

Into the Wild: The Uneven and Self-Defeating Effects of Bell Atlantic v. Twombly

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COMMENTS

INTO THE WILD: THE UNEVEN AND SELF- DEFEATING EFFECTS OF *BELL ATLANTIC V.* *TWOMBLY*

JASON BARTLETT*

INTRODUCTION

Discovery in modern civil litigation is often an undertaking of immense proportions. As one report concluded, discovery can account for ninety percent of litigation costs where it is actively employed.¹ Overall, this represents nearly half of the cost of litigation in all cases.² Given this fact,

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¹ Amendments to Federal Rules of Civil Procedure, 192 F.R.D. 340, 357 (2000); *Judicial Conference Adopts Rules Changes, Confronts Projected Budget Shortfalls*, THIRD BRANCH (Admin. Office of the U.S. Courts, Wash. D.C.), Oct. 1999, at 10, available at <http://www.uscourts.gov/ttb/oct99ttb/october1999.html>. *But see* Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531 (1998) (commenting on an empirical study which showed that most discovery costs are modest and proportionate to parties' needs and stakes in cases).

² Amendments to Federal Rules of Civil Procedure, 192 F.R.D. at 357; *see* Samuel Issacharoff, *The Content of our Casebooks: Why Do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1265, 1272 (2002) (noting that discovery costs serve two important functions of expanding potential settlement zones and

the Supreme Court has often expressed a concern with “*in terrorem*” litigation brought by plaintiffs brandishing the threat of costly litigation in order to extort a hefty settlement on a largely meritless claim.³ For years, many thought that the liberal notice pleading standard established by the Federal Rules of Civil Procedure, which were adopted in 1938, made the potential for such abuse of discovery an unfortunate but necessary way of life.⁴ Since a complaint would not be dismissed unless it became clear that under “no set of facts” could the plaintiff succeed in his claim,⁵ defendants unable to prove the impossibility of their adversaries’ meritless claims were forced to endure at least some degree of discovery costs before the case could be dismissed. Indeed, the decision by the framers of the Federal Rules to put the focus of the litigation process on determining the merits of a claim through a flexible pretrial process rather than on the pleadings necessarily resulted in such an outcome.⁶

Recently, in *Bell Atlantic Corp. v. Twombly*,⁷ the Supreme Court attempted to diminish the likelihood of discovery abuse by raising the bar for plaintiffs bringing claims in federal court. In holding that a complaint must provide “enough facts to state a claim to relief that is plausible on its

bringing parties’ assessments of cases into line before trial).

³ See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (discussing how abusive use of the liberal discovery provisions of the Federal Rules of Civil Procedure “represent[s] an *in terrorem* increment of the settlement value”); see also Brief for the United States as Amicus Curiae Supporting Petitioners, *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (No. 05-1126), 2006 U.S. S. Ct. Briefs LEXIS 701, at *1 (arguing that meritless antitrust suits, “if not promptly dismissed, . . . create economic inefficiencies, chill pro-competitive conduct, and act as a drain on the economy because they force parties either to expend substantial resources to defend themselves or to succumb to *in terrorem* settlement demands”).

⁴ See Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 645 (“Perhaps a system in which judges pare away issues and focus investigation is too radical to contemplate in this country -- although it prevailed here before 1938, when the Federal Rules of Civil Procedure were adopted. The change could not be accomplished without abandoning notice pleading, increasing the number of judicial officers, and giving them more authority (the system depends on the presiding officer having the power to decide). If we are to rule out judge-directed discovery, however, we must be prepared to pay the piper. Part of the price is the high cost of unnecessary discovery -- impositional and otherwise.”); see also Tim Oliver Brandi, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 98 DICK. L. REV. 355, 370 (1993) (discussing how shareholder strike suits are facilitated by the liberal notice pleading standard).

⁵ *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *abrogated by Twombly*, 127 S. Ct. 1955; see Amber A. Pelot, *Bell Atlantic v. Twombly: Mere Adjustment or Stringent New Requirement in Pleading?*, 59 MERCER L. REV. 1371, 1377 (2008) (explaining that *Conley* “permitted dismissal only when proceeding to discovery would be futile” and that the “no set of facts” language has been “cited over 10,000 times since the decision”).

⁶ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (“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.”). See *Conley*, 355 U.S. at 48 (“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.”).

⁷ 127 S. Ct. 1955 (2007).

face,”⁸ the Court purported to erect a significant hurdle restricting entry to the costly discovery stage of litigation.⁹ However, while *Twombly* will certainly have a significant impact on motion practice in federal courts, the decision has inherent inconsistencies that will considerably limit its effect in curbing discovery costs. Part I of this Comment will examine how *Twombly* has significantly redefined the meaning of Rule 8(a)(2)’s command that a complaint provide “a short and plain statement of the claim showing that the pleader is entitled to relief,”¹⁰ and discuss the Court’s policy-based justification for its re-interpretation. Part II will examine the dual levels of confusion brought about by the *Twombly* Court’s lack of clarity regarding the meaning of “plausible” and the scope of the standard’s applicability. Finally, Part III will discuss how this “dual confusion” is a substantial hindrance to the achievement of the Court’s goal, namely, the protection of defendants against the costs of impositional discovery.

I. FROM *CONLEY* TO *TWOMBLY*: THE REDEFINITION OF THE MEANING OF RULE 8(A)

A. Pleading in Historical Context

Prior to *Twombly*, civil procedure textbooks referenced *Conley v. Gibson*¹¹ when describing the standard of 12(b)(6) motions. In that case, a group of black railroad workers brought suit against their local union after the group members were fired and replaced by white workers.¹² The plaintiffs alleged that, in violation of the National Railway Labor Act, the union failed to protect them against these discriminatory discharges.¹³ The district court granted the union’s motion to dismiss the complaint, and the court of appeals affirmed the judgment.¹⁴ The Supreme Court reversed,

⁸ *Id.* at 1974.

⁹ See Andree Sophia Blumstein, *A Higher Standard: ‘Twombly’ Requires More for Notice Pleading*, 43 TENN. B.J. 12, 12 (2007) (“Impelled by a sense that discovery, particularly complex litigation discovery, has been allowed to run amok, the court crafted a stricter standard of review for motions to dismiss, so that the legal viability of claims can be evaluated with greater scrutiny before discovery costs engulf the parties and the courts.”); see also Saritha Komatireddy Tice, *Recent Developments: A ‘Plausible’ Explanation of Pleading Standards: Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), 31 HARV. J.L. & PUB. POL’Y 827, 829 (2008) (reflecting the majority’s alarm over rising discovery costs and affects on settlement values).

¹⁰ FED. R. CIV. P. 8(a)(2).

¹¹ 355 U.S. 41 (1957).

¹² *Id.* at 42–43.

¹³ *Id.* at 43.

¹⁴ *Id.* at 43–44. The union moved for dismissal on several grounds, including lack of jurisdiction

finding that the plaintiffs had stated a claim upon which relief could be granted under Rule 8 of the Federal Rules of Civil Procedure.¹⁵ Writing for the Court, Justice Black articulated the language that would become the oft-quoted mantra of judges, practitioners, and law students¹⁶ alike:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.¹⁷

The plaintiffs had alleged that they were wrongfully discharged and that the union had failed to protect their jobs or to help them with their grievances on account of their race.¹⁸ Since these allegations, if proven to be true, would entitle the plaintiffs to relief, the complaint was sufficient.¹⁹ In so finding, the Court explicitly rejected the union's claim that the plaintiffs had failed to set forth sufficient facts to support their general allegations, noting that the "simplified 'notice pleading'" approach of the Federal Rules did not require a claimant to plead the factual basis for his claim.²⁰

As Justice Stevens noted in his dissent in *Twombly*, *Conley* was repeatedly cited as authority by the federal courts, including eleven times

(arguing that the National Railroad Adjustment Board had exclusive jurisdiction over the controversy), failure to join an indispensable party and failure to state a claim upon which relief could be granted. *Id.* The district court actually relied upon the first ground, lack of jurisdiction, in granting the motion. *Id.* The court of appeals "apparently rel[ie]d] on the same ground" in affirming that judgment. *Id.* at 44. However, the Supreme Court found that the act purporting to give the Board exclusive jurisdiction applied only to disputes between employees and employers, not employees and their unions. *Id.* at 44–45. The Court also found that the union's second asserted ground, failure to join an indispensable party (the employer railroad company), was meritless, leaving only the final ground, failure to state a claim, to be considered. *Id.* at 45.

¹⁵ *Id.* at 47–48. "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." *Id.* at 48.

¹⁶ See Adam H. Charnes & James J. Hefferan, Jr., *Friendly to Corporations*, 29 NAT'L L.J. 49, at 10 col.1 (2007) (describing the *Conley* standard as "well known" and a "venerable precedent . . . learned by generations of law students"); see also William Kolasky & David Olsky, Commentary, Bell Atlantic Corp. v. Twombly: *Laying Conley v. Gibson v. Rest*, 22 ANTITRUST 27, 27 (2007) (highlighting *Conley*'s half-century reputation in civil procedure).

¹⁷ *Conley*, 355 U.S. at 46–47 (emphasis added).

¹⁸ *Id.* at 47.

¹⁹ *Id.* at 47–48.

²⁰ *Id.* ("To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests . . . Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.")

by the Supreme Court.²¹ Prior to *Twombly*, district courts had referenced the “no set of facts” language literally thousands of times when ruling on motions to dismiss.²² Justice Black’s words were learned and relearned by civil procedure students for decades. Any doubts regarding *Conley* were thought to have been put to rest by two relatively recent cases. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*,²³ the Court overturned a Fifth Circuit decision imposing a heightened pleading standard on a complaint alleging municipal liability for a civil rights violation.²⁴ The Supreme Court held that only where Rule 9(b) was applicable could a heightened pleading standard be employed²⁵ and, “in the absence of amendment to Rules 8 or 9, the courts could rely only on control of discovery and summary judgment to ‘weed out unmeritorious claims.’”²⁶

²¹ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1978 (2007) (Stevens, J., dissenting) (citing *SEC v. Zandford*, 535 U.S. 813, 818 (2002); *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 654 (1999) (calling upon the standard established in *Conley* as a precedent); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993) (including *Conley* as a basis to support the maintenance of the petitioner’s claim); *Brower v. County of Inyo*, 489 U.S. 593, 598 (1989) (applying the *Conley* principle regarding allegations viewed in the light most helpful to the petitioner); *Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (per curiam) (relying on *Conley* to decide that the District Court improperly dismissed one of petitioner’s claims); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) (using the *Conley* standard to support not dismissing a plaintiff’s claim based on provable facts); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (making reference to *Conley* about whether the facts of plaintiff’s allegations constitute a §1983 claim); *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976) (determining that allegations of conspiracy related to unreasonable burdens on free and uninterrupted interstate commerce constitute sufficient grounds for a claim to not be dismissed); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (basing its holding for whether a plaintiff successfully plead a §1983 claim on the *Conley* standard); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam) (referencing *Conley* regarding a claim based on rights to freedom of religious expression); *Haines v. Kerner*, 404 U.S. 519, 521 (1972) (per curiam) (supporting the decision to hold for the defendant wherein “the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”). See generally Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. BRIEF 135, 137 (2007) [hereinafter *Dodson article*], available at <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf> (“The Supreme Court had cited to the ‘no set of facts’ language in *Conley* twelve times in controlling opinions, and many lower courts had adhered to it and its liberal notice-pleading standard.”).

²² See *Iqbal v. Hasty*, 490 F.3d 143, 157 n.7 (2d Cir. 2007) (noting that federal courts cited *Conley* “at least 10,000 times in a wide variety of contexts (according to a Westlaw search)”); see also *In re Ocwen Loan Servicing, L.L.C.*, 491 F.3d 638, 648–49 (7th Cir. 2007) (referring to the *Conley* language as “canonical”).

²³ 507 U.S. 163 (1993).

²⁴ *Id.* at 168.

²⁵ *Id.* (stating that Rule 9(b) “provides that ‘in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity’”); see *Iqbal*, 490 F.3d at 153 (noting that the Court in *Leatherman* suggests that heightened pleading standards are only permissible when authorized by Rule 9(b) of the Federal Rules of Civil Procedure).

²⁶ *Iqbal*, 490 F.3d at 153. As Justice Stevens observed in his *Twombly* dissent, the Fifth Circuit justified its heightened pleading standard in *Leatherman* as an effort to combat “‘the enormous expense involved today in litigation.’” *Twombly*, 127 S. Ct. at 1981 (Stevens, J., dissenting) (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054, 1057 (5th Cir. 1992)).

The Court's 2002 ruling in *Swierkiewicz v. Sorema N.A.*²⁷ also reaffirmed the crucial role of discovery under the liberal notice pleading regime of the Federal Rules. In that case, the Second Circuit required a plaintiff to plead facts establishing a prima facie case to get a claim of employment discrimination into discovery.²⁸ The Court struck down this measure, noting that "Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits."²⁹ Citing *Conley*, the Court once again ruled that the Federal Rules' "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."³⁰ Only the exceptions of Rule 9(b) were subject to a heightened pleading standard.³¹

B. The Twombly Decision and its Policy-Based Justification

The plaintiffs in *Twombly* were a putative class of "subscribers of local telephone and/or high speed internet services."³² Bringing suit in the District Court for the Southern District of New York, they alleged that the defendants, Incumbent Local Exchange Carriers ("ILECs"), had conspired to keep competing local telephone companies, referred to as Competitive Local Exchange Carriers ("CLECs"), out of the market.³³ The plaintiffs brought their claim under § 1 of the Sherman Act, which prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."³⁴

The ILECs were alleged to have inflated charges for local telephone and high-speed Internet services in two ways. First, the plaintiffs claimed that

²⁷ 534 U.S. 506 (2002).

²⁸ *Id.* at 511 (explaining that under the Second Circuit's heightened pleading standard, if plaintiff did not have direct evidence of discrimination at the time a complaint was made, plaintiff must still plead a prima facie case).

²⁹ *Id.* at 515; see *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("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 Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

³⁰ *Swierkiewicz*, 534 U.S. at 512 (citing *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)).

³¹ *Id.* at 513 ("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.")

³² *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1962 (2007).

³³ *Id.* The four defendant ILECs were the four predecessors of the original seven "Baby Bells" created when AT&T was broken up in 1984: BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. *Id.* at 1962 n.1. As the opinion noted, these four companies were alleged to control "90 percent or more of the market for local telephone service in the 48 contiguous States." *Id.*

³⁴ 15 U.S.C. § 1 (2008). The plaintiffs sought treble damages, as well as declaratory and injunctive relief. *Twombly*, 127 S. Ct. at 1962.

the defendants had “‘engaged in parallel conduct’” in dealing unfairly with the CLECs.³⁵ The complaint pointed to a “‘compelling common motivation’ to thwart the CLECs’ competitive efforts,” which in turn “‘naturally led [the defendants] to form a conspiracy.’”³⁶ Second, the plaintiffs alleged agreements between the ILECs to not compete against each other, to be inferred from the ILECs’ failure to pursue business opportunities in contiguous markets controlled by the other ILECs.³⁷ Ultimately, the complaint summed up the plaintiffs’ contentions as follows:

In the absence of any meaningful competition between the [ILECs] in one another’s markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.³⁸

The defendants filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court granted the motion.³⁹ The court found that allegations of parallel business conduct alone did not state a claim under § 1 of the Sherman Act.⁴⁰ Judge Gerard E. Lynch ruled that the plaintiffs were required to allege additional facts that

³⁵ *Twombly*, 127 S. Ct. at 1962. According to the complaint, the ILECs’ “actions 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.” *Id.*

³⁶ *Id.* Conspiracy was the natural result, according to the plaintiffs, because the failure of any one of the ILECs to prevent a CLEC in the ILEC’s territory from effectively competing would be to expose to other CLECs in other ILECs’ territories the opportunity for competitive success. *Id.* In essence, the plaintiffs claimed that Verizon provided inferior service to one CLEC in its territory so that Qwest would do the same to a CLEC in that territory, thereby discouraging a second CLEC in Verizon’s territory from competing against Verizon. *Id.*

³⁷ *Id.* The complaint also described a statement from the CEO of Qwest, Richard Notebaert, who said 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.’” *Id.*

³⁸ *Id.* at 1962–63. In setting forth the grounds for relief under the Sherman Act, the complaint used similar language: “Defendants . . . engaged in a contract, combination, or conspiracy to prevent competitive entry in [their respective territories] 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 in violation of . . . the Sherman Act.” *Id.* at 1963 n.2.

³⁹ *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 176 (S.D.N.Y. 2003), *vacated*, *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99 (2d Cir. 2005).

⁴⁰ *Id.* at 179 (quoting *Theatre Enters., Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954)).

“tend[] to exclude independent self-interested conduct as an explanation for defendants’ parallel behavior.”⁴¹ He also held that the complaint failed to allege facts suggesting that refraining from competing was contrary to the ILECs’ apparent economic interests and thus did not raise an inference of conspiracy.⁴² Judge Lynch found that district courts in the Second Circuit required plaintiffs to “allege plus factors” to withstand a motion to dismiss and be entitled to discovery in cases involving parallel conduct conspiracies.⁴³ This requirement, he stated, separated complaints that suggested a conspiracy from those that did not.⁴⁴ It also ensured that defendants were given notice of the “conduct which is alleged to be conspiratorial.”⁴⁵

The Second Circuit reversed the judgment and ruled that the district court had applied the wrong standard.⁴⁶ The Second Circuit found that the district court had “demanded far more than a short and plain statement of the claims and the grounds upon which they rest,” thus imposing a heightened pleading standard.⁴⁷ In doing so, the district court violated the explicit instruction of *Swierkiewicz* that “[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.’”⁴⁸ The Second Circuit then applied the “extremely permissive” standard of *Conley*.⁴⁹ The court noted that the plaintiffs were required to plead facts that “include conspiracy among the realm of ‘plausible’ possibilities in order to survive a motion to dismiss.”⁵⁰ However, it found that in order “to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a

⁴¹ *Id.* at 179.

⁴² *Id.* at 188.

⁴³ *Id.* at 179–80 (citing *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 255–56 (S.D.N.Y. 1995); *Levitch v. Columbia Broad. Sys.*, 495 F. Supp. 649, 675 (S.D.N.Y. 1980)). It should be noted that Judge Lynch found plus factors to be required only where a conspiracy was alleged on the basis of parallel conduct. *Id.* at 180.

⁴⁴ *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 180 (S.D.N.Y. 2003).

⁴⁵ *Id.* at 181 (quoting *Levitch*, 495 F. Supp. at 675).

⁴⁶ *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 111 (2d Cir. 2005), *rev’d*, *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

⁴⁷ *Id.* at 108.

⁴⁸ *Id.* at 107 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002)). The Second Circuit also noted that “[t]he purpose of pleading is to facilitate a proper decision on the merits.” *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

⁴⁹ *Id.* at 108. The court of appeals also explicitly rejected the notion, suggested by the district court, that antitrust cases required heightened pleading standards: “Antitrust claims are, for pleading purposes, no different [from other claims governed by Rule 8].” *See id.* at 108–09.

⁵⁰ *Id.* at 114.

plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.”⁵¹ The Second Circuit declined to so conclude; therefore, it reversed the district court’s judgment.⁵²

The Supreme Court granted certiorari “to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.”⁵³ The Court specifically rejected the “no set of facts” language of *Conley* as the proper standard.⁵⁴ Finding that the language, as applied by the Second Circuit, had been improperly interpreted in isolation from its original context, the Court stated that *Conley* “described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s survival.”⁵⁵ In the Court’s view, to employ the *Conley* language literally as the standard would be to do away with the requirement, set forth in *Dura Pharmaceutical Inc. v. Broudo*,⁵⁶ that the plaintiff show a “reasonably founded hope” of being able to make a case before being permitted to begin the discovery phase.⁵⁷ Insofar as the well-known *Conley* language was employed as the standard, the Court stated that “this famous observation has earned its retirement . . . [and] is best forgotten as an incomplete, negative gloss on an accepted pleading standard”⁵⁸

The proper standard is one that “calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the elements

⁵¹ *Id.*

⁵² *See id.* at 118–19 (“We conclude that these allegations are sufficient to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests’” (quoting *Conley*, 355 U.S. at 47)).

⁵³ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1963 (2007).

⁵⁴ *Id.* at 1969 (rejecting *Conley*’s “no set of facts” standard).

⁵⁵ *Id.* The Court understood the language to stand for the simple proposition that “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” *Id.*

⁵⁶ 544 U.S. 336 (2005).

⁵⁷ *Twombly*, 127 S. Ct. at 1969. It appears that, by its ruling in *Twombly*, the Court has reinterpreted the meaning of “reasonably founded hope.” As Justice Stevens pointed out in his dissent, the *Dura* plaintiffs failed to adequately allege a necessary element, loss causation, in their private securities fraud claim. *Id.* at 1984 n.8 (Stevens, J., dissenting). In *Dura Pharmaceutical*, the complaint asserted only that the prices of the securities purchased by the plaintiffs were artificially inflated and did not speak to any connection between the defendants’ alleged misrepresentation and the plaintiffs’ economic loss (or even what that loss was). *Id.* (citing *Dura Pharm., Inc. v. Broudo* 544 U.S. 347 (2005)). Conversely, the *Twombly* plaintiffs did not fail altogether to plead a required element of their claim, but (in the opinion of the majority) did so in a conclusory, insufficient manner. *Id.* at 1985.

⁵⁸ *Id.* at 1969. The Court also stated that the language had “puzzl[ed] the profession for 50 years,” suggesting that its true meaning had never been properly understood. *See id.* *But see id.* at 1978 (Stevens, J., dissenting). Justice Stevens stated, “[i]n indeed, today’s opinion is the first by any Member of this Court to express any doubt as to the adequacy of the *Conley* formulation.” *Id.*

of the claim].”⁵⁹ In short, a complaint must provide “enough facts to state a claim to relief that is *plausible on its face*.”⁶⁰ The Court held that a § 1 complaint must contain “enough factual matter (taken as true) to suggest that an agreement was made.”⁶¹ While the plaintiff need not “set out *in detail* the facts upon which he bases his claim,”⁶² there must be “some factual allegation in the complaint.”⁶³ Without this, “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.”⁶⁴ In directly addressing what a plaintiff is required to plead in order to state a claim under § 1 of the Sherman Act, the Court found that when a claimant relies upon allegations of parallel conduct, those allegations “must be placed in a context that raises a suggestion of a preceding agreement.”⁶⁵

Applying this updated standard, the Court held that the complaint failed to pass muster, as “nothing contained in the complaint invest[ed] either the action or inaction alleged with a plausible suggestion of conspiracy.”⁶⁶ In doing so, the Court noted that it was not “apply[ing] any ‘heightened’ pleading standard, nor . . . broaden[ing] the scope of Federal Rule of Civil Procedure 9.”⁶⁷ The complaint was insufficient because it contained facts giving rise only to a conceivable claim, not a plausible claim.⁶⁸

The Court’s ruling appears to be almost entirely rooted in a policy-based justification: the limitation of the high costs of litigation. As the Court noted, “it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that

⁵⁹ *Id.* at 1965. Thus, in this § 1 Sherman Act case, the complaint was required to “raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” *Id.*

⁶⁰ *Id.* at 1974 (emphasis added).

⁶¹ *Id.* at 1965.

⁶² *Id.* at 1956 n.3 (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

⁶³ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1956 n.3 (2007).

⁶⁴ *Id.* The Court also stated that Rule 8(a)(2) “contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented’ . . .” *Id.* (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1202, at 94–95 (3d ed. 2004)).

⁶⁵ *Id.* at 1966.

⁶⁶ *Id.* at 1971. The Court found that the allegations of parallel conduct, on which the plaintiffs based their claim of conspiracy, was insufficient, for the resistance of competition was “only natural” and no agreement could be inferred from such conduct. *See id.* Similarly, the failure to enter neighboring markets by the defendants had “an obvious alternative explanation” – since the defendants had been government-sanctioned monopolies until 1996, they were accustomed to “sitting tight” and “would see their best interests in keeping to their old turf.” *Id.* at 1972.

⁶⁷ *Id.* at 1973 n.14. In denying any augmentation of the pleading standard, the Court attempted to reconcile *Twombly* with its decision in *Swierkiewicz*, noting that the district court had recognized that the use of a heightened pleading standard “was contrary to the Federal Rules’ structure of liberal pleading requirements.” *Id.* at 1973 (quoting *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 181 (S.D.N.Y. 2003)).

⁶⁸ *See id.* at 1974 (“Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”).

proceeding to antitrust discovery can be expensive.”⁶⁹ The Court had previously recognized the “potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure” in *Blue Chip Stamps v. Manor Drug Stores*.⁷⁰ In *Twombly*, the Court went beyond lamenting the problems it perceived as associated with discovery; it crafted a standard to ameliorate them.

The Court extensively detailed what it viewed as the major drawbacks of a liberal interpretation of the pleading standard. Discovery, in the eyes of the Court, had exploded into a massive and resource-draining undertaking.⁷¹ The Court blamed this development on the liberal regime imposed by the Federal Rules, remarking, “[g]iven the system that we have, the hope of effective judicial supervision [of discovery] is slim.”⁷² The efforts of trial judges to weed out groundless claims early in the discovery process, and therefore keep costs to a minimum, were largely unsuccessful, allowing the prevalence of discovery abuse to grow unabated.⁷³ Under a liberal interpretation of the Rule 8(a)(2), “[j]udges can do little about impositional discovery [because] parties control the legal claims to be presented and conduct the discovery themselves.”⁷⁴ In interpreting Rule 8(a)(2) as requiring a plaintiff to plead “enough facts to

⁶⁹ *Id.* at 1966–67 (citing *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)).

⁷⁰ 421 U.S. 723, 741 (1975). “[T]o the extent that [the discovery process] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.” *Id.*

⁷¹ See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007). The Court cited one report stating that as much as 90 percent of litigation costs arose out of discovery expenses in cases where discovery was actively employed. *Id.* (citing Amendments to Federal Rules of Civil Procedure, 192 F.R.D. 340, 357 (2000)). Such expense, in the eyes of the Court, was likely in the case at hand. *Id.* at 1967 n.6.

[D]etermining whether some illegal agreement may have taken place between unspecified persons at different ILECs (each a multibillion dollar corporation with legions of management level employees) at some point over seven years is a *sprawling, costly, and hugely time-consuming undertaking* not easily susceptible to the kind of line drawing and case management the dissent envisions.

Id. (emphasis added). See *The Supreme Court, 2006 Term: Leading Case: Federal Jurisdiction and Procedure – Civil Procedure – Pleading Standards*, 121 HARV. L. REV. 305, 312 (2007). This article describes the costly nature of the discovery process.

⁷² *Twombly*, 127 S. Ct. at 1967 n.6 (noting that the difficulty in supervising discovery has contributed to the costliness of discovery).

⁷³ See *id.* at 1967. “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.” *Id.* “The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define ‘abusive’ discovery except in theory, because in practice we lack essential information.” *Id.* at 1967 n.6 (quoting Easterbrook, *supra* note 4, at 638–39).

⁷⁴ *Id.* at 1967 (quoting Easterbrook, *supra* note 4, at 638).

state a claim to relief that is plausible on its face,”⁷⁵ the Court took to heart a decades-old decision of the Seventh Circuit, *Car Carriers, Inc. v. Ford Motor Co.*,⁷⁶ which stated 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.”⁷⁷

It is this justification proffered by the Court that is most troubling to Justice Stevens in his dissent, the bulk of which is spent noting the problems with the Court’s policy-centric justification of stricter pleading standards. Terming the Court’s decision as a “dramatic departure from settled procedural law,”⁷⁸ Justice Stevens explained the history of Rule 8, which he described as the “starting point”⁷⁹ of a liberal notice pleading system designed to ensure that the merits of a claim would be sorted out during a “flexible pretrial process and, as appropriate, through the crucible of trial.”⁸⁰ Justice Stevens did recognize that discovery can often be costly in complex cases, but argued that such cost was a necessary evil of notice pleading and did not justify a heightened pleading burden.⁸¹

The Court, Justice Stevens explained, had given into the temptation to ignore the Federal Rules’ liberal provisions by using special pleading in order to bring about speedier dispositions of claims.⁸² Despite its good

⁷⁵ *Id.* at 1974.

⁷⁶ 745 F.2d 1101 (7th Cir. 1984). There, a transporter filed suit against Ford for Sherman antitrust violations, and later tried to sue on the same facts for Commerce Act and Rico violations. *Id.* at 1104.

⁷⁷ *Twombly*, 127 S. Ct. at 1967 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

⁷⁸ *Id.* at 1975 (Stevens, J., dissenting). As Justice Stevens noted, the Court had previously rejected attempts by lower courts to craft more stringent pleading standards, even where the higher standard was meant to curb litigation costs. *Id.* Justice Stevens argued that the Court’s holding in *Leatherman* had “rebuffed the Fifth Circuit’s effort to craft a standard for pleading municipal liability that accounted for “the enormous expense involved today in litigation.” *Id.* at 1981 (quoting *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054, 1057 (1992)). Furthermore, in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 506 (2002), the Supreme Court held that the Second Circuit erred in requiring plaintiff to plead a prima facie case of employment discrimination.

⁷⁹ *Twombly*, 127 S. Ct. at 1976 (Stevens, J., dissenting) (quoting *Swierkiewicz*, 534 U.S. at 514).

⁸⁰ *Id.*

⁸¹ The Court’s new pleading standard was especially inappropriate in an antitrust case, according to Justice Stevens, in light of Congress’s clear intention to encourage private enforcement of the law by authorizing the recovery of treble damages by successful plaintiffs. *Id.* at 1983. Justice Stevens reasoned that “[i]t is therefore more, not less, important in antitrust cases to resist the urge to engage in armchair economics at the pleading stage.” *Id.*

⁸² *See id.* at 1983–84. In his defense of the notice-pleading regime, Justice Stevens quoted the writings of Judge Charles E. Clark, whom Stevens described as one of the “principal draftsmen” of the Federal Rules. *Id.* at 1976. In the same year that the Supreme Court decided *Conley*, Judge Clark wrote the following:

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

intentions, the Court's new standard was contrary to the very essence of the Federal Rules: "that pretrial matters will be settled through a flexible process of give and take . . . not by having trial judges screen allegations for the plausibility *vel non* without requiring an answer from the defendant."⁸³ The Court had previously instructed parties seeking to change pleading standards that "their remedy was to seek to amend the Federal rules – not [the Court's] interpretation of them."⁸⁴ In redefining the standard of Rule 8(a), the Court was, in Justice Stevens's eyes, ignoring its prior admonitions and effectively amending the Federal Rules by changing their meaning to conform to a particular view of public policy.⁸⁵

II. THE *TWOMBLY* STANDARD'S TWO LEVELS OF CONFUSION

A. What does "Plausible" Mean?

Despite the Court's claim that its decision merely clarified a misconception and was not announcing a change in the interpretation of Rule 8,⁸⁶ the abrogation of the *Conley* language in favor of a requirement of "enough fact to raise a reasonable expectation that discovery will reveal

pleadings, i.e., the formalistic claims of the parties. Experience has found no quick and easy short cut for trials in cases generally *and antitrust cases in particular*.

Id. at 1983 (quoting Charles E. Clark, *Special Pleading in the "Big Case"?* in *PROCEDURE – THE HANDMAID OF JUSTICE* 147, 148 (Charles Alan Wright & Harry M. Reasoner eds., 1965)).

⁸³ See *id.* at 1988 n.13 (emphasis added); see also *Vincent v. City Colls. of Chi.*, 485 F.3d 919, 924 (7th Cir. 2007) ("Although we appreciate the pressure that a heavy flux of litigation creates, and the temptation to get rid at the earliest opportunity of claims that do not seem likely to pan out, *Rule 12(b)(6)* does not serve this function."); Easterbrook, *supra* note 4, at 645 ("If we are to rule out judge-directed discovery, however, we must be prepared to pay the piper. Part of the price [of notice pleading] is the high cost of unnecessary discovery – impositional and otherwise.")

⁸⁴ *Twombly*, 127 S. Ct. at 1988 (Stevens, J., dissenting) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002); *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993)); see Posting of Ted Frank to <http://www.pointoflaw.com/archives/003245.php> (Nov. 27, 2006, 14:34 EST) [hereinafter Posting of Ted Frank] ("[T]he Second Circuit's decision is horrible public policy: bare-bones antitrust complaints permit hugely expensive fishing expeditions with no consequences to the plaintiffs who bring the case, as numerous amicus briefs point out. But the respondents are correct that this counterproductive result is precisely what Rule 8 commands. The problem here is with the law, not with the court decisions. This is not a place for the Supreme Court to intervene as judges—but the Supreme Court can fix the problem with the rules under their authority granted to it by Congress under 28 U.S.C. § 2072, and Congress can also step in.")

⁸⁵ See *Twombly*, 127 S. Ct. 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 . . . [T]hat concern [does] not provide an adequate justification for this law-changing decision." *Id.*

⁸⁶ See *id.* at 1973 n.14 ("In reaching this conclusion, we do not apply any 'heightened' pleading standard . . . which can only be accomplished 'by the process of amending the Federal Rules, and not by judicial interpretation.'" (quoting *Swierkiewicz*, 534 U.S. at 515)). But see *id.* at 1984 (Stevens, J., dissenting) ("While the majority assures us that it is not applying any 'heightened' pleading standard . . . I have a difficult time understanding its opinion any other way.")

evidence” does reflect a change, at least in practice, in how motions to dismiss should be considered.⁸⁷ The *Twombly* formulation focuses a trial court’s attention on the plausibility of the allegations, asking the judge to differentiate those claims that are plausibly suggested from those that are merely conceivable by looking at the factual basis for those claims.⁸⁸ This begs the threshold question: as used by the Court, exactly what does “plausible” mean? And, once that question is answered, it still must be determined how a complaint’s factual basis is to be scrutinized in deciding whether the allegations are plausible.

The Court’s meaning in its use of “plausible” is ambiguous. The term is not precisely defined in the opinion, but some rough guideposts can be gleaned from the text by implication from what the term does *not* mean. Most importantly, “plausible” means something greater than “conceivable,”⁸⁹ but less than “probable.”⁹⁰ A plausible claim does not require “heightened fact pleading of specifics,” as the standard of Rule 9(b) requires,⁹¹ but it does seem to require pleading of some specific facts, such as when and where the purportedly illegal actions of the defendant occurred.⁹² While these facts do draw some distinctions between what is

⁸⁷ Indeed, as this paper notes, while commentators disagree as to the meaning and effect of *Twombly*, they are nearly unanimous in holding the belief that *Twombly* is a marked change from prior precedent and will have a substantial effect on motion practice in the federal courts. See *Dodson article, supra* note 21, at 137–38 (noting that *Twombly* is a “significant statement from the Court from a proceduralist perspective” and that the circuit courts “will now have to change their pleading jurisprudence”); see also Gregory F. Joseph, *Pleading Requirements*, 30 NAT’L L.J. 1, at 13 col. 1 (2007) (arguing that *Twombly* “revolutionized pleading rules”); Janet L. McDavid & Eric Stock, *Bell Atlantic v. Twombly*, 29 NAT’L L.J. 47, at 12 col. 1 (2007) (stating that *Twombly* “marks a clear and visible departure from the liberal federal pleading standards”). But see *Dodson article, supra* note 21, at 139 (noting Professor Dorf’s suggestion that *Twombly* might be interpreted as a re-affirmation of the “rule that plaintiffs can plead themselves out of court” by failing to plead alternative theories of liability (citing Dorf on Law, *The End of Notice Pleading?*, <http://www.michaeldorf.org/2007/05/end-of-notice-pleading.html> (May 24, 2007, 07:35 EST))).

⁸⁸ See *Twombly*, 127 S. Ct. at 1974. “Because the plaintiffs here have not nudged their claims across from the line from conceivable to plausible, their complaint must be dismissed.” *Id.* “[T]he plaintiff must allege facts ‘plausibly’ suggesting the existence of a conspiracy.” *Dodson article, supra* note 21, at 136.

⁸⁹ *Twombly*, 127 S. Ct. at 1974.

⁹⁰ *Id.* at 1965 (“Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage . . .”).

⁹¹ *Id.* at 1974 (highlighting the requirement of “enough facts to state a claim to relief that is plausible on its face,” rather than heightened fact pleading of specifics).

⁹² *Id.* at 1971 n.10. “Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs . . . supposedly agreed, or when and where [it] took place.” *Id.* (emphasis added). The following exchange gives insight into the apparent importance of “when and where” the agreement took place, at least in the eyes of one justice:

JUSTICE SCALIA: “The agreement happens at one moment in time.”

MR. RICHARDS [counsel for the plaintiffs]: “Oh, it could happen in many moments.”

JUSTICE SCALIA: “Meetings of the minds, meeting of the minds. I used to [t]each Contracts. Meeting of the minds at one moment in time, okay.”

plausible and what is not, a definitive meaning of the word, as used by the Court, cannot be reached.⁹³

The failure of the Court to define the term “plausible” clearly has serious implications for one trying to understand the gravity of the change caused by *Twombly*. The decision reaffirms *Swierkiewicz*, which held that the allegations in a complaint must be taken as true in determining a motion to dismiss under Rule 12(b)(6).⁹⁴ However, the “re-affirmation comes with the caution” that the plaintiff must “show that he is ‘plausibly’ entitled to relief.”⁹⁵ The plausibility requirement, therefore, reflects an increased sense of scrutiny towards complaints. Yet, since *Twombly* does not “apply any ‘heightened’ pleading standard,”⁹⁶ this increased scrutiny cannot exceed the heightened strict scienter pleading requirement of the Private Securities Litigation Reform Act (“PSLRA”).⁹⁷ Thus, a plausible claim can be one that is less likely than not to raise a claim to relief. However, exactly what

Transcript of Oral Argument at 29, *Twombly*, 127 S. Ct. 1955 (No. 05-1126), available at 2006 WL 3422211. Also, Form 9, the model complaint for negligence, alleges the defendant’s liability as follows: “On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing the highway.” FED. R. CIV. P. Form 9. The Court’s reference to Form 9 as a model which the *Twombly* plaintiffs could have followed is particularly puzzling. While the “when and where” of the occurrence of a motor vehicle accident is undeniably crucial to the case, the “when and where” of the formation of an agreement in restraint of trade is not as crucial. Indeed, it is hard to see how “where” an agreement between the ILECs was entered into would be important to the case as long as the very existence of the agreement can be reliably proven otherwise, whereas the location and time of an automobile accident are nearly always important factors in determining whether the defendant was negligent (and whether the plaintiff contributed to the damages through his own lack of care). Also, as Justice Stevens’ dissent notes, the aversion of Form 9 that the defendant was negligent is a “bare allegation.” *Twombly*, 127 S. Ct. at 1977 (Stevens, J., dissenting). In contrast, the *Twombly* plaintiffs’ allegation of an illegal agreement between the ILECs is supported by the description of the ILECs’ parallel conduct. *Id.* at 1962. If Form 9 asserts no facts speaking to negligence and is not too conclusory to be plausible, it is hard to see how the *Twombly* complaint, which alleges some (albeit far from dispositive) facts, is implausible.

⁹³ At least one commentator has called *Twombly*’s plausibility standard “notice-plus,” meaning that the complaint must give the defendant notice of the claims asserted by the plaintiff as well as some factual matter going beyond fair notice that makes the claims “plausible.” See *Dodson article, supra* note 21, at 138; see also Posting of Scott Dodson to Civil Procedure Professor Blog, http://lawprofessors.typepad.com/civpro/2007/05/prof_scott_dods.html (May 21, 2007) [hereinafter *Dodson blog*]. While this interpretation is helpful to the extent that it describes plausibility as going beyond simple notice of the claim, it still is quite ambiguous, for it sheds no light on exactly how much “plus” information a complaint must contain to be plausible.

⁹⁴ See Blumstein, *supra* note 9, at 14 (“Good news for plaintiffs defending against a motion to dismiss: *Twombly* re-affirms the holding in *Swierkiewicz* . . . The allegations in the complaint must still be taken as true, as has long been required of courts in deciding Rule 12(b)(6) motions.”).

⁹⁵ See *id.*

⁹⁶ See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1973 n.14 (2007) (discussing the pleading standard and the level of facts a plaintiff must plead in certain cases); see also Blumstein, *supra* note 9, at 13 (highlighting the holding in *Twombly*, which does not require a heightened pleading standard).

⁹⁷ See Joseph, *supra* note 87, at 13 col. 1. As the Court held just weeks after its decision in *Twombly*, “the PSLRA is satisfied by an inference of equal plausibility.” *Id.* (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007)). Since the intent of the PSLRA is to heighten pleading standards in certain kinds of securities cases above the normal Rule 8 standard, the standard of *Twombly* must be lower than that of *Tellabs*. *Id.*

degree of unlikelihood will cause a claim to slip from plausible to conceivable remains unclear.⁹⁸

Given the vague definition of the proper meaning of “plausible,” it stands to reason that the Court envisioned a more active role for trial judges as gate-keepers at the pre-discovery stage.⁹⁹ In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*,¹⁰⁰ the Court had previously remarked in a footnote that “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”¹⁰¹ The *Twombly* standard appears to be an attempt to give teeth to that statement by making it easier for a trial court to dismiss a complaint.¹⁰² As Justice Scalia hinted during the *Twombly* oral arguments, the Court seemed to be seeking a standard that, if anything, would err on the side of dismissing too many suits, rather than too few, so as to avoid the possibility for prolonged costly discovery when possible.¹⁰³ As noted

⁹⁸ Thinking of this problem numerically may elucidate the uncertainty. The standard of *Tellabs* is 50% plausibility (“an inference of equal plausibility”). The standard of the rejected reading of the *Conley* language (“complaint shall not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim”) would seem to be anything above 0%. The *Twombly* standard must therefore be a degree of likelihood more than 0% but less than 50%, which certainly leaves a wide margin for error in interpretation. *Twombly* does suggest that there is a level of mere “conceivability,” which seems to indicate that there is some level from 0% to some higher likelihood in which complaints have not achieved plausibility. However, from the text of the Court’s decision, there is no way to determine exactly where the line between “conceivable” and “plausible” lies.

⁹⁹ See Edward M. Spiro, *The Supreme Court’s Pleading Trilogy*, 238 N.Y. L.J. 23, at 3 (2007) (“By eschewing *Conley v. Gibson*’s ‘no set of facts’ language [and] articulating the plausibility standard for pleadings under Rule 8(a)(2), . . . the Court clearly envisions a more robust role for lower courts reviewing the sufficiency of pleadings in complex cases.”) (emphasis added); see also Wendy N. Davis, *Just the Facts, But More of Them: An Antitrust Ruling Is Proving To Be a Bigger Deal Than Expected*, A. B. A. J., Oct. 2007, available at http://abajournal.com/magazine/just_the_facts_but_more_of_them (noting that much is left to the discretion of trial judges).

¹⁰⁰ 459 U.S. 519 (1983).

¹⁰¹ *Id.* at 528 n.17. The Court in *Associated Gen. Contractors* also expressed its concern that the “rule” of *Conley* was being stretched too far as to allow a weak claim of coercion, the nature of which was unspecified, to withstand a motion to dismiss in an action for treble damages brought under § 4 of the Clayton Act. See *id.* at 528 nn.15 & 17. Interestingly, it was Justice Stevens, who strongly dissented in *Twombly*, who wrote for the Court in *Associated Gen. Contractors*.

¹⁰² Just weeks before *Twombly* was handed down, Chief Judge Frank H. Easterbrook, to whose academic works the Court cited to extensively in *Twombly*, wrote the following description of the likelihood a district court’s dismissal of a complaint: “a judicial order dismissing a complaint because the plaintiff did not plead facts has a short half-life. ‘Any decision declaring this complaint is deficient because it does not allege X is a candidate for summary reversal, unless X is on the list in Fed. R. Civ. P. 9(b).’” *Vincent v. City Colls. of Chi.*, 485 F.3d 919, 923 (7th Cir. 2007) (quoting *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 715 (7th Cir. 2006)). The Seventh Circuit reversed the district court’s dismissal of the claim being discussed. *Id.* at 926.

¹⁰³ Posting of Jason Harrow to SCOTUSblog, <http://www.scotusblog.com/wp/commentary-and-analysis/recap-bell-atlantic-v-twombly-on-1127/#more-4781> (Nov. 29, 2006, 17:55 EST). “Justice Scalia made clear that he would err on the side of dismissing suits, believing that the time and expense of discovery will lead to meritless suits brought to force defendants to settle.” *Id.* See Transcript of Oral Argument, *supra* note 92, at 48–49. Justice Scalia, discussing the prospect of allowing the *Twombly*

above, the Court acknowledged that traditional methods of case management were ineffective, as they failed to allow district judges to dismiss meritless claims prior to discovery.¹⁰⁴ A “plausibility” standard seems to be a way to provide trial judges with the flexibility of discretion necessary to weed out weak claims sooner rather than later.

Such an approach, however, has the negative effect of promoting disparate and inconsistent results. Prior to *Twombly*, it was well-established that only the weakest and most patently groundless claims faced dismissal at the pleadings stage.¹⁰⁵ The *Twombly* Court gave trial judges increased authority to dismiss claims at the outset through a vague and largely undefined standard, rather than after the commencement of discovery.¹⁰⁶ In doing so, the Court sacrificed a large extent of that predictability in pursuit of diminished litigation costs. As such, the Court made a momentous value judgment: that a cost savings in the discovery stage does more to protect the integrity of the justice system than does a clear standard that ensured almost entirely consistent results.

Two decisions from the summer of 2007, *EEOC v. Concentra Health Services, Inc.*¹⁰⁷ and *Goldstein v. Pataki*,¹⁰⁸ demonstrate the disparate results that will flow from *Twombly*’s vague plausibility standard. *Goldstein* involved the planned development of a large section of Brooklyn, New York, into office and residential towers, a sports arena, and

plaintiffs the opportunity to conduct discovery, asked the following of plaintiffs’ counsel: “How much money do you think it would have cost the defendants by then to assemble all of the documents that you’re going to be interested in looking at? How many buildings will have to be rented to store those documents and how many years will be expended in, in gathering all the materials?” *Id.*

¹⁰⁴ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007) (quoting *Dura Pharm., Inc. v. Broudo* 544 U.S. 347 (2005)). “Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid . . . discovery in cases with no ‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ to support a § 1 claim.” *Id.* (quoting *Dura*, 544 U.S. at 347). The Court commented that pre-*Twombly* plaintiffs were required only to file “a sketchy complaint” in order to reach discovery. *Id.* See A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 452 (2008). The Court was concerned about heavy judicial caseloads and the danger of sending parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint. *Id.*

¹⁰⁵ See *Vincent*, 485 F.3d at 924 (“Dismissal under *Rule 12(b)(6)* is reserved for complaints that do not state legally cognizable claims, including the situation in which the plaintiff pleads himself out of court by making allegations sufficient to defeat the suit.”); see also *Conley v. Gibson*, 355 U.S. 41, 45 (1957) (holding that dismissal is only proper where it “appears beyond doubt that the plaintiff can prove no set of facts in support his claim”).

¹⁰⁶ *Twombly*, 127 S. Ct. at 1965 (stating that a complaint must contain some set of facts in support of the claim). See *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 286 (E.D.N.Y. 2007) (dismissing the complaint because the plaintiffs did not set forth a set of facts supporting a plausible claim).

¹⁰⁷ 496 F.3d 773, 776 (7th Cir. 2007) (applying the *Twombly* decision to dismiss a claim based upon unfair employment practices).

¹⁰⁸ 488 F. Supp. 2d at 286 (applying the *Twombly* decision to dismiss a claim based on the Fifth Amendment Takings Clause).

a hotel.¹⁰⁹ The plaintiffs, each owning or renting real estate in the affected area, brought suit against various state and city officials and entities and the private developer contracted to build the development project in an attempt to prevent the condemnation of their properties.¹¹⁰ Specifically, the plaintiffs alleged that the condemnation procedures to be used in conjunction with the development project violated the public use requirement of the Fifth Amendment's Takings Clause.¹¹¹ Their complaint contained allegations that the development project had the "sole purpose" of conferring a private benefit,¹¹² and even if there was some purpose to benefit the public, it was merely a pretext, secondary to the project's true purpose of benefiting the developer.¹¹³

The defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted.¹¹⁴ In granting the motion to dismiss, Judge Nicholas G. Garaufis applied *Twombly* and found that the "plaintiffs ha[d] not set forth facts supporting a plausible claim of an unconstitutional taking."¹¹⁵ According to the decision, the complaint conceded that some public benefit, while less than what the defendants claimed, would result from the project.¹¹⁶ Therefore, their claim that the "sole purpose" of the project was to confer a private benefit was "baseless

¹⁰⁹ *Id.* at 256. The controversial Atlantic Yards Arena and Development Project is planned to cover twenty-two acres of largely blighted land in an attempt to revitalize the economy of the surrounding area. *Id.* The asserted public purposes, as found by the court, included the elimination of blight in the area through the construction of a sports and entertainment arena, affordable housing, office space, "community facility spaces," a Long Island Railroad depot facility, and "environmental remediation of the Project site". *Id.* at 258.

¹¹⁰ *Id.* at 258 (arguing that seizure of their land violated the Fifth Amendment Takings Clause).

¹¹¹ *Id.* at 278 (stating that the "for public use" provision is not satisfied); U.S. CONST. amend. V (announcing that private property shall not "be taken for public use, without just compensation").

¹¹² See *Goldstein*, 488 F. Supp. 2d at 286 ("Plaintiffs argue that the uses offered to justify the Project . . . are chimerical because (1) the Project will generate no or minimal economic benefits, (2) the Project will not create jobs, (3) the area to be condemned is not blighted, and (4) the Project will not materially increase available affordable housing.").

¹¹³ *Id.* at 287-88 ("[Plaintiffs] also claim that any benefits to the public are 'secondary and incidental to the benefit that inures to [the developer]' and that 'Defendants' desire to confer a private benefit to [the developer] was a substantial, motivating factor in Defendants' decision to seize Plaintiffs' property and transfer it to [the developer].").

¹¹⁴ *Goldstein*, 488 F. Supp. 2d at 278. The defendants also claimed that the court should abstain from hearing the case under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), on the ground that timely and adequate state-court review of the action of a state administrative agency was available to deal with difficult questions regarding state law and state policy. *Goldstein*, 488 F. Supp. 2d at 260-61. The court rejected this claim and declined to abstain. *Id.* at 278. The court also summarily rejected the defendants' claim that the case was unripe and should be dismissed under *Younger v. Harris*, 401 U.S. 37 (1971). *Id.* at 278.

¹¹⁵ *Goldstein*, 488 F. Supp. 2d at 288.

¹¹⁶ See *id.* at 286-87 ("[A]lthough Plaintiffs allege that the net gain in tax revenues will be lower than Defendants have predicted, they do not allege that there will be no net gain.").

and may be rejected even at this early stage of the litigation.”¹¹⁷ Judge Garaufis also found the “pretext” claim to be without merit.¹¹⁸ Since the plaintiffs only claimed that the asserted purposes of public benefit were dubious and did not provide facts establishing a motive for the governmental defendants to bestow any private benefit, he held that the complaint did not present a plausible right to relief.¹¹⁹ Therefore, “even if Plaintiffs could prove every allegation in the Amended Complaint, *a reasonable juror would not be able to conclude*” that the defendants had the necessary improper motive in order to win on their claim.¹²⁰ Thus, Judge Garaufis identified a plausible allegation as one that would “permit a reasonable juror to conclude” that the defendants’ actions were illegal.¹²¹

The *Twombly* standard as applied in *Goldstein* is a high burden for a plaintiff. In effect, he must plead facts establishing a prima facie case in his complaint or have his claim or claims dismissed.¹²² This interpretation therefore dangerously blurs the distinction between a motion to dismiss and a motion for summary judgment.¹²³ As the Supreme Court held in

¹¹⁷ *Id.* at 286.

¹¹⁸ *Id.* at 288.

¹¹⁹ *Id.* at 278. The plaintiffs had alleged favoritism in determining the area to be condemned was evidenced by the incredibly short and apparently rigged bidding process. See Amended Complaint at ¶¶ 49–82, *Goldstein v. Pataki*, 488 F. Supp. 2d 254 (E.D.N.Y. 2007) (No. 06-CV-5827). After the developer had made significant plans over several years, including an offer to buy the New Jersey Nets and move the professional basketball team to Brooklyn to play in the planned arena, the complaint stated that others were given just 42 days to submit proposals for purchase of the development rights to the area. Even though another bidder has submitted an offer for \$150 million to buy the site, that bid was rejected in favor of the developer’s \$100 million bid. *Id.* at ¶¶ 49–82.

¹²⁰ *Goldstein*, 488 F. Supp. 2d at 288 (emphasis added). Under *Kelo v. City of New Haven*, 545 U.S. 469, 278 (2005), a plaintiff must show that the “public purposes offered in support” of the taking are “mere pretexts for an actual purpose to bestow a private benefit” to establish a violation of the Takings Clause. *Goldstein*, 488 F. Supp. 2d at 288.

¹²¹ See *Goldstein*, 488 F. Supp. 2d at 290 (“Plaintiffs’ allegations are not plausible grounds to infer that the asserted public uses of the Project are ‘palpably without reasonable foundation’ . . . Plaintiffs’ allegations, if proven, would not permit a reasonable juror to conclude that the ‘sole purpose’ of the Project is to confer a private benefit. Neither would those allegations permit a reasonable juror to conclude that the purposes offered in support of the Project are ‘mere pretexts’ for an actual purpose to confer a private benefit on [the developer].”).

¹²² See *id.* at 286. Assuming that Judge Garaufis properly took the facts of the complaint to be true in deciding the motion, it follows that in finding that the assertion that the public defendants’ desired to confer a benefit on the private developer was supported by only a conclusory allegation and did not rise to the level of plausibility, see *id.* at 288–89, he implicitly found that the assertion of a rigged bidding process was not sufficient evidence plausibly suggesting an improper motive on the part of the governmental defendants. In other words, it was so unlikely that the plaintiffs would be able to show that an improper motive led to the questionable bidding procedures that the further litigation would be useless. This seems hard to reconcile with the proposition that a complaint serves only to give the defendant and the court notice of the nature of the claim, but rather more in line with a view that the plaintiff must establish a prima facie right to relief.

¹²³ Justice Stevens addressed just this issue in his *Twombly* dissent. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1983 (2007) (Stevens, J., dissenting) (“Everything today’s majority says would therefore make perfect sense if it were ruling on a *Rule 56* motion for summary judgment and the evidence included nothing more than the Court has described.”); see also Richard A. Epstein, *Access to*

Matsushita Electric Industrial Co. v. Zenith Radio Corp.,¹²⁴ a case is to be dismissed on summary judgment if there is “genuine issue of material fact” left to be determined.¹²⁵ The nonmoving party must present “specific facts showing that there is a *genuine issue for trial*” to survive summary judgment.¹²⁶ In *Goldstein*, this is essentially what the court required of the plaintiffs, for it is only by a showing of facts that could convince a reasonable jury that there can be a “genuine issue of material fact.”¹²⁷ While it may be presumed that there remains some difference between the motion to dismiss standard and the summary judgment standard under this interpretation, it is hard to imagine what that might be.¹²⁸ While it seems more likely that the court misapplied the plausibility standard by requiring too much to be pleaded by the plaintiff, the very fact that *Twombly* could be read in such a manner as to require that a complaint provide enough facts to essentially establish a *prima facie* case demonstrates the likelihood of widely disparate results arising from the plausibility standard.

On the other end of the spectrum is *Concentra*.¹²⁹ In this case, the Seventh Circuit was faced with a retaliation claim brought under Title VII on behalf of an employee allegedly discharged after reporting a sexual affair between his supervisor and another employee.¹³⁰ The complaint broadly described the alleged wrongdoing on the part of the employer, asserting that the aggrieved employee told the defendant’s Director of Human Resources that “his female supervisor gave a male subordinate,

Justice: The Social Responsibility of Lawyers: Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments, 25 WASH. U. J.L. & POL’Y 61, 82 (2007) (stating that the *Twombly* Court “treated the defendant’s motion to dismiss as though it set up a ‘mini-summary judgment’”).

¹²⁴ 475 U.S. 574 (1986) (holding that a grant of summary judgment was appropriate against an electronic product company alleging conspiracy where the respondent did not present factual evidence of a motive for the petitioner to conspire).

¹²⁵ *Id.* at 585–86 (explaining that the respondents needed to establish a genuine issue of material fact to survive a summary judgment motion); see FED. R. CIV. P. 56 (requiring that “judgment sought should be rendered if . . . there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law”).

¹²⁶ *Matsushita*, 475 U.S. at 587 (quoting FED. R. CIV. P. 56); see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (finding that the correct standard for granting summary judgment requires a lack of genuine, material facts with regard to the evidentiary standards that apply to a particular case, such as failing to show evidence of actual malice in a defamation action such that a reasonable jury could not reach more than one decision).

¹²⁷ See generally *Goldstein*, 488 F. Supp. 2d at 286–90 (requiring facts that would support *prima facie* plausibility of the plaintiff’s claims).

¹²⁸ Judge Garauffis did indicate that the plaintiffs did not have to prove their claims to survive the motion to dismiss. See *id.* at 290. Proof, of course, is also not required at the summary judgment stage. See Spencer, *supra* note 104, at 486.

¹²⁹ *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773 (7th Cir. 2007) (holding that an employee filing an equal opportunity claim must plead specific facts pertaining to the offensive workplace conduct).

¹³⁰ *Id.* at 775.

with whom she was having an inappropriate sexual relationship, preferential treatment over similarly situated employees with respect to his employment.”¹³¹ The complaint also alleged that the plaintiff was terminated in retaliation for reporting the relationship.¹³² After the initial complaint was dismissed without prejudice by the district court,¹³³ the EEOC filed an amended complaint that provided even less information, asserting only that the defendant had engaged in unlawful employment practices when it retaliated against the defendant by issuing him negative evaluations and later terminating him.¹³⁴ The amended complaint was also dismissed, this time with prejudice.¹³⁵

On appeal to the Seventh Circuit, Judge Richard D. Cudahy applied *Twombly* and found that the decision imposed “two easy-to-clear hurdles.”¹³⁶ All that is needed to state a claim was (1) “sufficient detail to give the defendant ‘fair notice of what . . . the claim is and the grounds upon which it rests,’”¹³⁷ and (2) allegations that “plausibly suggest that the plaintiff has a right to relief, raising that possibility above a ‘speculative level.’”¹³⁸ The complaint was dismissed, as the plaintiff’s failure to “provide some specific description of [the protected] conduct beyond the mere fact that it is protected” was fatal to his allegation of illegal retaliation on account of protected conduct.¹³⁹

However, Judge Cudahy interpreted *Twombly* far differently than Judge Garaufis had in *Goldstein* and found an entirely different standard arising

¹³¹ *Id.*

¹³² *Id.* (explaining that after Horn reported to Concentra’s Director of Human Resources that Concentra was giving a male subordinate with whom she shared an inappropriate sexual relationship preferential treatment over other employees, Concentra responded by firing Horn).

¹³³ See *EEOC v. Concentra Health Servs., Inc.*, No. 05 C 1109, 2005 U.S. Dist. LEXIS 26926, at *1 (N.D. Ill. Nov. 3, 2005). After filing a complaint against Concentra alleging that it discriminated against Horn by retaliating against him in violation of Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991, the court granted Concentra’s motion to dismiss. *Id.*

¹³⁴ See *Concentra*, 496 F.3d at 776. The entire portion of the complaint laying out the nature of the claim read as follows:

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

¹³⁵ *EEOC v. Concentra Health Servs., Inc.*, No. 05 C 1109, 2006 U.S. Dist. LEXIS 6715, at *3 (N.D. Ill. July 12, 2006). The district court noted that the “amended complaint was even more vague than the original.” *Id.*

¹³⁶ *Concentra*, 496 F.3d at 776.

¹³⁷ *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007)).

¹³⁸ *Id.* (citing *Twombly*, 127 S. Ct., at 1965).

¹³⁹ *Id.* at 780–81.

from *Twombly*. Judge Cudahy noted that “requiring a plaintiff to plead detailed facts interferes” with the Federal Rules’ goal “to ensure that claims are determined on their merits rather than through missteps in pleading.”¹⁴⁰ In a footnote, he stated that *Twombly* did not alter the standard of detail required to give notice of the claim.¹⁴¹ Instead, Judge Cudahy was of the view that *Twombly* reaffirmed the proposition that the Federal Rules do not encourage plaintiffs to disguise the nature of their claims.¹⁴² He found that pleading facts were not required under the liberal notice pleading regime for two reasons: (1) given the “astronomical” number of factual details potentially relevant to a case, “most details are more efficiently learned through the flexible discovery process,”¹⁴³ and (2) since plaintiffs “sometimes have a right to relief without knowing every factual detail supporting its right,” requiring the pleading of facts “would improperly deny the plaintiff the opportunity to prove its claim” in those situations.¹⁴⁴ As long as the complaint provided “what few facts can be easily provided and will clearly be helpful,” it would be sufficient under the Federal Rules.¹⁴⁵

Two judges, purporting to apply the same standard, reached widely disparate results. Indeed, *Concentra*’s permissive take on *Twombly* seems to be the polar opposite of the *Goldstein* view. Judge Cudahy’s view effectively renders *Twombly* a toothless reaffirmation of the *Conley* standard (albeit an abrogation of the oft-quoted “no set of facts” language).¹⁴⁶ On the other hand, Judge Garaufis’s interpretation would

¹⁴⁰ *Id.* at 779 (quoting 2 JAMES W. MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 8.04 (3d ed. 2006)).

¹⁴¹ *Id.* at 782 n.4 (“Even assuming that [*Twombly*] changed the level of detail required by notice pleading, which seems doubtful, we hold that the amended complaint failed to provide adequate notice under precedents that long preceded [*Twombly*] . . .”). *But see id.* at 783 (Flaum, J., concurring) (“I respectfully disagree, however, that the complaint was insufficient under our pre-*[Twombly]* case law.”).

¹⁴² *Id.* at 780 (explaining that “[t]he rules do not require unnecessary detail, but neither do they promote vagueness or reward deliberate obfuscation.”).

¹⁴³ *Id.* at 779–80 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512–13 (2002)).

¹⁴⁴ *See id.* at 780.

¹⁴⁵ *Id.* Judge Cudahy’s reference to facts that “can be easily provided” is also noteworthy, for it would seem that the *Twombly* plaintiffs pleaded facts that could easily be provided (that the defendants had engaged in parallel conduct) and expected to use discovery to find more definitive evidence of an illegal agreement. *Id.* If *Concentra* is to be understood as to ensure plaintiffs are not penalized for not pleading facts they do not know, the case would largely undercut the *Twombly* policy of requiring more of a plaintiff. As discussed below, the apparently heightened standard of *Twombly* pressures a plaintiff to engage in fact-finding prior to filing a complaint. Requiring only that “a plaintiff . . . plead what few facts can be easily provided,” *id.*, would seem to be contrary to this policy, as the plaintiff would have an incentive to refrain from fact-finding until discovery, at which point the cost burden of discovery would fall, completely or in part, on the defendant.

¹⁴⁶ *See* Nathan T. Kipp, *Pleading in the Seventh Circuit After Bell Atlantic “Fact,” “Notice,” or Otherwise?*, 96 ILL. B.J. 82, 85 (2008) (discussing the court’s opinion that *Twombly* requires plaintiffs

seem to heighten the standard of Rule 8(a)(2) to that of summary judgment. The very fact that such disparate results can be reached by two federal judges writing just two months apart¹⁴⁷ demonstrates the substantial uncertainty about the definition of the *Twombly* standard and of where the line between “plausibility” and “conceivability” lies.¹⁴⁸

B. When is the Standard Applicable?

The indeterminate scope of the standard and its bare definition is further evidence that the Court has envisioned a more active role for judges as gatekeepers at the pleadings stage.¹⁴⁹ Just as the vague “plausibility” standard gives trial judges significant leeway as to whether or not to dismiss claims it considers weak, the type of case to which the standard will apply is also vague. While the court is unclear as to the applicability of the standard, there is evidence that a broad, but not universal, application of the *Twombly* standard is intended.

The *Twombly* ruling twice purports to limit itself to the discrete issue of the proper pleading standard in a class action brought under § 1 of the Sherman Act.¹⁵⁰ However, even a cursory glance at the text of the opinion and the surrounding contextual circumstances of the case reveals that the newly formulated standard will be applied to cases outside of the antitrust realm.¹⁵¹ Three major aspects of *Twombly* support this view: (1) the

to plead minimal facts, a requirement that captures the mood of *Conley*); see also Daniel Patrick Jackson, *A New Federal Pleading Standard?*, 22 CHI. B. ASS'N REC. 46, 49 (2008) (noting the Seventh Circuit's interpretation of *Twombly* may not be a great departure from the previous interpretation of notice pleading).

¹⁴⁷ *Concentra* was decided on August 3, 2007. *Concentra*, 496 F.3d 773. *Goldstein* had been handed down just eight weeks earlier, on June 6, 2007. *Goldstein v. Pataki*, 488 F. Supp. 2d 254 (E.D.N.Y. 2007).

¹⁴⁸ See Jason G. Gottesman, *Speculating as to the Plausible: Pleading Practice After Bell Atlantic Corp. v. Twombly*, 17 WIDENER L.J. 973, 1005 (2008) (stating that *Twombly* is confusing the profession because of the circuit court's disparate interpretations); see also Ettie Ward, *The After-Shocks of Twombly: Will We “Notice” Pleading Changes?*, 82 ST. JOHN'S L. REV. 893, 904 (2008) (noting the Court's confusing statements as to what facts must be pleaded to withstand a motion to dismiss).

¹⁴⁹ Edward M. Spiro, *The Supreme Court's Pleading Trilogy*, 238 N.Y. L.J. 23, col. 3 (2007) (arguing that by eschewing *Conley*'s “no set of facts” language and instead articulating *Twombly*'s “plausibility” language, the Court intended a more active role by lower courts in determining the sufficiency of pleadings); see Gottesman, *supra* note 148, at 1004 (noting that the district courts will be dealing with the bulk of the motions to dismiss).

¹⁵⁰ See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1961 (2007) (“The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss”); see also *id.* at 1963 (“We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct”).

¹⁵¹ See *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (holding that the plausibility standard in *Twombly* extends to a case involving claims for invasion of privacy and intentional infliction of emotional distress); See also Charles B. Goodwin, *Bell Atlantic v. Twombly: A*

decision hinged on an interpretation of Rule 8, rather than any specific provision of the Sherman Act; (2) the complexity of the case is not unique to the antitrust context; and (3) the econo-centric, pro-business tenor of the holding crosses substantive boundaries.¹⁵²

The *Twombly* opinion is, at heart, a re-interpretation of Rule 8.¹⁵³ The Rule is not limited to the antitrust context, but rather governs the majority of claims brought before the federal courts.¹⁵⁴ Cases governed by provisions other than Rule 8 are the exception, not the norm. In abrogating *Conley*, the Court rejected what was regarded by most as the authoritative interpretation of Rule 8.¹⁵⁵ When the Court held that plausibility was required of a pleading under Rule 8 in *Twombly*, it arguably changed the standard of pleading for all cases governed by that rule, inside or outside of the antitrust context.¹⁵⁶

The complex circumstances of the case also point to an expansive application of the *Twombly* standard.¹⁵⁷ Antitrust cases, especially class actions, are typically very complex. Given the intricate interplay between the law and facts, there is often a very “fine line” between what is legal and

New Definition of Notice Pleading for Federal Courts, 79 OKLA. B. J. 519 (2008), available at <http://www.okbar.org/obj/articles08/030808goodwin.htm> (stating that the Supreme Court’s analysis in *Twombly* was based solely on an interpretation of Rule 8(a)(2) thus applying to all pleadings governed by that rule).

¹⁵² See Goodwin, *supra* note 151 (noting that federal and civil courts have applied the *Twombly* plausibility standard across the broad spectrum of civil claims); see also Saritha Komatireddy Tice, *Recent Developments: A “Plausible” Explanation of Pleading Standards*: Bell Atlantic Corp. v. *Twombly*, 127 S. Ct. 1955 (2007), 31 HARV. J.L. & PUB. POL’Y 827, 830–831 (2008) (noting that the effects of *Twombly* extend far beyond the field of antitrust).

¹⁵³ Audio Recording: Richard Nagareda’s comments on Supreme Court ruling in Bell Atlantic v. *Twombly* (May 23, 2007) (audio available at <http://law.vanderbilt.edu/article-search/article-detail/index.aspx?nid=115>).

¹⁵⁴ See Komatireddy Tice, *supra* note 152, at 831 (stating that *lower courts have cited Twombly* in an array of litigation contexts ranging from breach of contract to race discrimination to Title VII retaliatory discharge); see also Goodwin, *supra* note 151 (stating that the suggestion that *Twombly* only applies to antitrust cases has found little support amongst the federal and circuit courts that have considered it).

¹⁵⁵ See *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 289 (E.D.N.Y. 2007) (“[T]he plausibility standard announced in *Twombly* was intended to apply beyond antitrust-conspiracy cases. Were this not so, then *Twombly* would not have addressed *Conley v. Gibson*, formerly the leading case regarding motions to dismiss for failure to state a claim, in the manner in which it did.”); see also *Dodson article*, *supra* note 21, at 138 (noting that the best reading of *Twombly* is that the new standard is absolute and that mere notice pleading is dead for all cases and all causes of action).

¹⁵⁶ See Nagareda, *supra* note 153 (noting that *Twombly* will affect the entire modern system of civil litigation); see also *Dodson article*, *supra* note 21, at 138 (explaining that several courts have already interpreted the plausibility standard beyond cases involving antitrust industries).

¹⁵⁷ See Nagareda, *supra* note 153 (explaining the rationales for an expansion of the *Twombly* standard). See generally Michael R. Baye & Joshua D Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals 1* (Sept. 4, 2008) (unpublished comment, available at http://www.law.ucla.edu/docs/1256492008baye_wright_090408_ucla.pdf) (pointing out that “Antitrust analysis is becoming increasingly complicated”).

what is illegal.¹⁵⁸ Since there is such a fine line, antitrust cases often last for a long period of time and the litigation process can be quite costly. Settlements in these cases are prevalent, as the costs (in time and money) of discovery and further litigation often coax a defendant otherwise desiring to vigorously deny the allegations against it into a disposition by agreement.¹⁵⁹ Typically, an antitrust defendant holds much of the information pertinent to the plaintiff's claims. Such a defendant is often a large corporation or entity, for which complying with discovery requests could be costly and difficult due to the sheer volume of information and records that must be sorted through and examined.¹⁶⁰

Looking at these aspects of antitrust litigation, there are certainly several substantive areas of the law that "bear more than a passing resemblance" to *Twombly*.¹⁶¹ Securities litigation, mass torts, and employment discrimination suits are three areas that present themselves as most analogous to antitrust litigation.¹⁶² However, the standard will likely be applied in a myriad of other contexts that share at least some of the characteristics of *Twombly*. In addition to employment discrimination, courts have already applied the new plausibility formulation in a trademark case governed by the Lanham Act¹⁶³ and a claim brought under § 1983 alleging violation of the plaintiff's First Amendment right to free exercise of religion.¹⁶⁴ The court in *Goldstein v. Pataki* specifically noted that the

¹⁵⁸ See Nagareda, *supra* note 153 (discussing what is illegal under federal antitrust laws); see also Baye & Wright, *supra* note 157, at 1 (noting that "fifty years ago, antitrust laws consisted primarily of *per se* rules and bright line prohibitions").

¹⁵⁹ See Christine C. Wilson & Adam J. Coates, *Bell Atlantic v. Twombly: Court Should Reverse in Antitrust Class Action*, LEGAL BACKGROUNDER, Nov. 17, 2006, at 1, available at <http://www.wlf.org/upload/111706LBwilson.pdf> (arguing that plaintiffs often employ abusive discovery practices to "hijack federal courts" in seeking "*in terrorem* settlements"); see also Easterbrook, *supra* note 4, at 638–39 ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves.").

¹⁶⁰ See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007) (discussing the many "reams and gigabytes" of information that discovery in the case would involve); see *Dodson article*, *supra* note 21, at 138–39 (commenting on the "information asymmetry" faced by plaintiffs in cases where the defendant possesses all or most of the relevant information).

¹⁶¹ Nagareda, *supra* note 153.

¹⁶² See Nagareda, *supra* note 153. The *Blue Chip Stamps* Court's discussion of the "potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure" in securities cases, and resulting concern with *in terrorem* settlements due to the costs of litigation was written in the same tenor of *Twombly*. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975). Just as the potential for discovery abuse "is a social cost rather than a benefit" in securities cases, so too is it in antitrust cases. *Id.*

¹⁶³ 15 U.S.C.S § 1125 (2008) ("[A]ny word, term, name, symbol, or device, or any combination thereof [which] . . . is likely to cause confusion . . . as to the origin, sponsorship, or approval of his or her goods . . ."); see *Collins v. Marva Collins Preparatory Sch.*, No. 1:05cv614, 2007 U.S. Dist. LEXIS 49410, at *22 (S.D. Ohio July 9, 2007) (stating that the "plaintiffs correctly assert[ed] that the Lanham Act does offer protection to nonregistered marks").

¹⁶⁴ See *Watts v. Florida Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007) (touching on the issue of

“practical concerns” in avoiding discovery were applicable outside of the antitrust context in applying *Twombly* to an eminent domain case.¹⁶⁵

The *Twombly* Court also had business interests in mind when it formulated its new pleading standard. At oral argument, several justices were concerned with the effect of notice pleading on large corporations.¹⁶⁶ Justice Breyer even voiced a concern that an overly liberal standard would cause a “major restructuring of the economy.”¹⁶⁷ Even Justice Stevens, in his dissent, recognized the thrust of the decision, deriding the holding as “armchair economics”¹⁶⁸ and foreseeing that the new rule would therefore “invite lawyers’ debates over economic theory to conclusively resolve” claims.¹⁶⁹

As commentators have noted, *Twombly* is just one in a series of pro-business decisions.¹⁷⁰ In the 2006 term alone, the Court handed down decisions in line with the position taken by the United States Chamber of Commerce in thirteen of the sixteen cases in which the Chamber filed amicus briefs on the merits.¹⁷¹ Under Chief Justice Roberts, the Court has

the court’s role in determining a particular belief in a religion or the plausibility of a religious claim).

¹⁶⁵ *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 290 (E.D.N.Y. 2007) (noting that *Twombly* relied on concerns “such as deterring the filing of frivolous cases and avoiding discovery in such cases” in dismissing the complaint).

¹⁶⁶ See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1989 (2007) (Stevens, J., dissenting) (stating that “[t]he 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”); see also Harrow, *supra* note 103 (“Justice Scalia made clear that he would err on the side of dismissing suits, believing that the time and expense of discovery will lead to meritless suits brought to force defendants to settle.”).

¹⁶⁷ See Harrow, *supra* note 103. (“[I]t seems that Breyer is implying that concentrated industries could not continue to function if constantly sued for antitrust violations for mere parallel conduct, even if those claims do not later survive summary judgment.”).

¹⁶⁸ *Twombly*, 127 S. Ct. at 1983 (Stevens, J., dissenting).

¹⁶⁹ *Id.* at 1988.

¹⁷⁰ See Charnes & Hefferan, *supra* note 16, at 10 col. 1 (describing several recent decisions which have had beneficial for the business community); see also Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1555 (2008) (noting that several periodicals that have described the Roberts court as being “pro-business”).

¹⁷¹ Charnes & Hefferan, *supra* note 16, at 10 col. 1 (citing examples of pro-business decisions made by the Roberts Court); see *Twombly*, 127 S. Ct. 1955, 1965 (stating that a complaint must contain “enough factual matter (taken as true) to suggest that an agreement was made”). See generally *Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007) (holding that for an inference of scienter to be drawn from a complaint in a securities fraud case it must be more than merely “reasonable” or “plausible”); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2707 (2007) (overruling the per se rule against resale price maintenance and holding that “vertical price restraints are to be judged by the rule of reason”); *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007) (ruling that federal securities law implicitly precluded the application of antitrust law to certain behavior by securities underwriting firms); *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) (forbidding states from employing punitive damages on a defendant for injuries to those not involved in the litigation); *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007) (finding that the test for determining the obviousness under § 103 of the Patent Act should be flexible so as to ensure that innovation was not stifled).

turned “significantly to the right,” thus “tend[ing] to favor businesses over employees and consumers.”¹⁷² One high court litigation expert, Mary Levy even stated, “I don’t think there was a significant business case that was lost this term.”¹⁷³ Thus, the result in *Twombly* must be understood in this pro-business context as just one of several decisions meant to bolster the economic competitiveness of businesses.¹⁷⁴ The Court has added a heavy weight to the scales in the classic battle between the need for fairness and due process with the need for judicial economy. *Twombly*, along with the other pro-business decisions, has made the economic effects of a court’s ruling a very important factor to be weighed in the decision-making process both inside and outside of the antitrust context.

However, the effect of *Twombly* will not be universal, even assuming that *Twombly* is applicable outside of the antitrust context. In “simpler” cases, the *Twombly* standard has far less applicability. As another recent decision, *Erickson v. Pardus*,¹⁷⁵ indicates, the Supreme Court seems not to have intended for its newly formulated standard to bring about a complete revolution in pleading practices.¹⁷⁶ Instead, it appears that the Court has provided trial courts with a tool to be used selectively, as needed under certain circumstances.

The facts of *Erickson* are quite simple. *Erickson*, a Colorado State inmate, brought a § 1983 claim and asserted violations of his Eighth and Fourteenth Amendment rights against cruel and unusual punishment.¹⁷⁷ In his complaint, he “alleged that a liver condition resulting from hepatitis C required a treatment program that [prison] officials had commenced but

¹⁷² Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2d 423, 424 (2007) (stating that the court made a conservative move by favoring the government over individuals); see Marcia Coyle, *In the First Full Term with Alito, Court Took Marked Conservative Turn*, 29 NAT’L L.J. 49, at 1 col. 1 (2007) (concluding that the Court’s attention to business cases is “in keeping with what the business community hoped for when Roberts became chief justice” (quoting Mark Levy, of counsel to the Washington office of the firm of Kilpatrick Stockton)).

¹⁷³ Coyle, *supra* note 172, at 1 col. 1 (quoting Mark Levy, of counsel to the Washington office of the firm of Kilpatrick Stockton).

¹⁷⁴ The *Twombly* Court received a multitude of amicus curiae briefs from business interests supporting the defendant ILECs. See Brief of Mastercard Int’l Inc. & Visa U.S.A. Inc. as Amici Curiae Supporting Petitioners, *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (No. 05-1126); Brief of the American Petroleum Institute as Amicus Curiae Supporting Petitioners, *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (No. 05-1126). Also, the Office of the Solicitor General filed a brief and was heard at oral argument in support of the corporate defendants. See Brief for the United States as Amicus Curiae Supporting Petitioners, *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (No. 05-1126); Transcript of Oral Argument, *supra* note 92, at 17–28.

¹⁷⁵ 127 S. Ct. 2197 (2007) (per curiam).

¹⁷⁶ See *Dodson article*, *supra* note 21, at 139 (“Still others have suggested that *Erickson v. Pardus* . . . mitigates [*Twombly*’s] significance.”); see also Posting of Amy Howe to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2007/06/more_on_yesterd_1.html (June 5, 2007, 17:10 EST) (discussing *Erickson*).

¹⁷⁷ *Erickson*, 127 S. Ct. at 2197.

then wrongfully terminated, with life-threatening consequences.”¹⁷⁸ His complaint was dismissed by the district court for failing to allege that the defendants’ actions had caused “substantial harm” to the petitioner.¹⁷⁹ The Tenth Circuit affirmed the dismissal, finding that the Erickson had made only “conclusory allegations to the effect that he has suffered a cognizable independent harm as a result of his removal from the [hepatitis C] treatment program.”¹⁸⁰

The Supreme Court, in a per curiam decision¹⁸¹ released just two weeks after *Twombly* was handed down,¹⁸² reversed the Tenth Circuit’s judgment to find that “[t]he case cannot . . . be dismissed on the ground that petitioner’s allegations of harm were too conclusory to put these matters in issue.”¹⁸³ The Court noted that Rule 8(a)(2) requires only that a complaint “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”¹⁸⁴ While the Court cited *Twombly* in support of this proposition,¹⁸⁵ it made no mention of the plausibility requirement at any point in *Erickson*. In fact, the Court specifically avoided examining that complaint’s plausibility, noting that “[i]t may in the final analysis be shown that the District Court was correct to grant respondents’ motion to dismiss [, but] [t]hat is not the issue here.”¹⁸⁶ The opinion even went so far as to deride the Tenth Circuit’s “departure from the liberal pleading standards set forth by Rule 8(a)(2),”¹⁸⁷ the nature of which the Court had sharply criticized in *Twombly*. The Court found that Erickson had satisfied Rule 8(a)(2) by the following three allegations alone: (1) that “medication was withheld ‘shortly after’ petitioner had commenced a treatment program that would take one year”; (2) that Erickson was “still in need of treatment”

¹⁷⁸ *Id.* at 2197–98. The Court also noted that “[i]n his complaint petitioner alleged Dr. Bloor had ‘removed [him] from [his] hepatitis C treatment’ . . . ‘thus endangering [his] life,’ . . . [and that] he was suffering from ‘continued damage to [his] liver’ as a result of the nontreatment.” *Id.* at 2199.

¹⁷⁹ *See Id.* at 2199.

¹⁸⁰ *Id.* (quoting *Erickson v. Pardus*, 198 F. App’x 694, 698 (10th Cir. 2006)).

¹⁸¹ Justice Scalia would have denied the petition for certiorari altogether. *Id.* at 2200. Justice Thomas dissented, arguing that the Eighth Amendment relates to “only injuries relating to a criminal sentence.” *Id.* (Thomas, J., dissenting).

¹⁸² *Twombly* was decided on May 21, 2007. *Bell Atl. v. Twombly*, 127 S. Ct. 1955 (2007). *Erickson* was decided on June 4, 2007. *Erickson v. Pardus*, 127 S. Ct. 2197 (2007).

¹⁸³ *Erickson*, 127 S. Ct. at 2200.

¹⁸⁴ *Id.* (citing *Twombly*, 127 S. Ct. at 1964).

¹⁸⁵ The Court also cited *Twombly* (which itself had quoted language from *Conley*) as authority in stating that “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief’” and in noting that “specific facts are not necessary.” *Id.*

¹⁸⁶ *Id.* at 2199–200. The Court reiterated this lack of concern with the plausibility of the complaint later when the Court commented that “[w]hether petitioner’s complaint is sufficient in all respects is a matter yet to be determined . . .” *Id.* at 2200.

¹⁸⁷ *Id.* at 2200 (“This alone was enough to satisfy Rule 8(a)(2).”).

for hepatitis C; and (3) that the prison officials were refusing to provide that treatment.¹⁸⁸

While the Court, as evidenced by its citing of *Twombly* in *Erickson*, presumably felt that the decisions were consistent, the tension between the holdings seems quite evident.¹⁸⁹ The apparent implication arising from *Erickson* is that, despite the problems discussed in *Twombly*, notice pleading is not dead.¹⁹⁰ The permissive tone of *Erickson* reaffirms the purpose of the Federal Rules to do away with fact pleading.¹⁹¹ However, this does not mean *Twombly* was an aberration, limited to the very narrow context of allegations of parallel conduct in an antitrust case. As noted above, *Twombly* will indeed have relatively broad applicability. *Erickson* simply makes clear that the *Twombly* plausibility standard is unnecessary in every case brought before a trial court.¹⁹²

The uncertainty caused by the tension between *Twombly* and *Erickson* begs an obvious question: exactly under which circumstances is the new *Twombly* standard to be applied? Perhaps the most notable discussion of this issue can be found in the Second Circuit's decision in *Iqbal v. Hasty*.¹⁹³ *Iqbal* involved a claim brought by a Pakistani pretrial detainee who alleged that various former and current government officials "took a

¹⁸⁸ *Id.* Thus, the Court found that "it was error for the Court of Appeals to conclude that [Erickson's] allegations . . . were too conclusory to establish for pleading purposes that petitioner has suffered 'a cognizable independent harm' as a result of his removal from the hepatitis C treatment program." *Id.*

¹⁸⁹ See Joseph, *supra* note 87, at 13col. 1 (explaining that *Erickson* appears to diminish the extensiveness of *Twombly*'s "change [of] the law of notice pleading"); see also Spiro, *supra* note 99, at 6 col. 1 (noting the "obvious tension" caused by the Court's "mixed signals").

¹⁹⁰ See Matthew A. Josephson, *Some Things are Better Left Said: Pleading Practice After Bell Atlantic Corp. v. Twombly*, 42 GA. L. REV. 867, 903-04 (2008) (asserting that *Twombly*'s plausibility standard will be applied outside of the antitrust context, but its application will be limited); see also Posting of Mike O'Shea to Concurring Opinions, http://www.concurringopinions.com/archives/2007/06/how_cautionary_1.html (June 6, 2007, 18:47 EST) (referring to *Erickson* as a "Don't Get Carried Away" decision limiting the scope of *Twombly*, but also noting the uncertainty as to the exact interplay between the two decisions). *But see* Spencer, *supra* note 104, at 431 (arguing that "[n]otice pleading is dead").

¹⁹¹ See Josephson, *supra* note 190, at 903 (stating that circumstances suggest *Erickson* was written to assure lower courts that the rules of pleading had not been drastically revised); see also Spiro, *supra* note 99, at 6 col. 1 (commenting on the "Court's insistence that [*Twombly*'s] plausibility standard does not alter the traditional notice pleading requirements of Rule 8(a)(2).").

¹⁹² See *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 ("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.'" (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007))); see also Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 451 SUFFOLK U. L. REV. 851, 859-60 (2008) (describing how the Supreme Court itself, soon after *Twombly*, employed a different standard in *Erickson*).

¹⁹³ 490 F.3d 143, 157 (2d Cir. 2007) ("These conflicting signals create some uncertainty as to the intended scope of the Court's decision. We are reluctant to assume that all of the language of *Bell Atlantic* applies only to *section 1* allegations based on competitors' parallel conduct or, slightly more broadly, only to antitrust cases.").

series of unconstitutional actions against him in connection with his confinement under harsh conditions” in a federal detention center.¹⁹⁴ The defendants, a group of various government officials, moved to dismiss the plaintiff’s claims.¹⁹⁵ The district court denied the motions with a few exceptions, finding that the complaint’s allegations were largely sufficient.¹⁹⁶

On appeal by the defendants, the Second Circuit had to determine which standard was applicable before actually examining the validity of the complaint’s allegations. In doing so, the court determined that *Twombly* was applicable to the case.¹⁹⁷ Discussing the various conflicting signals from *Twombly* as to the nature and scope of the plausibility standard,¹⁹⁸ the *Iqbal* court concluded that the standard was indeed applicable outside of the antitrust context.¹⁹⁹ As the court wrote:

After careful consideration of the Court’s opinion [in *Twombly*]

¹⁹⁴ *Id.* at 147. Essentially, *Iqbal* claimed that following his arrest by Immigration and Naturalization Service agents in November of 2001, he was classified as a high risk detainee due to his race, religion, and national origin. *Id.* at 147–48. That classification, *Iqbal* alleged, led to prolonged mistreatment and brutal physical abuse of which high level officials, like Former Attorney General John Ashcroft and FBI Director Robert Mueller, among others, were at least aware and may have actually condoned. *Id.* at 148–49.

¹⁹⁵ *Iqbal* asserted 21 causes of action. *See id.* at 149 n.3. The defendants asserted several grounds for dismissal, namely that “(1) [the actions were barred by the] ‘special factors’ [of the post-9/11 context]; (2) they were protected by qualified immunity; (3) the supervisory defendants were not alleged to have sufficient personal involvement; and (4) [several of the defendants] were not subject to personal jurisdiction in New York.” *Id.* at 150. Rule 8(a)(2) and *Twombly* were implicated by the motions to dismiss on the grounds of qualified immunity and lack of personal involvement. *Id.* at 153.

¹⁹⁶ *See id.* at 147 (noting the named plaintiff in the district court litigation later dropped out of the case after reaching a settlement with the United States in the form of a \$300,000 payment); *see also* *Elmaghraby v. Ashcroft*, No. 04 CV 1409 (JG)(SMG), 2005 U.S. Dist. LEXIS 21434, at *114 (E.D.N.Y. Sept. 27, 2005) (citing the district court’s denial of the defendant’s motions to dismiss).

¹⁹⁷ *See Iqbal*, 490 F.3d at 155 (“However, the Court’s explanation for its holding [in *Twombly*] indicated that it intended to make some alteration in the regime of pure notice pleading that had prevailed . . . ever since [*Conley*] was decided half a century ago.”); *see also id.* at 157 n.7 (“[I]t 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 (according to a Westlaw search), applies only to section 1 antitrust claims.”).

¹⁹⁸ *Id.* 155–57. The factors the court cited as supporting an expansive scope to *Twombly* included: (1) the Court’s disavowal of *Conley*’s “‘no set of facts’” language; (2) the Court’s apparent indication that more than notice of a claim was required to allege a sufficient allegation; (3) the ineffectiveness of “‘careful case management’” in weeding out implausible claims; and (4) the Court’s encapsulation of its various requirements into “what it labeled ‘the plausibility standard’”. *Id.* at 155–56. Factors militating in favor of a narrower scope were: (1) the Court’s explicit disclaimer of a requirement of “‘heightened fact pleading of specifics’”; (2) the manner by which the Court expressed its approval of Form 9 (which the Second Circuit described as “generalized”); (3) the Court’s heavy emphasis on the heavy costs of discovery in complex cases; (4) the Court’s failure to disclaim its prior statement that summary judgment and control of discovery to weed out weak claims; and (5) the Court’s permissive tone in *Erickson*. *Id.* at 156–57.

¹⁹⁹ *See id.* at 157. “We are reluctant to assume that all of the language of [*Twombly*] applies only to section 1 allegations based on competitors’ parallel conduct or, slightly more broadly, only to antitrust cases.” *Id.*

and the conflicting signals from it that we have identified, we 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*.²⁰⁰

The Court then applied its interpretation of the standard, finding that the plaintiff had sufficiently alleged plausible claims.²⁰¹

Iqbal's view of the *Twombly* as a flexible, circumstantially dependent standard seems to have gained relative acceptance by federal courts in determining whether *Twombly* plausibility is applicable to the case at hand.²⁰² However, this view is not universally shared: one district court has found *Twombly* to be confined to antitrust cases,²⁰³ while another is of the view that the plausibility standard is to be applied anytime 12(b)(6) motions are considered.²⁰⁴

²⁰⁰ *Id.* at 157–58.

²⁰¹ *Id.* at 160–78. The Second Circuit did, however, dismiss plaintiff's claimed violation of procedural due process, not because of insufficient pleading, but rather due to the uncertainty in the case law that precluded a finding that *Iqbal*'s right to procedural due process was clearly established. *See id.* at 167. The court concluded that while the plaintiff had adequately pleaded a violation of a procedural due process right “in this case ‘officers of reasonable competence could [have] disagree[d]’ whether their conduct violated a clearly established procedural due process right.” *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

²⁰² *See Collins v. Marva Collins Preparatory Sch.*, No. 1:05cv614, 2007 U.S. Dist. LEXIS 49410, at *9 n.1 (S.D. Ohio July 9, 2007). In *Collins*, the court noted that, while the Sixth Circuit had not yet applied *Twombly* or *Iqbal*, eight district courts in the Sixth Circuit had adopted the *Iqbal* interpretation. *Id.* (citing *U. S. ex rel. Howard v. Lockheed Martin Corp.*, 499 F. Supp. 2d 972 (S.D. Ohio 2007); *Massey v. Inman*, No. 2:06-CV-76, 2007 U.S. Dist. LEXIS 46389 (E.D. Tenn. June 26, 2007); *Ellis v. Bradley County*, No. 1:06-CV-260, 2007 U.S. Dist. LEXIS 45715 (E.D. Tenn. June 22, 2007); *Fisher v. Caruso*, Nos. 03-71804, 06-11110, 2007 U.S. Dist. LEXIS 45366 (E.D. Mich. June 22, 2007); *McKnight v. Gates*, No. 3:06-1019, 2007 U.S. Dist. LEXIS 44955 (M.D. Tenn. June 20, 2007); *Reid v. Purkey*, No. 2:06-CV-40, 2007 U.S. Dist. LEXIS 42761 (E.D. Tenn. June 11, 2007); *Agfa Photo United States Corp. v. Parham*, No. 1:06-CV-216, 2007 U.S. Dist. LEXIS 40980 (E.D. Tenn. June 5, 2007)). The Sixth Circuit, weeks later, applied *Twombly* in *League of United Latin American Citizens v. Bredeesen*, 500 F.3d 523, 527 (6th Cir. 2007), and noted its approval of *Iqbal* in *Weisbarth v. Geauga Park District*, 499 F.3d 538, 541-42 (6th Cir. 2007). *See also Gaffer Ins. Co. v. Discover Reinsurance Co.*, No. 3:07-CV-00580, 2007 U.S. Dist. LEXIS 75259, at *9 (M.D. Pa. Oct. 10, 2007). The court held it “will follow the guidance of the Second and Seventh Circuit Courts of Appeals, and apply a flexible ‘plausibility’ standard, on a case-by-case basis, in those contexts in which it is deemed appropriate that the pleader be obliged to amplify a claim with sufficient factual allegations.” *Id.* at *9.

²⁰³ *See United States v. Harchar*, No. 1:06-cv-2927, 2007 U.S. Dist. LEXIS 47028, at *4 (N.D. Ohio June 28, 2007) (finding that “*Twombly* merely held that a complaint that alleged only parallel conduct did not state a claim for an antitrust conspiracy” and that “[t]he Supreme Court did not purport to change the applicable 12(b)(6) standards”).

²⁰⁴ *See Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans, Inc.*, 511 F. Supp. 2d 1, 16 (D.D.C. 2007) (noting that “other district courts have not sought to confine *Twombly*'s teachings to their original context” and applying the plausibility standard to a complaint alleging trademark infringement); *see also Farmland Indus., Inc. v. Rinaldi*, 376 B.R. 718, 722 n.6 (Bankr. W.D. Mo. July 17, 2007) (discussing that *Fame Jeans, Inc.* “suggest[ed] that *Twombly* created an across-the-board heightened pleading standard”).

Even if all courts were in accord with the *Iqbal* approach, confusion would remain regarding the scope of *Twombly's* applicability. Exactly what are “those contexts” in which amplification is needed? Since the *Iqbal* court envisioned a flexible approach, it is not surprising that the decision did not give a precise definition. Nonetheless, the fact remains that practitioners and trial judges alike are in large part forced to guess at when the *Twombly* plausibility standard is to be applied.

First, “those contexts” may refer to cases in which the cause of action is “disfavored” by the courts. Such a reading would view the Supreme Court as having imposed a more rigorous standard on the plaintiffs in *Twombly* not because of any specific factors in the case itself, but rather (at least primarily) because the Court felt that the cause of action asserted, a violation of § 1 of the Sherman Act, was particularly undesirable and should be limited in applicability. Thus, the plausibility standard would serve as a roadblock discouraging plaintiffs from filing certain causes of action that were found to be “disfavored.” Whether this is the correct interpretation or not, the *Twombly* decision’s vagueness lends itself to the possibility that a trial judge might employ *Twombly* as a pretext to scrutinize certain disfavored claims more rigorously.²⁰⁵

“Those contexts” may also refer to the relative ease of inferences required of a trial court in analyzing a complaint. Under this interpretation, *Twombly* requires a judge to look objectively at the asserted injury and determine whether it is plausible that the alleged defendant caused that harm before he or she even reads the supporting factual allegations.²⁰⁶ If the judge finds it implausible that the defendant caused the asserted injury, the factual basis for the claim should then be rigorously examined. If the asserted injury is objectively plausible, then only a cursory reading is necessary, which only requires that the complaint give some basic notice of the claim.²⁰⁷

“Those contexts” may also concern the complexity of the case, referring

²⁰⁵ For example, a judge supporting massive tort reform might find that “those contexts” include all personal injury claims, while another judge in favor of expanded consumers’ rights might determine that a more rigorous standard is warranted in breach of contract claims brought by corporations against consumers.

²⁰⁶ According to such a reading, the trial court should have first determined, without examining the allegations of the complaint, if it was plausible that the four telecommunications companies in *Twombly* conspired.

²⁰⁷ Thus, a complaint alleging that the defendant negligently drove into the plaintiff and injured him would be considered plausible (objectively, car accidents happen all the time and it is likely that one of the drivers was negligent). On the other hand, a complaint alleging an agreement by four massive corporations not to compete would be objectively implausible and a trial judge would require that complaint to lay out in detail the underlying basis for the allegations.

to the cost in time and money that discovery is likely to require. Thus, *Twombly* could be read to require a trial court to make an initial determination of the claims before it, and to decide whether they are complex and thus warranting increased scrutiny for their plausibility, or simple and not meriting such a strictly discerning eye.²⁰⁸ Under this interpretation, practitioners should envision a “complexity spectrum” to be in effect, and should attempt to present to a trial judge a picture of the case at hand that places it on whichever end of the spectrum (complex or simple) that will result in the level of scrutiny (heavy or light) most beneficial to their client’s interests. The more arduous and time-consuming discovery is likely to be, the more likely it is that *Twombly* will be applicable.

The issue of which of these interpretations is correct is not a question this paper will attempt to answer. After all, the “proper” interpretation will be the one that is most often adopted by the various courts – only time will reveal the prevailing view. The very fact that (at least) three widely divergent meanings of “those contexts” can be inferred from the *Twombly* decision demonstrates the extremely subjective nature of the scope of *Twombly*.²⁰⁹ Therefore, it appears the problem of when plausibility analysis will be undertaken by a trial court has its solution rooted not in any objective guideposts, but rather in the subjective interpretations of trial judges.

Any time a rule or standard is to be applied in a case-by-case manner, as *Iqbal* suggests *Twombly* is to be considered, substantial uncertainty will exist as to the effect of that rule.²¹⁰ The subjective worldviews of judges are called upon to play an important role in determining which cases are dismissed and those that are allowed to proceed to the discovery stage. Indeed, the lock holding closed the proverbial “gate” to discovery will have

²⁰⁸ See Josephson, *supra* note 190, at 897 (commenting on the potential for increased emphasis on the relationship between complexity of the case and greater details in pleadings required by courts after *Twombly*); see also Patrick A. Jackson & John J. McLaughlin, Jr., *Supreme Court Announces New “Plausibility” Standard for Rule 12(b)(6) Dismissal: Not Just Any “Conceivable” Set of Facts Will Do*, 26-6 AM. BANKR. INST. J. 34, 61 (2007) (positing that *Twombly* could possibly have an affect on complex bankruptcy court proceedings).

²⁰⁹ See Josephson, *supra* note 190, at 871 (noting the district courts and federal circuit courts have taken divergent views when applying *Twombly*); see also Ward, *supra* note 148, at 910–18 (2008) (considering the many possible ways in which *Twombly* could be applied by courts in the future).

²¹⁰ *Iqbal v. Hasty*, 490 F.3d 143, 155 (“Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court’s decision in [*Twombly*].”); see *Accenture Global Servs. GMBH v. Guidewire Software Inc.*, No. 07-826-SLR, 2008 U.S. Dist. LEXIS 79958, at * 14 (D. Del. Oct. 8, 2008) (noting “the apparent conflict between *Twombly*’s emphasis on ‘plausibility’ and the Court’s statements that it was not adopting or applying a ‘heightened pleading standard’”).

a different combination for every judge. Thus, as in any other context where no bright-line rule has been promulgated, inconsistent jurisprudence seems to be inevitable.²¹¹

III. THIS DUAL CONFUSION WILL TEMPER THE GOALS OF THE *TWOMBLY* COURT

The combination of the vague definition of a plausible claim and the complex-simple distinction points courts and practitioners down an uncharted path. The Seventh Circuit has observed that, “[t]aking *Erickson* and *Twombly* together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under *Rule 8*.”²¹² However, as recent attempts by courts and commentators alike have shown, where that “point” lies is far from established. The net result of this uncertainty has been and will continue to be a lack of uniformity within the federal judiciary.²¹³ Indeed, the Court’s attempt to lessen the burden of “sprawling, costly, and hugely time-consuming” litigation on civil defendants is so poorly adapted to the accomplishment of its goals that the process of finding the meaning of the new standard will be “sprawling, costly, and hugely time-consuming.”²¹⁴

As noted above, the Supreme Court’s fundamental concern in *Twombly* was its perception of the costly and time-consuming burden extensive discovery places upon modern complex litigation. The goal of *Twombly*, it seems, is to diminish the effects of this burden on defendants by making it more difficult for plaintiffs to get their claims to the discovery stage. In doing so, the potential for the abusive use of discovery, first addressed by

²¹¹ The likelihood of dissonance within courts in their application of the plausibility standard is undoubtedly heightened by the highly political nature of *Twombly*’s key factor: the high cost of discovery on defendants. It takes no stretch of the imagination to see how so-called conservative judges might over-utilize *Twombly* to protect corporate interests, while so-called liberal judges might concurrently apply the standard in such a way as to prevent damage to the due process rights of (comparatively) economically disadvantaged litigants in their fight against wealthy corporate defendants. See *supra* notes 151–58 and accompanying text.

²¹² *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007).

²¹³ Even within the antitrust context, application of *Twombly* has not been uniform. For instance, in *In re Elevator Litigation*, 502 F.3d 47 (2d Cir. 2007), the Second Circuit implied that *Twombly* raised the pleading standard to require plausibility rather than mere statements consistent with illegal conduct. However, in *Hyland v. Homeservices of America*, No. 3:05-CV0612-R, 2007 WL 2407233 (W.D. Ky. Aug. 17, 2007), the court did not stress that *Twombly* required a more stringent pleading standard.

²¹⁴ *Dodson article, supra* note 21, at 142 (indicating that because the meaning of *Twombly* is difficult to understand it will result in expensive and time-consuming litigation); see *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1988 n.13 (2007) (Stevens, J., dissenting) (noting that there is “[t]he potential for ‘sprawling, costly, and hugely time-consuming’ discovery”).

the Court in *Blue Chip Stamps*,²¹⁵ would be limited. While the ruling, especially in light of the *Iqbal* “flexibility” interpretation, is certainly a large step in pursuit of this cost-limiting goal, the ambiguity surrounding the application of the standard will severely temper *Twombly*’s effectiveness in achieving it.²¹⁶ Because the reinterpretation of the meaning of Rule 8 involves such a high degree of uncertainty, the Court’s decision to use reinterpretation instead of the process of amending the text of the Rule itself will hamper the ruling’s effectiveness in preventing discovery abuse.

First, fewer claims will be filed by plaintiffs. This “chilling” effect that *Twombly* will have on individuals with tenuous claims is perhaps the most significant of any change resulting from the institution of the plausibility standard.²¹⁷ Potential plaintiffs will be deterred from filing complaints due to the increased likelihood that the complaint will be dismissed. Moreover, the requirement that allegations be “amplified” in certain contexts will force plaintiffs to spend increased resources early in the litigation process, the prospect of which will cause cash-strapped individuals to refrain from filing their claims, even when their chance of success is reasonably “plausible.”²¹⁸ Whether one agrees or disagrees with the wisdom of such a policy, the ability of *Twombly* to prevent complaints from being filed by plaintiffs will be the most successful means by which discovery

²¹⁵ See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (“[T]o the extent that [the discovery process] . . . permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.”).

²¹⁶ *In re Elevator*, 502 F.3d at 50 (mentioning that “[c]onsiderable uncertainty” surrounds the Supreme Court’s decision in *Twombly*); *Ollie v. Plano Indep. Sch. Dist.*, No. 4:06-cv-069, 2008 U.S. Dist. LEXIS 22077, at *6 (E.D. Tex. Mar. 20, 2008) (“*Twombly* has generated an ample amount of discussion, it is not clear how far, if much at all, it departs from the previously accepted pleading standard.”).

²¹⁷ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007), (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. 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’”); see *Iqbal v. Hasty*, 490 F.3d 143, 156–157 (2007) (mentioning the effects the holding set forth in *Twombly* may have on future litigation of “anemic” cases).

²¹⁸ Civil Plaintiffs, often financially overmatched by civil defendants, will be deterred from filing suit because of the likely increase to their expenses resulting from *Twombly*. See Mark Samson, *Arizona Should Avoid Twombly’s Pernicious Effects*, ARIZ. ATT’Y, Sept. 2007, at 27–28. This, of course, has the probability of discouraging truly meritorious claims and even those upon which the potential plaintiff could very well have prevailed after discovery and trial, as the “Court’s standard is likely to bar many . . . cases . . . with merit.” See *Dodson article, supra* note 21, at 124–25. Such a result is particularly likely in the antitrust context where the defendant holds all the evidence (e-mails, memoranda, etc.) that would establish the existence of illegal conduct. *Id.* Some of the harshest criticism of *Twombly* has been along these lines. *Id.*

expenditures will be limited.²¹⁹ However, its effectiveness in “chilling” plaintiffs will be hampered significantly by the inconsistent results arising from the ruling’s application. Given the substantial uncertainty in whether and how *Twombly* will be applied, the deterrent effect on plaintiffs will likely be diminished.²²⁰ With a clearer standard, even fewer complaints would be filed.

Where the plaintiff is not deterred from filing a complaint, it is clear that *Twombly* will lead to a rise in the filing of 12(b)(6) motions, given the more rigorous challenge complaints will face under the plausibility regime.²²¹ In cases where the motion is denied and discovery takes place, all *Twombly* will have done is add an extra layer of motion practice to the litigation, adding to the time, money, and resources spent by the parties to achieve exactly the same result to which the old *Conley* formulation would have led. To the extent that this outcome results, *Twombly* has actually served to increase costs, which is contrary to the policy concerns of the Court.

However, given the more stringent standard of plausibility, it is likely that the number of dismissals will also increase.²²² Where dismissals are granted without prejudice, plaintiffs will be forced to investigate the circumstances of their claims further in order to file an amended complaint that rises to the requisite level of plausibility. To the extent that this shifts some of the costs of discovery away from defendants, this result is consistent with the spirit of *Twombly*. However, if the initial complaint was missing only a few facts that are easily discoverable, the court’s dismissal without prejudice will have accomplished very little, forcing the plaintiff to run one simple errand before getting to discovery. The defendant may even have a net increase in costs from the process.²²³ *Twombly*’s inconsistency,

²¹⁹ See Samson, *supra* note 218, at 28 (arguing that “[t]he ability to increase plaintiffs’ expenses in all cases, good or bad, and the resulting ‘chilling’ of plaintiffs is the most pernicious effect of *Twombly*”); see also Josephson, *supra* note 190, at 900 (finding that the volume of litigation going to discovery may decrease under *Twombly*’s standards).

²²⁰ After all, the effect of any discouragement to a potential plaintiff from a rigorous plausibility challenge is diminished to the extent that the likelihood of such a challenge will not be conducted at all.

²²¹ See Samson, *supra* note 218, at 28 (commenting that *Twombly* “mak[es] motions to dismiss more viable.”); see also Josephson, *supra* note 190, at 903 (showing that motions to dismiss are more feasible because “a judge must accept as true all of the factual allegations contained in the complaint”).

²²² See Tice, *supra* note 9, at 830 (noting that “[t]he Court’s decision in *Twombly* . . . reflects a significant move away from the litigation-promoting mindset embodied in *Conley* and instead solidifies what has been a growing hostility toward litigation.”); see also Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1856 (2008) (stating that courts have “exponentially increased” its use of motions to dismiss).

²²³ Even though the defendant would presumably save resources as a result of not having to provide the plaintiff with the information that the pre-amended complaint investigation garnered, the combined cost of the motion to dismiss the initial complaint and the inevitable motion to dismiss the amended complaint may exceed the savings.

insofar that a plaintiff is uncertain as to where exactly the threshold of plausibility lies, may very likely lead to repetitive motion practice where a judge willing to give plaintiffs the opportunity to replead several times.

Where dismissals are granted with prejudice, the appeals process will sometimes interfere with the pursuit of limiting costs.²²⁴ Where dismissals are successfully appealed, the parties are sent back to the district court, the same place they would have been had the trial court denied the motion to dismiss, only having spent X more months and Y more dollars to reach the same result. The trial judge's application of the plausibility standard, therefore, would again have resulted in nothing but an extra layer of litigation and increased costs. The likelihood of this result is significantly enhanced by *Twombly's* inconsistency, especially given the acceptance of *Iqbal's* flexible, case-by-case approach.²²⁵ The probability that the interpretation of the circuit court will differ from that of the district court is substantial.

The result is best for a defendant, of course, when the circuit court affirms the trial court's dismissal of the complaint. This is because the defendant has entirely avoided the costs of discovery, having to spend only a comparatively small amount of time and resources in filing a motion to dismiss and defending the grant of that motion on appeal.²²⁶ The outcome in such circumstances is most in line with the goals of *Twombly*, especially when the "trickle-down chilling" effect on the particular class of claims is considered.²²⁷ However, it must be remembered that the extent of this "success" in other cases will be limited by inconsistent results within the same context.

As many critics of *Twombly* have noted, much of the inconsistency arising from the decision results from the method the Court has chosen to

²²⁴ The court granted defendant's motion to dismiss with prejudice, which if appealed, would result in extra costs. *Saunders v. Port Auth. of N.Y.*, No. 02 Civ. 9768 (RLC), 2004 U.S. Dist. LEXIS 8482, at *15 (S.D.N.Y. May 10, 2004). The district court granted the defendant's motion to dismiss, which would raise expenses in an appeal. *Norley v. HSBC Bank USA*, No. 03 Civ. 2318 (DLC), 2003 U.S. Dist. LEXIS 21976, at *24 (S.D.N.Y. Dec. 10, 2003).

²²⁵ See *supra* note 202 and accompanying text (discussing the *Iqbal* decision's "relative acceptance").

²²⁶ Ward, *supra* note 148, at 916 (2008) (noting that post-*Twombly* defendants are likely to predict an increased rate of success on a 12(b)(6) motion); see Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. PA. J. BUS. & EMP. L. 627, 642-43 (2008) (alleging that an antitrust plaintiff's lack of access to information necessary to draft a sufficient complaint will benefit a defendant, as the court will be more likely to affirm his motion to dismiss). *But see* McMahon, *supra* note 192, at 870 (commenting that the lack of predictability regarding how a court will interpret *Twombly* may actually prejudice the "cost-conscious" defendant).

²²⁷ Just as the Supreme Court's decision in *Twombly* will discourage other individuals from filing their own antitrust claims where the circumstances are similar, so too will an appeals court's decision to affirm the dismissal of a particular claim deter similar claims in the legal context at issue.

effect change.²²⁸ The Court did not employ the usual process of amending the federal rules to change the pleading standard, which Congress instituted to encourage “informed deliberation” when changes in the rules of procedure in federal courts are considered.²²⁹ Instead, the Court left the text of Rule 8(a)(2) alone but acted to change the meaning of that text with “judicial overlay.”²³⁰ Rather than having Committee Notes to examine in order to understand the meaning of the new standard and the extent of its applicability, lower courts and practitioners have only the *Twombly* opinion itself to guide their analysis.²³¹ Thus, it is left for courts and attorneys to discern the contours of the plausibility standard through an adversarial process, to which the interested parties approach with the narrow focus of deciding the case’s discrete issue at hand, largely blind to the broader implications that a particular result may have.²³² The end result of the Court’s adoption of a new standard by interpretation of Rule 8(a)(2) rather than amendment of the rule is can only be inconsistency, with consensus being attained only after a “sprawling, costly, and hugely time-consuming” process.²³³

²²⁸ *Philips v. County of Allegheny*, 515 F.3d 224, 230 (3d. Cir. 2007) (noting that *Twombly*’s impact on Rule 12(b)(6) is confusing because even though the Court rejects the “no set of facts” language, it does not attempt to change the Rules’ framework); see McMahon, *supra* note 192, at 867 (claiming that it is constitutionally questionable for the Court to impose a “factfinding-like exercise[] at the pleading stage” if Congress has not amended Rule 8).

²²⁹ See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1979 (2007) (Stevens, J., dissenting) (citing 28 U.S.C. §§ 2072-2074 (2000 & Supp. IV)) (commenting that Congress, through the Rules Enabling Act, has established a process for revising the Federal Rules); see also McMahon, *supra* note 192 at 868–69 (suggesting that the Judicial Conference did not amend the rule because the process would be a time-consuming burden and ultimately within Congress’s power).

²³⁰ Posting of Ted Frank, *supra* note 84 (noting that 28 U.S.C. § 2072 gives the Court the authority to amend the rules).

²³¹ The fact that current members of the Court have very little experience in litigation, with none having spent significant time as a trial court judge, only serves to highlight the problematic method employed by the Court. See Chemerinsky, *supra* note 172, at 437–38. Rather than being the result of the “informed deliberation” of the members of the Judicial Conference, the new plausibility standard is an expression of the best judgment of seven individuals relatively unfamiliar with the daily process of litigation at the trial level. See *id.* Even though most of the Justices have no experience as trial lawyers, most of their decisions involve judgments about how trials can be run more effectively. See Michael Dorf, *The Supreme Court Wreaks Havoc in the Lower Federal Courts--Again* (Aug. 13, 2007), <http://writ.news.findlaw.com/dorf/20070813.html>.

²³² See Posting of Ted Frank, *supra* note 84 (“This is not a place for the Supreme Court to intervene as judges—but the Supreme Court can fix the problem with the rules under their authority granted to it by Congress under 28 U.S.C. §2072, and Congress can also step in.”); see also Kendall W. Hannon, *Much Ado About Twombly?, A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1839 (2008) (noting that attorneys are in the habit of pleading well beyond the requirements of Rule 8).

²³³ *Twombly*, 127 S. Ct. at 1967 n.6.

CONCLUSION

Bell Atlantic v. Twombly has brought about a momentous change to an issue that most believed was settled fifty years ago. Concerned with the burdensome nature of modern litigation, the Court “retired” the well-known “no set of facts” language of *Conley v. Gibson* in favor of a standard requiring a factual basis rendering a claim “plausible on its face.” However, in defining the new standard in such vague terms, the Court has injected a significant amount of inconsistency into pleadings jurisprudence. Both the meaning and the scope of applicability of *Twombly* leave much to be decided by judicial interpretation at the district and circuit court levels. The effect of the *Twombly*, while far from insignificant, will be considerably restricted because of the inconsistency of the new standard. Whether one agrees or disagrees with the wisdom of instituting a more rigorous standard for a plaintiff to get his claim to the discovery stage, it is clear that the Court’s method of doing so will bring about a significant level of consternation among judges, practitioners, and law students for the foreseeable future. It may be only after the Court revisits its decision to clarify the contours of the standard that we will learn what is truly required to defeat a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.

