond to complaints as follows: "The allegations are consistent with a claim, but also could be consistent with no claim; because the allegations could go either way, and I've been given no additional facts that preponderate in the direction of a claim, the complaint is dismissed."

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<sup>267</sup> *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962).

<sup>268</sup> See *Hosp. Bldg. Co.*, 425 U.S. at 746 ("[I]n antitrust cases, where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." (citation and internal quotation marks omitted)).

<sup>269</sup> Marcus, *supra* note 23, at 468 (citations omitted).

<sup>270</sup> If the expense of discovery is a concern, courts can limit discovery to certain topics focused on verifying that a factual basis for the claims exist. See *Twombly*, 127 S. Ct. at 1987 n.13 (Stevens, J., dissenting) ("Rule 26(c) specifically permits a court to take actions 'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense' by, for example, disallowing a particular discovery request, setting appropriate terms and conditions, or limiting its scope."). Further, courts should be able to shift some of the cost of such limited discovery to the plaintiffs under Rule 26(b), action that would give plaintiffs an additional incentive (beyond Rule 11) to plead valid, viable claims and to limit their initial discovery efforts to minimize this expense. See FED. R. CIV. P. 26(b).

After a *Twombly* dismissal, observers can only say, "He might have had a claim but he failed to 'prove' it." One cannot say, "He did not have a claim" or "His claim was groundless."

## 2. The Impropriety of Pleadings Decisions to Screen Out Groundless Claims

In addition to running counter to the liberal ethos of procedure, plausibility pleading assigns to complaints a function they cannot truly fulfill. A foundational understanding on which the Federal Rules were based was the belief that pleadings poorly fulfilled the range of functions historically assigned to them under the predecessor regimes of code pleading and common law pleading.<sup>271</sup> Among the functions that pleadings are most ineffective at fulfilling is providing courts the ability to determine whether the plaintiff's claims are meritorious or can be proved. Charles Clark made this point when he wrote, "Experience has shown, therefore, that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function."<sup>272</sup> Pleadings cannot prove, even provisionally, a plaintiff's case because a plaintiff has yet to have access to all relevant facts in the case. Thus, Clark went on to explain:

[T]hrough the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate function. . . . There is certainly no longer reason to force the pleadings to take the place of proof, and to require other ideas than simple concise statements, free from the requirement of technical detail.<sup>273</sup>

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<sup>271</sup> CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 66, at 458, § 68, at 470 (6th ed. 2002) ("The draftsmen of the Civil Rules proceeded on the conviction, based on experience at common law and under the codes, that pleadings are not of great importance in a lawsuit. . . . The keystone of the system of procedure embodied in the rules is Rule 8. . . . The other procedural devices of the rules—broad joinder, discovery, free amendment, and summary judgment—rest on these provisions about pleadings.")

<sup>272</sup> Clark, *supra* note 25, at 977.

<sup>273</sup> *Id.*; see also Charles E. Clark, *Summary Judgments*, 2 F.R.D. 364, 366 (1943) ("[T]he trend is to such simple forms of allegation and denial as are shown by the forms attached to the new federal rules. . . . Under such a system of pleading, procedure for entering summary judgments, for making pre-trial orders, and for extensive discovery before trial is most valuable, if not indispensable. . . . These [devices] are the more necessary for prompt and effective adjudication of litigation as we realize that the formal allegations of the parties in actual experience have never served this function. . . .").

Of course, where subjective intent or state of mind is an element of the claim, a plaintiff's complaint will be all the more unable to present proof with specificity, a fact that Rule 9(b) seems to acknowledge.<sup>274</sup> The *Twombly* standard confidently neglects all of this wisdom by shifting to the plaintiff what amounts to a burden of proof at the pleading stage.<sup>275</sup> Rather than benefiting from a presumption that a generally alleged claim will be tested for support—after discovery—at a later stage such as summary judgment, plaintiffs now must offer their support up front prior to discovery. If plaintiffs fail to meet the burden of marshalling facts that establish their asserted claims, the complaint will be dismissed.

But identifying claims suspected of having shaky or insufficient factual support is not the proper role of pleadings in our system. Rather, the Federal Rules assign the function of screening out unsupported claims to later stages in the litigation. Specifically, the Court has isolated the summary judgment device found in Rule 56 as the appropriate mechanism for such screening:

Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims

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<sup>274</sup> FED. R. CIV. P. 9(b) ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally."); see also Fairman, *supra* note 155, at 592 ("By its very nature, proof of a defendant's subjective intent is peculiarly in the defendant's own hands. The Federal Rules recognize that pleading intent with specificity is both unworkable and undesirable and explicitly allow intent to be averred generally.")

<sup>275</sup> Richard Marcus offered the same description of the heightened pleading standards that lower federal courts had come to embrace over the years:

The insistence on more details is really a demand for an offer of proof—some specification of evidence that will raise an inference that the defendant's state of mind was as alleged. This creation of a new burden of production effects a subtle but real shift in the substantive law because plaintiff's lack of evidence provides insufficient assurance that plaintiff in fact has no valid claim against defendant.

Marcus, *supra* note 23, at 468 (citation omitted).

and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.<sup>276</sup>

Or, as the Court said more recently and succinctly in *Swierkiewicz*, "claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim."<sup>277</sup> It is particularly appropriate to vest summary judgment with the screening function given the Supreme Court's interpretation of Rule 56 in 1986, in *Celotex Corp. v. Catrett*,<sup>278</sup> after which parties carrying the burden at trial are obligated to bring forward evidence supporting their claims when faced with a summary judgment challenge.<sup>279</sup>

Summary judgment under Rule 56 is not the only device that allows courts to screen out claims lacking merit.<sup>280</sup> First, the obligations of Rule 11, as already discussed, require counsel and parties to do some self-screening, being sure only to put forward claims that have or are likely to have factual support and that have some arguable basis in the law.<sup>281</sup> One can say then that the *Twombly* Court's statement that the plausibility standard would make sure that there is a "reasonably founded hope that the [discovery] process will reveal relevant evidence" in support of the claim<sup>282</sup> steps directly on the toes of Rule 11, because under that rule counsel already are certifying that asserted

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<sup>276</sup> *Celotex Corp.*, 477 U.S. at 327; see also *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998) ("[S]ummary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial.").

<sup>277</sup> *Swierkiewicz*, 534 U.S. at 514; see also *id.* at 512 ("This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."); *Leatherman*, 507 U.S. at 168 ("[F]ederal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.").

<sup>278</sup> 477 U.S. 317.

<sup>279</sup> *Id.* at 324 ("Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'").

<sup>280</sup> Justice Stevens offers an extended recitation and review of the array of rules that empower courts to manage and control litigation in a way that will prevent baseless claims from progressing too far and imposing too much undue burden and expense. See *Twombly*, 127 S. Ct. at 1987 n.13 (Stevens, J., dissenting).

<sup>281</sup> Fed. R. Civ. P. 11(b).

<sup>282</sup> *Twombly*, 127 S. Ct. at 1967 (citations omitted).



claims and allegations are warranted by the evidence or are likely to have such support after discovery.<sup>283</sup>

Second, under Rule 16, courts are given quite a free hand to shape the issues in a case and eliminate frivolous claims,<sup>284</sup> an authority that is independent of the court's ability to dismiss claims under Rule 12(b)(6) or Rule 56.<sup>285</sup> Third, the scope of discovery has been narrowed by the 2000 amendments to Rule 26.<sup>286</sup> Under that rule, courts retain the authority to constrain discovery further to minimize undue burden and expense in relation to the claims raised in the case.<sup>287</sup> Each of these rules, in union with the summary judgment rule, combine to provide powerful mechanisms for ensuring that meritless claims do not proceed to trial. These tools also serve to ensure that, to the extent that claims do proceed beyond the pleadings, the costs and burdens incurred along the way can be minimized by the court—for example, through the provision of limited discovery on a single dispositive issue.

Rather than defer to these other devices as the proper screening mechanisms, the *Twombly* Court rejects them as ineffective and turns the entire system on its head by transforming the 12(b)(6) motion to dismiss into the front-end gatekeeper against groundless claims. By requiring plaintiffs to offer factual allegations that report the factual basis for their assertions of liability and to do so in a way that makes liability plausible, the *Twombly* Court effectively has moved the summary judgment evaluation up to the pleading stage.<sup>288</sup> The only distinction is that at the pleading stage, the plaintiff's factual allegations may simply be asserted rather than evidenced. But in both instances, if the facts presented do not present a plausible picture of liability, then the claims will not survive.

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<sup>283</sup> FED. R. CIV. P. 11(b)(3).

<sup>284</sup> FED. R. CIV. P. 16(c)(1) ("At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to the formulation and simplification of the issues, including the elimination of frivolous claims or defenses.").

<sup>285</sup> See, e.g., *MacArthur v. San Juan County*, No. 00-584, 2005 WL 2716300, at \*5 (D. Utah Oct. 21, 2005) ("Pretrial identification of triable issues under Rule 16(c)(1) proceeds under its own power, without reference to summary judgment under Rule 56 or any 'pleadings-only' analysis of legal sufficiency under Rule 12(b)(6).").

<sup>286</sup> FED. R. CIV. P. 26 advisory committee's note to the 2000 amendments.

<sup>287</sup> FED. R. CIV. P. 26(b)(2).

<sup>288</sup> Cf. *Twombly*, 127 S. Ct. at 1983 (Stevens, J., dissenting) ("[I]t should go without saying in the wake of *Swierkiewicz* that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage.").

Such was the case in 1986, in *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*,<sup>289</sup> in which the Supreme Court criticized a circuit court reversal of summary judgment in an antitrust case because “[t]he court apparently did not consider whether it was as plausible to conclude that petitioners’ price-cutting behavior was independent and not conspiratorial.”<sup>290</sup> The Supreme Court upheld the entry of summary judgment because it did not believe that the claim of conspiracy was plausible given facts that failed to establish “any plausible motive to engage in the conduct charged.”<sup>291</sup> *Twombly*’s dismissal echoes the approach of the *Matsushita* Court: “when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.”<sup>292</sup> Thus, the *Twombly* Court is requiring no less than what it required of the *Matsushita* plaintiffs but now at the pleading stage: the presentation of facts sufficient to set forth a plausible picture of liability.<sup>293</sup> Such a return to fact pleading narrows if not eviscerates the Court’s previous delineation between scrutiny under Rule 12(b)(6) and Rule 56, given the latter rule’s explicit command that parties responding to summary judgment motions “must set forth specific facts” rather than the “mere allegations” that would be permissible at the complaint stage.<sup>294</sup>

To the extent that *Twombly* endorses parity between the level of scrutiny applied to claims at the Rule 12(b)(6) and Rule 56 stages—with the only distinction being that between alleged facts and evidenced facts—such a development is unwelcome. Such an approach

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<sup>289</sup> 475 U.S. 574.

<sup>290</sup> *Id.* at 581.

<sup>291</sup> *Id.* at 596.

<sup>292</sup> *Twombly*, 127 S. Ct. at 1966 (speaking of “[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement”).

<sup>293</sup> *Id.*

<sup>294</sup> FED. R. CIV. P. 56(e). The Supreme Court made this clear distinction, for example, in *Lujan v. Defenders of Wildlife*.

At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we “presum[e] that general allegations embrace those specific facts that are necessary to support the claim.” [*Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 889 (1990)]. In response to a summary judgment motion, however, the plaintiff can no longer rest on such “mere allegations,” but must “set forth” by affidavit or other evidence “specific facts,” Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true . . . .” [*Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 115 n.31 (1979)].

504 U.S. 555, 561 (1992).

would be wholly out of line with the original liberal vision of the rules and would ultimately saddle plaintiffs in disfavored actions like anti-trust and civil rights claims with burdens they will have difficulty meeting.<sup>295</sup> Further, it is inappropriate to apply the type of scrutiny applied at the summary judgment stage to the pleadings of litigants that have yet to have access to discovery. As already noted, Rule 11 contemplates that postcomplaint discovery will serve the purpose of supplying factual support that might have been lacking *ex ante*.<sup>296</sup> Such an allowance is vital for plaintiffs pursuing those claims requiring evidence held only by the defendants. By imposing heightened plausibility pleading on litigants in such circumstances, the Court makes it possible that valid claims that could have found support through discovery never make it into the system,<sup>297</sup> a result never envisioned by those who crafted the Federal Rules.

Although I reject plausibility pleading as a valid means of weeding out meritless claims, it is worth acknowledging that the Supreme Court's concerns surrounding the cost of modern litigation are legitimate and that something needs to be done to combat the problems the Court identifies.<sup>298</sup> Indeed, a revision of civil pleading standards may be an appropriate part of that solution. But requiring plaintiffs to plead facts showing "plausible" entitlement to relief is not the answer. Perhaps simply requiring the pleading of facts, without taking the additional step of requiring facts that show plausibility would be a useful innovation (if proposed by the Civil Rules Advisory Committee). Such a change would prevent plaintiffs from relying on wholly conclusory assertions of liability without permitting courts to scrutinize whether those facts are sufficiently suggestive to allow further discovery. Even with this approach, however, plaintiffs faced with information asymmetry—that is, an inability to identify direct evidence of wrongdoing at the pleading stage—would still have some

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<sup>295</sup> See Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 371-73 (1990) (discussing this issue in the civil rights context).

<sup>296</sup> FED. R. CIV. P. 11(b)(3).

<sup>297</sup> *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2512 n.9 (2007) ("Any heightened pleading rule, including Fed. Rule Civ. Proc. 9(b), could have the effect of preventing a plaintiff from getting discovery on a claim that might have gone to a jury, had discovery occurred and yielded substantial evidence.").

<sup>298</sup> *Twombly*, 127 S. Ct. at 1966-67.

difficulty going forward.<sup>299</sup> To address that challenge, perhaps another piece of the solution would be to provide such plaintiffs with the opportunity for very limited initial discovery to pursue such facts. How would such plaintiffs be identified? Would it be appropriate for the Rules to make such determinations based on the type of claim asserted, for example whether the claim involves negligence or an antitrust conspiracy?

Whether these suggestions are good ideas or not is not the point. Rather, the point is that the rising cost of complex litigation—particularly in the class action context—is a valid concern and there may be a way that civil pleading standards could be revised to address the issue. As noted earlier, however, the Civil Rules Advisory Committee—in consultation with the entire legal community—would be much better suited to the task.<sup>300</sup> By taking the rules as a whole into account and by balancing the interests of defendants desiring to avoid unwarranted litigation expenses and the interests of plaintiffs pressing potentially valid claims, the Committee is better suited to develop a nuanced solution to address the issue in a targeted fashion. It is in that regard that the Court's new plausibility standard falls short.

#### IV. PLEADING PROPERLY UNDERSTOOD: FUNCTIONAL PLEADING

If it is improper to require a complaint to present factual detail that sets forth a plausible picture of liability, what can we expect from pleadings? What is their proper function? Charles Clark offered the following suggestion: "We can expect [from pleadings] a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result."<sup>301</sup> From this simple statement one can discern a proper understanding of the generalized pleading system intended by Rule 8(a)(2). Rather than terming this system "notice" pleading, the term *functional pleading* is more useful to focus attention on the purposes behind requiring the complaint to provide notice and thereby isolate the proper circumstances under which a complaint should be deemed to have failed to state a claim.<sup>302</sup> Under a functional pleading

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<sup>299</sup> See Posting of Randy Picker to The University of Chicago Law School Faculty Blog, [http://uchicagolaw.typepad.com/faculty/2006/11/reading\\_twombly.html](http://uchicagolaw.typepad.com/faculty/2006/11/reading_twombly.html) (Nov. 28, 2006, 09:46 AM) (defining "information asymmetry" as "what I know that you don't know").

<sup>300</sup> *Leatherman*, 507 U.S. at 168; see also *Crawford-El*, 523 U.S. at 595.

<sup>301</sup> Clark, *supra* note 25, at 977.

<sup>302</sup> Charles Clark, early in the history of the Federal Rules, emphasized that the concept of "notice pleading" had to be given greater definition based on the underlying pur-

system, stating the claim in a complaint fulfills the overarching function of notice, but the purpose of doing so is primarily twofold: to give the defendant something to which to respond (the *instigation* function) and to identify the nature and contours of the dispute for purposes of discovery, judicial case management, determination of the jury right,<sup>303</sup> and *res judicata*<sup>304</sup> (the *framing* function).<sup>305</sup> I would allow that a complaint serves a third function, not by design but rather in response to a motion to dismiss under Rule 12(b)(6). That is, the complaint permits the defendant and the court to identify facially *invalid* claims that should be dismissed (to be distinguished from “implausible,” “unsubstantiated” or “groundless” claims), something one might call the *filtering* function. A failure of the complaint on this latter count is the measure of whether it properly states a claim.

Speaking, then, to the filtering function, it should be understood that by filtering I do not mean to suggest that groundless or implausible claims are to be identified at the pleading stage as suggested by the *Twombly* Court. We have already discussed the impropriety of that type of screening at the pleading stage.<sup>306</sup> Rather, the filter is one that is set to screen out only those complaints that assert as wrongdoing conduct that is *clearly* lawful. Put differently, the only way in which such a statement of a claim should be able to fail is if it *conclusively* reveals the absence of a claim on its face.<sup>307</sup> Conversely, a complaint that alleges

poses that the pleadings were intended to serve: The usual modern expression, at least of text writers, is to refer to the notice function of pleadings; notice of the case to the parties, the court, and the persons interested. This is a sound approach so far as it goes; but content must still be given to the word “notice.” Clark, *supra* note 20, at 460.

<sup>303</sup> *Id.* at 457 (stating that pleadings will “show the type of case brought, so that it may be assigned to the proper form of trial, whether by the jury in negligence or contract, or to a court, referee, or master, as in foreclosure, divorce, accounting, and so on”).

<sup>304</sup> See *id.* at 456–57 (“[Pleadings] must sufficiently differentiate the situation of fact which is being litigated from all other situations to allow of the application of the doctrine of *res judicata*, whereby final adjudication of this particular case will end the controversy forever.”).

<sup>305</sup> Richard Marcus has properly noted that the liberality of amendments and the ability of courts to define the issues via pretrial orders minimizes the importance of the framing function of the pleadings. See Marcus, *supra* note 31, at 1756 (“[P]leadings set the parameters for the ensuing litigation of the case. The scope of discovery and relevance rulings at trial depend on what the pleadings place in issue. . . . [I]ncreased judicial management means that pretrial orders often supersede the pleadings, and the liberality of amendment also shows that setting outside limitations for the scope of litigation is not an important objective for pleading practice.” (citation omitted)).

<sup>306</sup> See *supra* notes 271–300 and accompanying text.

<sup>307</sup> Marcus, *supra* note 23, at 493 (“The circumstances in which . . . merits decisions are possible on the pleadings . . . are distressingly limited. . . . [S]uch situations fall generally

wrongdoing—even if done conclusorily with only skeletal facts—should suffice regardless of whether the plaintiff has identified any facts explicating the conclusory legal terms in the complaint. When the defect in the complaint is that it lacks sufficient detail, that is a defect that undermines the instigation and framing functions of the complaint. In other words, a complaint with insufficient detail either fails to give enough information to enable the defendant to “frame a responsive pleading”—something that should be a rarity<sup>308</sup>—or is insufficiently precise to reliably delimit the scope of the allegations so that discovery may remain within certain bounds. The appropriate remedy for such defects is the grant of a motion for a more definite statement,<sup>309</sup> not dismissal of the claim.<sup>310</sup> The defendant, then, is entitled to look to the pleadings for notice, but must rely on seeking more information rather than a dismissal when such notice is lacking.

An illustration will clarify the expectations of functional pleading. If a complaint alleged, “The defendant committed a battery against me on June 1, 2007, causing personal injuries for which I seek \$100,000 in

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into two categories, those in which more detail will reveal a fatal defect and those in which sufficient detail will show that the defendant has not violated the plaintiff’s rights.”).

<sup>308</sup> See Fairman, *supra* note 9, at 992–93 (“In the rare case where a complaint is too vague to provide a defendant notice to prepare a responsive pleading, Rule 12(e) provides the tool for clarity.”). After all, a defendant requires only sufficient detail to frame a responsive pleading (consisting of admissions and denials), not to build its case. See Marcus, *supra* note 31, at 1756 (“[I]t is hard to believe that defendants will find it difficult to deny plaintiff’s allegations because the complaint is vague, and defendant’s ability to assert affirmative defenses turns little on the clarity of the complaint.”). Even in *Bell Atlantic Corp. v. Twombly*, the majority’s suggestion that defendants would not know where to begin to respond to plaintiffs’ conclusory allegations, see 127 S. Ct. 1955, 1970 n.10 (2007), is not credible. As Justice Stevens pointed out in his dissent, “A defendant could, of course, begin by either denying or admitting the charge.” *Id.* at 1987 n.12 (Stevens, J., dissenting). Discovery, not the pleadings, is the mechanism for collecting sufficient details to build one’s defense. See, e.g., *Fed. Air Marshals v. United States*, 74 Fed. Cl. 484, 488 (Fed. Cl. 2006) (“Defendant also requests that this court grant its Motion For A More Definite Statement and require plaintiffs to specify during which pay periods they received insufficient compensation. . . . Plaintiffs have adequately pleaded their claim for overtime compensation for the years during which defendant failed to comply with FLSA. Considering defendant has control over these records itself, it can easily access those documents during discovery and better establish the time periods in question.”).

<sup>309</sup> FED. R. CIV. P. 12(e); see also Marcus, *supra* note 31, at 1755–56 (“[P]leading motions may serve to assure the defendant of notice of the basis for the suit. The criteria for the motion for a more definite statement are keyed precisely to this objective . . . .” (citation omitted)).

<sup>310</sup> See *Twombly*, 127 S. Ct. at 1985 n.9 (Stevens, J., dissenting) (“The remedy for an allegation lacking sufficient specificity to provide adequate notice is, of course, a Rule 12(e) motion for a more definite statement.” (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002))).

damages," it could not be denied that unlawful conduct has been described and the defendant has been identified as the culprit. Of course, we do not know anything about the factual basis of the claim or whether it has any merit; it is a bald and unsupported conclusory assertion. Nevertheless, if the allegation in the complaint is true, that is, if it is true that the defendant committed battery against the plaintiff, then the plaintiff is indeed entitled to some relief.

How could a defendant respond to this claim? He could enter an answer denying the allegation in the complaint and proceed with discovery. Discovery would reveal the factual basis of the plaintiff's claim. If those facts do not actually make out a case of battery, the defendant could then move for summary judgment. Many courts would likely permit an alternative response, a motion for a more definite statement arguing that the complaint is too ambiguous to permit a responsive pleading. Although the defendant may be genuinely interested in what conduct the plaintiff is referring to in asserting that the defendant committed battery against her, such information does not seem to be essential to responding with an admission or a denial. Nevertheless, if a court did require a more definite statement in this instance and the plaintiff revealed that the underlying conduct for the battery was a harsh stare, that would give the defendant a basis for moving to dismiss the claim under Rule 12(b)(6) by arguing that such conduct does not constitute battery under the applicable law. Used in this way, the motion for a more definite statement would be a useful means of uncovering and eliminating facially invalid claims.<sup>311</sup>

Translated to the antitrust context, a comparable allegation would be: "During 2007 the defendants conspired and entered an agreement to restrain trade in the telecommunications market in violation of § 1 of the Sherman Act." The defendants certainly could form a response to such a charge; if they feel that they did not reach any such agree-

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<sup>311</sup> See Marcus, *supra* note 31, at 1759 ("[A]s a means for ferreting out a fatal fact in the plaintiff's claim, [a motion for a more definite statement] can foster merits decisions."). It seems to me that, strictly speaking, this would not be a proper use of Rule 12(e) because that rule is only properly invoked when the defendant cannot respond with an admission or denial, which in our example is not the case. See 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1376 (3d ed. 2004) ("[T]here should be a bias against the use of the Rule 12(e) motion as a precursor to a Rule 12(b)(6) motion or as a method for seeking out a threshold defense. This practice is not authorized by the language of the rule . . ."). However, given courts' substantial case management authority under Rule 16, courts would certainly be able to ferret out this information on their own to evaluate the validity of claims and thus there may be little offence in permitting defendants to instigate such scrutiny via the motion for a more definite statement.

ment, they should simply deny the claim, proceed with discovery, and seek summary judgment if they feel that the factual basis for the claim is insufficient. Alternatively, a motion for a more definite statement might reveal that the conspiracy is rooted in observed parallel conduct, the anticompetitive statement of one of the defendants, and a belief that during meetings among the defendants they actually entered into an agreement to restrain trade in the manner alleged. Such a clarification would give enough specification to focus discovery in a way that litigants could investigate whether there was evidence to support the allegation of an agreement. But as Rule 11(b) confirms, the plaintiff cannot be required at the complaint stage to articulate facts that they could only learn of and gain access to via discovery.<sup>312</sup> Thus it would be inappropriate to dismiss the above hypothetical complaint after the motion for a more definite statement because the plaintiff might be able to adduce facts that would support liability.

The *Twombly* Court's ultimate judgment was that because the above-prescribed course of action would permit the initiation of costly discovery,<sup>313</sup> the pleading standard needed to be tweaked in a way that would require plaintiffs to plead supporting facts that demonstrate liability first: "a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."<sup>314</sup> As discussed above, such a concern is unwarranted given other provisions in place to control litigation expense. Further, this concern is more properly vindicated through the ordinary rules amendment process.<sup>315</sup> The relevant point here is that a functional view of pleadings, focused exclusively on whether a complaint has properly fulfilled its instigation, framing, and limited filtering functions, would be helpful in cabining court scrutiny of complaints to its proper scope.

## CONCLUSION

Under plausibility pleading, rather than simply being required to state a claim, plaintiffs must now plead "enough facts to state a claim

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<sup>312</sup> FED. R. CIV. P. 11(b)(3).

<sup>313</sup> *Twombly*, 127 S. Ct. at 1967 ("Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence to support a § 1 claim." (citation and internal quotation marks omitted)).

<sup>314</sup> *Id.* at 1966.

<sup>315</sup> *Swierkiewicz*, 534 U.S. at 515; *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993).



to relief that is plausible on its face.”<sup>316</sup> When pleaded facts are consistent both with lawful and unlawful conduct, the pleader must include additional factual context that supports the idea that the conduct was unlawful. No longer are courts barred from dismissing 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” —the Court, in *Bell Atlantic Corp. v. Twombly*, has put that language to rest.<sup>317</sup>

The new plausibility standard, which is being and will continue to be applied by lower courts outside the antitrust context, bodes ill for plaintiffs who will now have to muster facts showing plausibility when such facts may be unavailable to them. Ultimately, *Twombly* raises the pleading bar to a point where it will inevitably screen out claims that could have been proven if given the chance. In doing so, the interests of protecting defendants against expensive discovery and managing burdensome caseloads were permitted to prevail over the interests of access and resolution on the merits that procedure’s original liberal ethos was designed to promote. Indeed, one may legitimately question whether the liberal ethos finds any remaining refuge in procedure, having lost one of its last perches within the area of pleading.

Perhaps the nature of modern complex litigation has changed sufficiently beyond the level addressed by the original drafters of the Federal Rules such that a revision in pleading standards is warranted if not long overdue. Open-access pleading has its downsides,<sup>318</sup> not the least of which is the easy ability under the American Rule to impose litigation expense on defendants with relative impunity in the absence of an attentive managerial judge. Amending the rules had been the means used to address such concerns and it is unclear why the Supreme Court acted outside of the amendment process to effect this most recent change. Perhaps formalizing plausibility pleading in the language of an amended rule would be too tricky a task, too controversial, or too much of an official departure from notice pleading. After all, the *Twombly* Court, as made clear in *Erickson v. Pardus*, likes to believe that notice pleading lives on and that not much has changed. Charles Clark would see things a bit differently I am sure.

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<sup>316</sup> *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).

<sup>317</sup> *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), *abrogated by Twombly*, 127 S. Ct. 1955.

<sup>318</sup> See Subrin, *supra* note 14, at 975–1000 (discussing the challenges of flexible equity-inspired rules—including liberal pleading and joinder rules—when applied to actions at law).