

## The After-Shocks of Twombly: Will We "Notice" Pleading Changes?

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# THE AFTER-SHOCKS OF *TWOMBLY*: WILL WE “NOTICE” PLEADING CHANGES?

ETTIE WARD†

## INTRODUCTION

*Bell Atlantic Corp. v. Twombly*<sup>1</sup> was decided by the U.S. Supreme Court on May 21, 2007, and has already been cited more than 9,400 times as of March 15, 2008.<sup>2</sup> The majority decision was not subtle in broadcasting its dissatisfaction with notice pleading,<sup>3</sup> at least in large, complex antitrust conspiracy cases, and the dissent certainly viewed the majority's holding as a procedural revolution.<sup>4</sup> *Twombly* was not to be ignored, and within a mere eight months every Circuit<sup>5</sup> had at least paid lip

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<sup>1</sup> 127 S. Ct. 1955 (2007).

<sup>2</sup> According to a Westlaw search, approximately 5,000 cases cited *Twombly* in February 2008; within two weeks, another 1,500 courts had joined in.

<sup>3</sup> See *Twombly*, 127 S. Ct. at 1964–69; *infra* text accompanying notes 43–53.

<sup>4</sup> *Twombly*, 127 S. Ct. at 1975 (Stevens, J., dissenting) (referring to the “Court's dramatic departure from settled procedural law”).

<sup>5</sup> See, for example, the following circuit court decisions:

First Circuit: *Clark v. Boscher*, No. 06-2473, 2008 WL 250297 (1st Cir. Jan. 31, 2008).

Second Circuit: *Ruotolo v. City of N.Y.*, No. 06-3886-c, 2008 WL 313795 (2d Cir. Feb. 6, 2008); *Goldstein v. Pataki*, No. 07-2537-cv, 2008 WL 269100 (2d Cir. Feb. 1, 2008); *Baron v. Complete Mgmt., Inc.*, No. 06-3672-cv, 2008 WL 205327 (2d Cir. Jan. 24, 2008); *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007).

Third Circuit: *Phillips v. County of Allegheny*, No. 06-2869, 2008 WL 305025 (3d Cir. Feb. 5, 2008); *Foreman v. Lowe*, No. 07-1995, 2008 WL 161471 (3d Cir. Jan. 16, 2008).

Fourth Circuit: *Barclay White Skanska, Inc. v. Battelle Mem'l Inst.*, No. 07-1084, 2008 WL 238562 (4th Cir. Jan. 29, 2008); *Lanier v. Norfolk S. Corp.*, No. 06-1986, 2007 WL 4270847 (4th Cir. Dec. 5, 2007).

Fifth Circuit: *Burnette v. Bureau of Prisons*, No. 06-30540, 2007 WL 4328808 (5th Cir. Dec. 10, 2007).

Sixth Circuit: *Midwest Media Prop., L.L.C. v. Symmes Twp.*, 512 F.3d 338 (6th Cir. 2008); *Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631 (6th Cir. 2007).

Seventh Circuit: *Jervis v. Mitcheff*, No. 06-4236, 2007 WL 4355433 (7th Cir. Dec. 13,

service to *Twombly*; the Supreme Court had even cited it twice before the 2007 term ended in June.<sup>6</sup>

The bar and academic community immediately began to weigh in on the question of whether the “new” standard applies to all civil cases or merely to antitrust conspiracy cases, with most commentators concluding that the pleading landscape had shifted.<sup>7</sup> The trickier questions are likely to revolve around how to satisfy the new standard in different types of cases.

2007); *Bartley v. Wis. Dep't of Corr.*, No. 07-2059, 2007 WL 4328666 (7th Cir. Dec. 6, 2007).

Eighth Circuit: *Abdullah v. Minnesota*, No. 06-4142, 2008 WL 283693 (8th Cir. Feb. 4, 2008).

Ninth Circuit: *Grabinski v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. 05-16987, 2008 WL 266722 (9th Cir. Jan. 29, 2008); *Weber v. Dep't of Veterans Affairs*, 512 F.3d 1178 (9th Cir. 2008).

Tenth Circuit: *Burris v. U.S. Dep't of Justice*, No. 07-6181, 2008 WL 194916 (10th Cir. Jan. 24, 2008); *Teigen v. Renfrow*, 511 F.3d 1072 (10th Cir. 2007).

Eleventh Circuit: *Davis v. Coca Cola Bottling Co. Consol.*, No. 05-12988, 2008 WL 314962 (11th Cir. Feb. 6, 2008); *McCray v. Potter*, No. 06-16678, 2008 WL 142032 (11th Cir. Jan. 16, 2008).

D.C. Circuit: *Powers v. Wickline*, No. 07-7091, 2007 WL 3230211 (D.C. Cir. Oct. 24, 2007).

Federal Circuit: *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007).

<sup>6</sup> *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007); *Erickson v. Pardus*, 127 S. Ct. 2197 (2007).

<sup>7</sup> See, e.g., the following articles for a discussion of pleading standards after *Twombly*.

Finding pleading standards changed:

Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. BRIEF 135 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>; Richard O. Halloran, *A Return to Fact Pleading? Viable Complaints After Twombly*, 44 ARIZ. ATT'Y 20, 24 (2007) (“[T]he rationale for *Twombly* should extend broadly to a wide range of federal cases.”); Michael C. Dorf, *The Supreme Court Wreaks Havoc in the Lower Federal Courts—Again*, FINDLAW, Aug. 13, 2007, <http://writ.news.findlaw.com/dorf/20070813.html>; Ted Frank, *Bell Atlantic v. Twombly*, POINTOFLAW.COM, May 21, 2007, <http://pointoflaw.com/archives/003906.php>.

Arguing that general pleading standards are not affected beyond antitrust Section 1 conspiracy claims:

John H. Bogart, *The Supreme Court Decision in Twombly: A New Federal Standard?*, UTAH B.J., Sept.–Oct. 2007, at 20, 22 (2007) (“At least for the foreseeable future, its effects are likely to be confined to antitrust litigation.”); Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117, 117 (2007) (“[I]t is a misreading of *Twombly* to extend ‘plausibility’ beyond [its antitrust] context.”).

Arguing pleading standards for certain types of cases likely to change:

Linda S. Mullenix, *Troubling Twombly*, NAT'L L.J., June 11, 2007, at 13 (“*Twombly* may herald a new era of rigorous analysis of class action pleading that may make federal courts a difficult venue to pursue class action relief.”).

The *Twombly* decision would not seem so significant if we did not already have a well-rehearsed narrative on the role pleadings should play under the Federal Rules of Civil Procedure. This narrative was based, in part, on the major shift in emphasis of the Federal Rules drafters from reliance on pleadings to reliance on pretrial discovery and motion practice to get to the merits of cases. The narrative was also heavily influenced by cases following *Conley v. Gibson* and its famous “no set of facts”<sup>8</sup> language that had been repeatedly endorsed by the Supreme Court until it was “retired”<sup>9</sup> in ignominy by *Twombly*.

We have yet to parse fully the impact of *Twombly* or how significant an adjustment to practice it will require, but there will be a shake-out period (which is already well underway) in which lawyers will do what they have been trained to do—namely, testing the limits and meaning of the new phraseology used by the *Twombly* Court to measure and examine pleadings.<sup>10</sup>

Part I will briefly discuss the pre-*Twombly* view of notice pleadings. To some extent, our understanding of what the rules required and what lawyers actually did was a romanticized view of pleading. Actual pleadings were rarely as “barebones” as we imagine. Further, in recent decades, rules, statutes, court decisions, and practical considerations have further eroded the notice pleading construct.

Part II will give a brief synopsis of the *Twombly* decision and then discuss the majority and dissent’s views on pleadings generally.

Part III will examine selected cases post-*Twombly* and make some general observations and predictions as to what our new pleading “narrative” will say. A definitive answer is premature, but we can at least identify some “plausible” story lines and areas that will need further clarification from the Supreme Court or the rulemakers.

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<sup>8</sup> 355 U.S. 41, 45 (1957), *overruled in part* by *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

<sup>9</sup> *Twombly*, 127 S. Ct. at 1969 (“*Conley*’s ‘no set of facts’ language has been questioned, criticized, and explained away long enough . . . and . . . has earned its retirement.”).

<sup>10</sup> See, e.g., Mary Swanton, *Plausible Pleadings: High Court Offers Defendants Relief from Frivolous Claims*, INSIDECOUNSEL MAG., Aug. 2007, <http://www.insidecounsel.com/section/litigation/1324> (“Defense attorneys in a range of cases will test the waters by seeking dismissals before discovery starts.”).

The conclusion discusses the difficult questions that have been left to the lower federal courts to resolve as they apply *Twombly* to new scenarios and consider its implications for federal practice in a wide range of cases.

### I. THE OLD NARRATIVE

The old narrative focuses on Rule 8 as the “keystone of the system of pleading embodied in the Federal Rules of Civil Procedure.”<sup>11</sup> Rule 8’s substitution of the requirement of “a short and plain statement of the claim showing that the pleader is entitled to relief”<sup>12</sup> for the typical code requirement that the pleader allege “facts constituting a cause of action” was heralded as a desirable departure from the technical pleading requirements of earlier practice.<sup>13</sup> The stated goal of the Federal Rules reform was to facilitate reaching the merits of disputes by using discovery, pretrial conferencing and summary judgment to flesh out claims and narrow issues for trial, leaving notice as the primary function of the pleadings.<sup>14</sup>

Earlier pleading systems were seriously flawed. Common law practice centered on successive rounds of pleadings in the expectation that eventually the dispute would be reduced to a single issue of law or fact that would dispose of the case. In practice, the system came to be considered a “mere series of traps

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<sup>11</sup> See 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2007).

<sup>12</sup> FED. R. CIV. P. 8(a)(2).

<sup>13</sup> See 5A WRIGHT & MILLER, *supra* note 11, § 1332.

<sup>14</sup> See Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 456 (1941–1943).

Clark goes on to say that:

[A] simple system of direct allegation, so successful a feature of the Federal Rules of Civil Procedure, furnishes fully adequate information for the court and litigant without opportunity for quibbling over details, while at the same time such a system needs the accessory devices [of discovery, pretrial, and summary judgment] both to expedite trial and to furnish litigants with all the information as to their opponents’ case which they may require. Any program for reform should therefore start with the benefits of a system of simple, direct allegation and denial.

*Id.* (citation omitted); see also *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.”); *Conley v. Gibson*, 355 U.S. 41, 48 (1957), *overruled in part by Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (“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.”).

and pitfalls for the unwary,—an impediment to justice that must be abolished.”<sup>15</sup> The common law pleading system also “proved to be excruciatingly slow, expensive, and unworkable” and “better calculated to vindicate highly technical pleading rules than it was to dispense justice.”<sup>16</sup>

Common law pleading was replaced by code pleading which created its own traps and pitfalls for the unwary; code pleading emphasized developing facts through the pleadings. Pleadings were to contain facts, but not evidence or conclusions; the distinctions drawn among “evidentiary facts,” “ultimate facts,” and “conclusions,” as well as the rigidity of pleading a “cause of action,” proved difficult and unwieldy to police<sup>17</sup>—resulting again in “frightful expense” and “endless delay.”<sup>18</sup> Code pleading encouraged over-pleading because “under-pleading resulted in sustained demurrers” and “the proper amount of pleading was too confining for trial.”<sup>19</sup>

Rule 8(a)(2) and so-called notice pleading generated their own criticisms, confusion, and controversy. No pleading system is a panacea for the delays, expenses, and stresses of even meritorious litigation. Despite criticism and suggestions for proposed revisions to Rule 8, only minor revisions have been enacted since the Federal Rules were first promulgated and adopted in 1938.<sup>20</sup> The Federal Rules Advisory Committee

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<sup>15</sup> Note, *Common Law Pleading*, 10 HARV. L. REV. 238, 239 (1896–97); see also Clark, *supra* note 14, at 459; William E. Nelson, *The Reform of Common Law Pleading in Massachusetts 1760–1830: Adjudication as a Prelude to Legislation*, 122 U. PA. L. REV. 97, 99 (1973).

<sup>16</sup> WRIGHT & MILLER, *supra* note 11, § 1202.

<sup>17</sup> See WRIGHT & MILLER, *supra* note 11, § 1216 (“The substitution of ‘claim showing that the pleader is entitled to relief’ for the code formulation of the ‘facts’ constituting a ‘cause of action’ was intended to avoid the distinctions drawn under the codes among ‘evidentiary facts,’ ‘ultimate facts,’ and ‘conclusions.’”); Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520–21 (1957) (“[I]t is virtually impossible logically to distinguish among ‘ultimate facts,’ ‘evidence’ and ‘conclusions.’”); see also Clark, *supra* note 14, at 460 (describing code pleading as “at best wasteful, inefficient, and time-consuming”); David M. Roberts, *Fact-Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 395–96 (1980) (discussing code pleadings’ “hypertechnical artifices” and “social cost”).

<sup>18</sup> Thomas E. Skinner, *Pre-Trial and Discovery Under the Alabama Rules of Civil Procedure*, 9 ALA. L. REV. 202, 204 (1957).

<sup>19</sup> *Id.*

<sup>20</sup> A 1955 Advisory Committee Note to Rule 8(a)(2), which was never officially approved because none of the proposals made by the Advisory Committee that year were acted upon by the Supreme Court, was prepared in response to early criticisms

initially and repeatedly endorsed “simplified ‘notice pleading,’” as did the Supreme Court until *Twombly*.<sup>21</sup>

In sum, the old narrative focused on the systemic benefits that were expected to accrue from procedural reform. Thus, the old narrative downgraded the importance of pleadings as a means to manage and limit cases and focused instead on discovery and pretrial motions to eliminate issues and minimize surprise at trial.

The old narrative threw out, as unproductive, successive rounds of technical pleadings and the need to plead facts to establish each element of each cause of action and instead required so-called “notice pleading”—pleadings intended to give defendants notice of the claims asserted against them.

A federal complaint must be able to withstand a Rule 12 motion to dismiss and, under the old narrative, the bar was set quite low. In *Conley v. Gibson*, the Supreme Court said that a motion to dismiss should be denied “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>22</sup> It was this “no set of facts” language that the Supreme Court retired in *Twombly*.<sup>23</sup>

That “old” narrative was, however, never an entirely accurate reflection of pleadings in the federal courts and in the last few decades has become even less so.<sup>24</sup> Although Federal

and suggestions for amendment of Rule 8(a)(2), which would have called for stricter pleading practice:

The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement.

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, 1995 REPORT OF THE ADVISORY COMMITTEE PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, reprinted in WRIGHT & MILLER, *supra* note 11, at app. F; see also WRIGHT & MILLER, *supra* note 11, §§ 1201, 1216.

<sup>21</sup> *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *overruled in part by Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007). *Conley* had been cited with approval by the Supreme Court repeatedly, including in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and, of course, it was discussed at length in 2007 in the *Twombly* opinion. It was also cited by the Supreme Court after *Twombly* in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007). See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (“If any rule in federal civil procedure deserves the label ‘blackletter,’ it is notice pleading.”).

<sup>22</sup> *Conley*, 355 U.S. at 45–46.

<sup>23</sup> *Twombly*, 127 S. Ct. at 1969.

<sup>24</sup> See, e.g., Fairman, *supra* note 21, at 988 (discussing a wide range of

Rule of Civil Procedure 8(a) requires only a “short and plain statement of the claim,” relatively few federal complaints actually model the barebone forms deemed sufficient in the Appendix of Forms to the Federal Rules of Civil Procedure. Several reasons can be readily identified. First, old habits die hard and lawyers, before the Federal Rules, had been accustomed to drafting the more detailed pleadings required by common law and code pleading. Code pleading persisted in state systems—and still does to a degree in some states—and lawyers who practice in state and federal courts tended to plead *more* rather than less. Even as more state systems adopted federal practice as their model over time by enacting state procedural rules modeled on the Federal Rules of Civil Procedure, detailed pleadings continued to be the norm. Second, on a practical level, specific pleading requirements for state law causes of action have tended to affect pleading those claims in federal court. Third, and perhaps most importantly, litigators often draft more detailed pleadings for strategic reasons—to send a message to opposing parties and counsel or to the court about the strength of their case. More detailed pleadings may encourage settlement discussions or flesh out information in response to the complaint or initial discovery. Finally, despite *Conley*’s “simplified ‘notice pleading’” language, the Supreme Court also stressed in that case that the Federal Rules require the complaint to give the defendant “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>25</sup> Something more than a bare averment that the plaintiff wants relief is required. As a result, it is doubtful whether many federal litigators have either drafted, or been on the receiving end of, complaints as spare as those in the approved forms contained in the Appendix to the Federal Rules.

District courts routinely grant motions to dismiss for failure to state a claim, although plaintiffs are also routinely given the opportunity to replead. Attorneys are well aware that their complaints must be capable of withstanding a motion to dismiss, but the bar for dismissal was generally considered a fairly low one, and the rules are applied even less stringently when a party

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substantive areas of law in which particularized fact-based pleading is required and noting that “[n]otwithstanding its foundation in the Federal Rules and repeated Supreme Court imprimatur, notice-pleading is a myth”).

<sup>25</sup> *Conley*, 355 U.S. at 47; see also WRIGHT & MILLER, *supra* note 11, § 1215.



is litigating pro se.<sup>26</sup> Many complaints still cannot even satisfy that low bar.

In addition, various Federal Rules amendments, court decisions, and legislative initiatives have sent subtle and not so-subtle signals to parties that more detailed pleadings might be required. For example, Federal Rule of Civil Procedure 11, which requires attorneys or parties to certify that there is a good faith basis<sup>27</sup> for allegations made in pleadings has no doubt contributed to more detailed pleadings.

There has always been a heightened pleading requirement for a limited number of claims, notably fraud. Federal Rule of Civil Procedure 9(b) requires that "a party must state with particularity the circumstances constituting fraud or mistake."<sup>28</sup> Federal statutes, notably including the Private Securities Litigation Reform Act of 1995 ("PSLRA"),<sup>29</sup> have adopted a similar approach. Court decisions have imposed non-Rule-based heightened fact pleading requirements in specific areas of law.<sup>30</sup>

It is beyond the scope of this Article to review the extent to which federal court decisions have sought to require more detailed pleadings in numerous substantive areas. Courts "talk" notice pleading, but often require more—whether authorized to do so by the Federal Rules or a statute or not. One might posit that the tendency of the federal courts to stray from the express mandate of Rule 8 made it necessary for the Supreme Court to repeatedly reject heightened pleading requirements and reassert that Rule 8 was to be applied uniformly, regardless of the

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<sup>26</sup> See, e.g., *Hughes v. Rowe*, 449 U.S. 5, 9 (1980).

<sup>27</sup> FED. R. CIV. P. 11(b).

<sup>28</sup> *Id.* 9(b). Federal Rule of Civil Procedure 9 includes other types of allegations that require special pleading, including special damages, *id.* 9(g), challenges to capacity of a party, *id.* 9(a), or performance or occurrence of a condition precedent, *id.* 9(c).

<sup>29</sup> 15 U.S.C. § 78u-4(b)(1)(B) (2000) ("[I]f an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.")

<sup>30</sup> Other commentators have examined this material at length. See Fairman, *supra* note 21, at 987–89 & n.3 (reviewing federal case law before and after *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz* in the areas of antitrust, CERCLA, civil rights, conspiracy, copyright, defamation, negligence, and RICO and concluding that "notice pleading as a universal standard is a myth" in the federal courts); Koan Mercer, Comment, "Even in These Days of Notice Pleadings": *Factual Pleading Requirements in the Fourth Circuit*, 82 N.C. L. REV. 1167, 1174 (2004); see also WRIGHT & MILLER, *supra* note 11, §§ 1228–38.

underlying substantive law, unless Congress established, by statute, a more restrictive rule or the matter fell within the limited exceptions specified in Federal Rule Civil Procedure 9(b).<sup>31</sup>

There is no doubt that the widespread perception that frivolous cases are overwhelming the system and victimizing defendants, along with the reality that litigation—especially in complex multi-party or class action cases—has become significantly more expensive, has increased the pressure to use pleading standards to maintain docket control.

To the extent that “notice pleading” was never as simple as originally contemplated, particularly when we consider the impact of rules changes, statutory mandates, law practice habits, and various pressures on court dockets mentioned above, it will make it all the more difficult to assess the impact of any changes on pleading standards and practices attributable to *Twombly*.

Commentators over the last couple of decades have predicted, mourned, or celebrated the purported demise of “notice pleading”—was *Twombly* its final obituary?

## II. TWOMBLY

It is difficult to summarize the *Twombly* holding without examining the history of the telecommunications industry and

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<sup>31</sup> In *Leatherman*, the Supreme Court rejected the Fifth Circuit’s attempt to apply a heightened pleading standard to civil rights cases alleging municipal liability under 42 U.S.C. § 1983, noting that “[i]n *Conley v. Gibson*, we said in effect that the rule meant what it said.” *Leatherman*, 507 U.S. at 167–68 (citation omitted). Because some federal courts did not read *Leatherman*’s holding as extending beyond cases alleging municipal liability under section 1983, the Supreme Court again addressed the issue in *Swierkiewicz*, a Title VII case:

Furthermore, imposing the Court of Appeals’ heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Such a statement must simply “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. “The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court.”

*Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512–13 (citations omitted) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, and *WRIGHT & MILLER*, *supra* note 11, § 1202).

antitrust law. *Twombly* is grounded in antitrust law—specifically, it deals with the requirements for pleading a Sherman Act section 1<sup>32</sup> violation based upon conscious parallel behavior.

Prior to breaking AT&T's monopoly of local phone service in 1984, AT&T ("Ma Bell") arguably had a "natural monopoly."<sup>33</sup> The divestiture of AT&T's local telephone business and the establishment of so-called "baby Bells" changed the industry with respect to long distance service, but maintained local telephone service as a monopoly. The "baby Bells," more formally referred to as "incumbent local exchange carriers" ("ILECs"), were part of a system of regional monopolies that remained in place until the enactment of the Telecommunications Act of 1996.<sup>34</sup> The 1996 Telecommunications Act was intended to fundamentally restructure local telephone markets and, among other things, required the regional baby Bells or ILECs to share their networks with competitors to facilitate market entry and competition from "competitive local exchange carriers" ("CLECs").<sup>35</sup> Local providers or ILECs did not compete as competitors in each others' territories as CLECs.

In *Twombly*, local telephone and Internet subscribers brought a putative nationwide class action in the Southern District of New York against the major ILECs (Bell Atlantic, BellSouth, Quest, and Verizon), claiming an illegal conspiracy in restraint of trade under section 1 of the Sherman Act, which forbids any "contract, combination . . . or conspiracy in restraint of trade."<sup>36</sup> The plaintiffs asserted two principal claims under section 1: (1) that the defendant ILECs had "engaged in parallel conduct" to inhibit the growth of CLECs; and (2) that an illegal

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<sup>32</sup> 15 U.S.C. § 1 (Supp. IV 2004).

<sup>33</sup> See Peter Passell, *Economic Scene; Turning the Baby Bells Loose on the Long-Distance Market*, N.Y. TIMES, June 8, 1995, at D2.

<sup>34</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.).

<sup>35</sup> See George J. Alexander, *Antitrust and the Telephone Industry After the Telecommunications Act of 1996*, 12 SANTA CLARA COMPUTER & HIGH TECH. L.J. 227, 251-52 (1996); Kathryn Gordon, Note, *Enhancing Competition: Are Proposed Federal Communications Commission Rules That Treat Local Exchange Carrier Access to Multiple Tenant Environments a Taking?*, 55 FED. COMM. L.J. 99, 106 (2002).

<sup>36</sup> 15 U.S.C. § 1.

conspiracy existed among the defendant ILECs to refrain from competing among themselves.<sup>37</sup>

The federal district court granted the defendants' motion to dismiss, concluding that allegations of parallel business conduct, without more, did not state a claim under section 1, and that plaintiffs were required to state additional facts (so-called "plus factors") tending to exclude independent, self-interested conduct as an explanation for the parallel actions.<sup>38</sup> The Second Circuit reversed, holding that the district court tested the complaint by the wrong standard—that "plus factors" were not *required* to be pleaded, and that allegations of parallel conduct are sufficient to support a conspiracy claim at the pleading stage, unless there is "no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."<sup>39</sup> The Second Circuit held that while a plaintiff must plead facts that include conspiracy among the realm of "plausible" possibilities, the pleading of so-called "plus factors" or additional facts that refute the possibility of independent action is not required to withstand a motion to dismiss.<sup>40</sup>

The Supreme Court reversed the Second Circuit and, in a 7-2 decision written by Justice Souter, ordered dismissal of the complaint,<sup>41</sup> concluding that more factual detail was necessary to make out a "plausible" complaint that was more than merely an inference from conscious parallel conduct.<sup>42</sup>

### A. *The Majority Decision in Twombly*

The questions considered by the Supreme Court focused on antitrust law, but the answers went to the heart of "notice" pleading. The Supreme Court addressed (1) "the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct,"<sup>43</sup> and (2) "whether a section 1 complaint can survive a motion to dismiss when it alleges that major

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<sup>37</sup> See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1962 (2007).

<sup>38</sup> See *Bell Atl. Corp. v. Twombly*, 313 F. Supp. 2d 174, 179–80 (S.D.N.Y. 2003), *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007).

<sup>39</sup> *Bell Atl. Corp. v. Twombly*, 425 F.3d 99, 114 (2005), *rev'd*, 127 S. Ct. 1955 (2007).

<sup>40</sup> See *id.*

<sup>41</sup> See *Twombly*, 127 S. Ct. at 1961.

<sup>42</sup> See *id.* at 1965–66.

<sup>43</sup> *Id.* at 1963.

telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action."<sup>44</sup> Justice Souter's opinion, joined by all but two dissenters, sent mixed messages on pleadings to the bench and the bar.

The Supreme Court expressly "retired" *Conley v. Gibson's* "no set of facts" statement as subject to misunderstanding and imposed a plausibility test at the pleading stage,<sup>45</sup> but explicitly rejected a requirement of heightened pleading.<sup>46</sup>

In discussing plausibility, the Court stated that something more than "possibility," but not "probability," was required of pleadings.<sup>47</sup> In the context of antitrust conspiracy claims, "it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. . . . [A]llegations of parallel conduct . . . must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."<sup>48</sup> The Supreme Court concluded that, without factual enhancement of a bare allegation of parallel conduct, the complaint gets "close to stating a claim, . . . [but] stops short of the line between possibility and plausibility of 'entitlement to relief.'"<sup>49</sup>

According to the Court, the plaintiffs had not "nudged their claims across the line from conceivable to plausible,"<sup>50</sup> so dismissal was appropriate. The various statements of the holding leave some confusion as to what facts must be pleaded to withstand a motion to dismiss in an antitrust context—and even more confusion if we assume applicability beyond antitrust. On the one hand, the Court seemed to be placing allegations on a continuum from "possibility" to "plausibility" to "probability." On the other hand, the Court expressly rejected movement to a "heightened" pleading standard,<sup>51</sup> and otherwise cited favorably

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<sup>44</sup> *Id.* at 1961.

<sup>45</sup> *See id.* at 1969.

<sup>46</sup> *See id.* at 1974.

<sup>47</sup> *See id.* at 1965–66.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1966.

<sup>50</sup> *Id.* at 1974.

<sup>51</sup> *See id.*

to *Conley*.<sup>52</sup> The Court also did not retreat from its 2002 decision in *Swierkiewicz v. Sorema N.A.*, in which it held that a complaint in an employment discrimination suit need not allege specific facts establishing a *prima facie* case of discrimination.<sup>53</sup>

### B. *The Dissent*

Justice Stevens' dissent, joined by Justice Ginsburg, saw the decision as a "dramatic departure from settled procedural law"<sup>54</sup> and argued that it substituted a question of "proof" for what had been a question of notice.<sup>55</sup>

The dissent reviewed the history and policy concerns underlying the federal pleading requirements and decried the majority's reliance on so-called "practical concerns" to explain its retreat from notice pleading.<sup>56</sup> The practical concerns, which focused on the expense of discovery and confusion to juries, could be addressed, according to the dissent, by "careful case management."<sup>57</sup> The dissent focused on the potential implications of a broad reading of the majority opinion.<sup>58</sup> Justice Stevens also objected to the majority's conflation of summary judgment standards and initial pleading challenges and, particularly, to the imposition of an "evidentiary" standard in evaluating a motion to dismiss.<sup>59</sup>

## III. A NEW NARRATIVE

So what is the *new* narrative? How different is it from the old one?

To some extent the jury is still out, and reasonable persons may disagree (even though a tougher pleading standard will stop many cases from reaching a jury). Over 9,400 circuit and district court cases have not yet worked out all the details.

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<sup>52</sup> *Id.* at 1969, 1969 n.8.

<sup>53</sup> *See id.* at 1973–74 (discussing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)).

<sup>54</sup> *Id.* at 1975 (Stevens, J., dissenting).

<sup>55</sup> *Id.* at 1984 n.8.

<sup>56</sup> *See id.* at 1975–77.

<sup>57</sup> *See id.* at 1975.

<sup>58</sup> *See id.* at 1988.

<sup>59</sup> *Id.* at 1979.

The starting point is that the Supreme Court clearly intended to effect some change—according to the Court, *Conley* had been widely misunderstood<sup>60</sup> and now,

after puzzling the profession for 50 years, this famous observation [regarding “no set of facts”] has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.<sup>61</sup>

So although *Twombly* was an antitrust case and, more specifically, the challenged pleadings involved allegations of conspiracy—and even more specifically, the allegations of conspiracy were dependent on pleaded inferences from conscious parallel conduct—it is hard to argue, looking at the broad language the Supreme Court chose, that *Twombly* is so limited.

Lower courts have already applied the *Twombly* “plausibility” standard in a wide range of cases outside the antitrust context,<sup>62</sup> including state securities law,<sup>63</sup> patent infringement,<sup>64</sup> trademark,<sup>65</sup> and eminent domain.<sup>66</sup>

Only a few cases have explicitly concluded that *Twombly* is, or should be, restricted to the antitrust context,<sup>67</sup> and they have almost certainly already been proven wrong. The Second Circuit, for example, quickly concluded in a series of early post-*Twombly* decisions that the Supreme Court had not meant to limit *Twombly*'s reach to antitrust conspiracy or even antitrust cases.<sup>68</sup>

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<sup>60</sup> *Id.* at 1969 (majority opinion).

<sup>61</sup> *Id.*

<sup>62</sup> See Kendall W. Hannon, Comment, *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. (forthcoming Apr. 2008) (manuscript at 104), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1091246](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091246).

<sup>63</sup> See, e.g., *Cannon v. GunnAllen Fin., Inc.*, No. 3:06-0804, 2007 WL 2351313, at \*5 (M.D. Tenn. Aug. 14, 2007).

<sup>64</sup> See, e.g., *Anticancer Inc. v. Xenogen Corp.*, No. 05-CV-0448-B, 2007 WL 2345025, at \*4 (S.D. Cal. Aug. 13, 2007).

<sup>65</sup> See *Collins v. Marva Collins Preparatory Sch.*, No. 1:05cv614, 2007 WL 1989828, at \*3 (S.D. Ohio July 9, 2007).

<sup>66</sup> See *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 286 (E.D.N.Y. 2007), *aff'd*, No. 07-2537-CV, 2008 WL 269100 (2d Cir. Feb. 01, 2008).

<sup>67</sup> See, e.g., *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 n.4 (Fed. Cir. 2007) (“[Retirement of *Conley* ‘no facts’ language] does not suggest that *Bell Atlantic* changed the pleading requirement . . . as articulated in *Conley*.”).

<sup>68</sup> See, e.g., *Transhorn, Ltd. v. United Techs. Corp.* (*In re Elevator Antitrust*

The Second Circuit is playing a role in shaping the *new* narrative. In June 2007, just three weeks after the *Twombly* decision, the Second Circuit decided *Iqbal v. Hasty*<sup>69</sup> and became the first circuit court of appeals to analyze *Twombly* in depth. In *Iqbal*, the Second Circuit considered an interlocutory review of the district court's denial of defendants' motions to dismiss most of the section 1983 claims asserted by a Pakistani Muslim detained after September 11, 2001.<sup>70</sup> The defendants' motions to dismiss were based upon qualified immunity and lack of personal jurisdiction, as well as failure to state a claim.<sup>71</sup> The Second Circuit was asked to consider the extent to which a plaintiff was required to plead specific facts to overcome a qualified immunity defense at the motion-to-dismiss stage—a question which had not been resolved in the circuit.<sup>72</sup> The court confronted *Twombly* head-on in resolving the pleading standard questions raised in the appeal, but recognized that “[c]onsiderable uncertainty concerning the standards for assessing the adequacy of pleadings”<sup>73</sup> had been created by the Supreme Court's decision in *Twombly*. Although *Twombly* appears to require that a complaint must include claims for relief that are *plausible*, and not just *possible*, to survive a Rule 12(b)(6) motion to dismiss, in *Twombly* and just two weeks later in *Erickson v. Pardus*, the Supreme Court expressly rejected any heightened pleading standard and reaffirmed Rule 8(a)(2)'s “liberal pleading standards.”<sup>74</sup>

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Litig.), 502 F.3d 47, 50 n.3 (2d Cir. 2007) (“A narrow view of *Twombly* would have limited its holding to the antitrust context, or perhaps only to Section 1 claims; but we have concluded that *Twombly* affects pleading standards somewhat more broadly.”); *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 n.2 (2d Cir. 2007) (“We have declined to read *Twombly*'s flexible ‘plausibility standard’ as relating only to antitrust cases.”); *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007) (“We are reluctant to assume that all of the language of *Bell Atlantic [v. Twombly]* applies only to section 1 allegations based on competitors' parallel conduct or, slightly more broadly, only to antitrust cases.”); see also Hannon, *supra* note 62 (manuscript at 104) (noting that a review of post-*Twombly* district court decisions showed that “[a]ntitrust . . . comprised only 3.7% . . . of all cases citing *Twombly* [with] the remainder . . . representative of every substantive area of law”).

<sup>69</sup> 490 F.3d at 143.

<sup>70</sup> See *id.* at 147–48.

<sup>71</sup> See *id.* at 150.

<sup>72</sup> See *id.* at 153.

<sup>73</sup> *Id.* at 155.

<sup>74</sup> *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 n.4 (2007).



The Second Circuit, in analyzing *Twombly*, concluded that the Supreme Court “intended to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts since *Conley v. Gibson*.”<sup>75</sup> The Second Circuit inventoried the conflicting signals in *Twombly* to ascertain whether the Supreme Court had indeed mandated a “new and heightened pleading standard.”<sup>76</sup> In favor of such a standard, the Second Circuit pointed to the Supreme Court’s explicit disavowal of the *Conley* “no set of facts” language<sup>77</sup> and the determination that more than notice of a claim is needed to allege a Sherman Act section 1 violation based on competitors’ parallel conduct.<sup>78</sup> The court also pointed to the serious concerns expressed about “the ability of careful case management to weed out early in the discovery process a claim just shy of a plausible entitlement”<sup>79</sup> and the encapsulation of the Supreme Court’s “various formulations of what is required into what it labeled ‘the plausibility standard.’”<sup>80</sup>

The Second Circuit also inventoried the “linguistic signals” that pointed away from a heightened pleading standard and suggested that *Twombly* might be limited to the context of Sherman Act section 1 allegations—or even only Sherman Act section 1 allegations relying on competitors’ parallel conduct.<sup>81</sup> The signals referenced by the *Iqbal* court included *Twombly*’s explicit disclaimer that it was requiring heightened fact pleading and its emphasis on the continued viability of *Swierkiewicz*,<sup>82</sup> as well as its approving acknowledgement of the adequacy of a generalized allegation of negligence in Form 9.<sup>83</sup> The Second

<sup>75</sup> *Iqbal*, 490 F.3d at 155. The Second Circuit noted that “it would be cavalier to believe that the Court’s rejection of the ‘no set of facts’ language from *Conley*, which has been cited by federal courts at least 10,000 times in a wide variety of contexts (according to a Westlaw search), applies only to section 1 antitrust claims.” *Id.* at 157 n.7.

<sup>76</sup> *Id.* at 155.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 156 (reviewing nine different variations that the *Twombly* court used to describe the pleading standard).

<sup>79</sup> *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007)) (internal quotation marks omitted).

<sup>80</sup> *Id.* (quoting *Twombly*, 127 S. Ct. at 1968). The Second Circuit noted that the *Twombly* Court “used the word ‘plausibility’ or an adjectival or adverbial form of [it] fifteen times (not counting quotations).” *Id.*

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

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

<sup>83</sup> *Id.*

Circuit also noted the Court's failure to disclaim prior statements in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit* that summary judgment and control of discovery should be used by courts and litigants "to weed out unmeritorious claims"<sup>84</sup> and its statement in *Erickson v. Pardus*, in an opinion issued just two weeks after *Twombly*, that "[s]pecific facts are not necessary [for a pleading that satisfies Rule 8(a)(2)]";<sup>85</sup> the statement need only 'give the defendant fair notice of what . . . the claim is and the grounds upon which it rests.'<sup>86</sup>

In *Iqbal*, the Second Circuit concluded that *Twombly* was not limited to an antitrust context and that the Supreme Court "is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."<sup>87</sup>

Although *Iqbal* may help clarify our understanding of *Twombly*, it is less clear how one would apply a flexible plausibility standard. When is "amplification" needed to render a complaint plausible and in what contexts? If "flexible plausibility" does not apply equally to all cases but depends on complexity, issue, and context, we are adding layers of complexity to what the Federal Rules drafters had contemplated would be a fairly simple and straightforward test.

Most of the circuit court cases decided so far have involved district court decisions on motions made pre-*Twombly*. These decisions tend to "plug" in *Twombly* as an additional citation in support of the decision, giving a nod to the Supreme Court and demonstrating that the most recent Supreme Court views have been considered. The district courts now deciding post-*Twombly* motions will have to fill out the contours of this new narrative.

I suspect, having reviewed a number of recent cases, that some lower courts are avoiding the tough decisions by simply

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<sup>84</sup> *Id.* at 157 (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993)).

<sup>85</sup> *Id.* (quoting *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007)) (alterations in original).

<sup>86</sup> *Id.* (quoting *Erickson*, 127 S. Ct. at 2200 (2007) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (internal quotation marks omitted))).

<sup>87</sup> *Id.* at 157–58.

citing *Twombly*, but noting, if a motion to dismiss is to be granted, that the complaint would have failed under the more permissive *Conley* standard as well.

Some courts, at least, will read *Twombly* as requiring that more facts be pleaded—at least in some types of cases. If that is true, does this start us on the road back to pre-1938 Code pleading where parties had to plead facts? If so, we should remember the difficulties courts had then in drawing distinctions between conclusions, evidence, and fact statements.

So what are the implications of *Twombly*? The ripples get wider as more courts contemplate Federal Rule of Civil Procedure 12(b)(6) motions in a post-*Twombly* world.

### *What are the possibilities?*

1. Can *Twombly* be limited to Sherman Act section 1 antitrust conspiracy claims? This possibility is highly unlikely based on the broad language with regard to pleading in Justice Souter's majority opinion and the heartfelt eulogy to notice pleading in Justice Stevens' dissent. Sheer numbers of non-antitrust district court and circuit court cases citing *Twombly* in just the last nine months make it apparent that most courts will not try to limit *Twombly* to its facts.<sup>88</sup>
2. Can *Twombly* be limited to conspiracy cases? An argument could be made that the Supreme Court was only addressing the adequacy of pleadings alleging a conspiracy in the absence of any direct evidence. Conspiracy claims are often raised in securities and RICO<sup>89</sup> cases, as well as in other complex matters involving both public and private enforcement. Pleading in most securities cases is governed by the PSLRA and a plethora of substantive decisions by the Supreme Court on securities law, so securities matters are unlikely to be significantly affected by *Twombly*. Although conspiracy complaints not buttressed by direct evidence of

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<sup>88</sup> See Hannon, *supra* note 62 (manuscript at 104), (finding, in an empirical study of post-*Twombly* district court decisions on Rule 12(b)(6) motions, that "courts have applied the decision in every substantive area of law governed by Rule 8" with antitrust cases comprising only 3.7% of the sample).

<sup>89</sup> See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1961-64 (West 2006).

conspiracy are more likely to be tested by Rule 12(b)(6) motions after *Twombly*, the cases citing a *Twombly* “plausibility” standard are not limited to conspiracy claims or complex litigation. As conspirators generally make every effort to avoid leaving direct evidence of a conspiracy, plaintiffs have come to rely on the availability of discovery to flesh out their allegations. A higher bar for withstanding motions to dismiss, which requires plaintiffs to plead facts that would tend to go beyond circumstantial evidence from which inferences might be drawn, is likely to drive some potentially meritorious cases out of court.

3. To what extent will *Twombly* impact class action practice in the federal courts? *Twombly* itself was a putative nationwide class action, but class actions are regularly brought in many other substantive law areas, including employment law, securities law, environmental law, and consumer protection. Certainly, the focus on the costs of discovery in “big” cases and, particularly, the disproportionate costs on defendants in most class actions, are equally relevant in every such case. Lower courts have picked up on *Twombly*’s concerns about excessive discovery costs.

Using motions to dismiss as a mechanism to control litigation costs, however, is an inefficient approach that may have the effect of barring legitimate, meritorious claims that would have continued—at least through discovery—pre-*Twombly*.

4. Can *Twombly* be limited to large, complex cases, particularly those in which discovery is likely to be costly and asymmetrical? Should it be? Obviously, this classification would not only include the antitrust, conspiracy, and class action matters described above, but it would also include any multi-party (and even two-party) cases that involve complex legal and/or factual claims and the likelihood that the parties will engage in extensive and expensive discovery. A few courts and commentators have suggested that *Twombly* might be limited in this way, but that view is also unlikely to prevail.

Where discoverable information is disproportionately in defendant's control, defendant's incentives to dispose of such cases at the earliest stage are significantly greater than plaintiff's incentives for early resolution. Plaintiffs in such cases require discovery to flesh out their claims and amass admissible evidence for trial. Defendants have greater incentives to avoid discovery—if plaintiffs' claims *lack* merit, defendants will prevail, but only after expending considerable resources; if plaintiffs' claims *have* merit, defendants will resist providing evidence of their own wrongdoing, at least to the extent that procedural rules permit them to do so. A Rule 12(b)(6) dismissal permits defendants to avoid the discovery process entirely.

The Federal Rules have, for the most part, avoided developing special procedures for different classes of cases. It would be troublesome to apply a different "plausibility" standard to "big" cases simply because the stakes are higher and the costs of litigation are more onerous. The Supreme Court majority in *Twombly* did not explicitly suggest a different standard for "big" cases, but the Court's emphasis on costly antitrust discovery and the perceived inability of trial judges to manage such cases suggests that possibility.<sup>90</sup> It would be troubling to take such potential costs into account only for those parties best able to withstand such costs—and even more troubling to make that decision at the pre-answer stage.

In addition, following that path assumes that the majority's perceptions about the discovery process are entirely correct<sup>91</sup> and that limiting pleadings is the best

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<sup>90</sup> See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007).

<sup>91</sup> See, e.g., ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 18–19 (2003) (discussing the absence of an empirical basis for the widespread belief in frivolous litigation); Fairman, *supra* note 21, at 1060–61 (discussing the use of heightened pleadings as a rationale for protection from abusive discovery and referring to the underlying basis as lacking foundation, "except [for] purely anecdotal comments"); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 995–96 (2003) (discussing the litigation crisis as a "product of assumption" with

way to address the perceived problem. Although discovery is unquestionably expensive, the sources cited by the majority opinion heavily rely on commentators and cases from the early- to mid-1980s for its claims about the effects of frivolous claims and excessive discovery on parties and the ineffectualness of courts to address the problems.<sup>92</sup> This ignores the significant efforts that the courts have made, in large part as a result of amendments to the Federal Rules since that time, to address those very issues. The amendments to the Federal Rules of Civil Procedure in 1983, 1993, and 2000 have given the parties and courts greater resources to control runaway, excessive discovery. The amendments to the rules include giving greater authority to district court judges to exercise meaningful managerial control of the scheduling and scope of discovery under Federal Rule of Civil Procedure 16;<sup>93</sup> the imposition of presumptive time limits on depositions,<sup>94</sup> and restrictions on the numbers of interrogatories;<sup>95</sup> the mandatory exchange of basic information under Federal Rule of Civil Procedure 26(a) to permit more targeted discovery and encourage earlier settlement discussions;<sup>96</sup> and, importantly, the narrowing of the scope of discovery with broader discovery available only with court approval upon a good cause showing. Frivolous pleadings have been addressed in modifications to Federal Rule of Civil Procedure 11 in 1983 and 1993 and in federal statutes such as the PSLRA.<sup>97</sup> These changes are not reflected at all in *Twombly*, which seems to be caught in a 1980s time warp.

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empirical data in short supply).

<sup>92</sup> See *Twombly*, 127 S. Ct. at 1967.

<sup>93</sup> FED. R. CIV. P. 16.

<sup>94</sup> *Id.* 30.

<sup>95</sup> *Id.* 33(a).

<sup>96</sup> *Id.* 26(a).

<sup>97</sup> See 15 U.S.C. § 77z-1(c)(2) (2000) (“If the court makes a finding . . . that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney . . .”).

5. Should *Twombly* apply in all federal cases? If it is not limited to antitrust conspiracy cases, it arguably *should* apply to all cases; Rule 8(a) applies to all civil cases, as does Rule 12(b)(6). It would be inappropriate for the lower courts to graft distinctions onto the Federal Rules which would apply in only certain cases; the rules amendment process or congressional enactments provide the appropriate mechanism for such a fundamental change.

The Supreme Court appeared to consider how its rule would apply in even the simplest federal case. In the course of the oral argument in *Twombly* and in its opinions, the Court kept returning to the model form for pleading negligence and concluded that the barebones form satisfied Rule 8(a).<sup>98</sup> In other words, the Court did not highlight any difference between simple cases contemplated by the Federal Rules of Procedure and the Appendix of Forms, and the more complex litigation that often drives procedural reform.

Perhaps given the Supreme Court's focus on unbridled large-case discovery and the perceived inability of trial judges to control it, such a distinction is being made. It is worth noting that contemplating changing the rules to deal with complex cases in general, or antitrust cases in particular, has been repeatedly considered and rejected, and may very well be undesirable.<sup>99</sup>

A focus on runaway discovery costs and pretrial excesses that force nuisance settlements may be a valid concern, but we should question whether the best approach for addressing that problem is to tighten entry into the federal courts by making it easier to dismiss complaints prior to discovery.

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<sup>98</sup> See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1971 n.10.

<sup>99</sup> See, e.g., the discussion by Chief Judge Charles E. Clark, the principal draftsman of the Federal Rules, speaking for the Second Circuit in *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957), an antitrust price discrimination action, holding that it is improper to insist on stricter pleading requirements in some cases but not in others: "It is true that antitrust litigation may be of wide scope . . . so that defense must be diffuse, prolonged, and costly. . . . But it is quite clear that the federal rules contain no special exceptions for antitrust cases. . . . [I]nstead there was adopted a uniform system for all cases . . ." *Id.* at 322-23.

A determination that *Twombly* applies to all civil cases does not resolve the more difficult questions as to what “applying” *Twombly* might mean in specific cases or specific types of cases. The recent spike in the number of Rule 12(b)(6) motions to dismiss in civil rights actions<sup>100</sup> raises serious questions about disparate impact of applications of *Twombly* to situations and cases not directly contemplated by the Supreme Court and echoes the concerns that were raised about applications of Rule 11 to civil rights cases after the 1983 amendment to that rule.<sup>101</sup> Such effects may be unanticipated consequences, but the broad language in *Twombly* leaves a great deal to the discretion of the district courts in applying the rules. Although the Supreme Court specifically disavowed the institution of a heightened pleading standard,<sup>102</sup> as the Second Circuit recognized in *Iqbal*, the “Court’s explanation for its holding indicated that it intended to make some alteration in the regime of pure notice pleading” but the “nature and extent of that alteration is not clear because the Court’s explanation contains several, not entirely consistent, signals.”<sup>103</sup> It will take some time before we can reliably predict, and apply, the *Twombly* standard in a wide range of cases.

Assuming *Twombly* applies broadly, what is it likely to mean for the federal courts? In the short-run, we would expect a significant increase in the number of Rule 12(b)(6) motions as defendants test the limits.<sup>104</sup> For some period of time, the battleground in litigations will shift from summary judgment motions to pre-answer, pre-discovery motions to dismiss, challenging the adequacy of pleadings in a wide range of cases. Depending on how courts rule in different districts and

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<sup>100</sup> See *infra* note 105.

<sup>101</sup> See 5A WRIGHT & MILLER, *supra* note 11, § 1202 (noting that the requirements for pleading in civil rights suits are more demanding than the *Conley* standard).

<sup>102</sup> *Twombly*, 127 S. Ct. at 1973–74.

<sup>103</sup> *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007).

<sup>104</sup> The sheer (and increasing) volume of cases citing *Twombly* demonstrates that this is already occurring.



circuits on different types of cases, we can expect a shift in pleadings to include more facts. Lawyers are adaptable. What will be more difficult to assess is whether certain types of potentially meritorious claims are more affected than others by the new regime and whether such claims will not be made because the new standards would find them not "plausible." One preliminary observation which jumps out from even a cursory review of recent district and circuit court determinations of Rule 12(b)(6) motions is what appears to be a disproportionate number of civil rights cases in which the pleadings are being challenged using *Twombly*.<sup>105</sup>

From a defendant's perspective, *Twombly* makes a Rule 12(b)(6) motion a desirable first gambit. Post-*Twombly*, a defendant would predict a higher rate of success on such a motion and, although motions to dismiss are by no means cost-free, they offer a more aggressive stance than settlement, negotiation, or merely responding to the complaint. A successful Rule 12(b)(6) motion has the satisfactory "upside" of obtaining dismissal of the action.

We will also have to wait and see what message the lower courts take from the Supreme Court's skepticism of trial courts' ability to effectively manage cases and contain unnecessary and expensive discovery. The Court's emphasis on discovery costs as a factor in assessing pleadings reopens the debate as to whether such concerns should be relevant in screening potentially meritorious claims.

6. What are the implications of conflating the standards for motions to dismiss and motions for summary judgment and directed verdicts?

The *Twombly* opinion engages in a bit of sleight-of-hand to the extent that the effect is to conflate the standards for motions to dismiss, summary judgments, and

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<sup>105</sup> See Hannon, *supra* note 62 (manuscript at 104) (noting that a review of post-*Twombly* district court decisions showed a "significant departure from previous dismissal practice" in the civil rights field, with the rate of dismissal in those cases spiking).

directed verdicts. In *Twombly*, the Supreme Court correctly states that, based on prior Supreme Court precedent, “[a]n antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict”<sup>106</sup> and that “at the summary judgment stage a § 1 plaintiff’s offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.”<sup>107</sup> This directed verdict and summary judgment standard based on “evidence” somehow morphs into an appropriate pleading standard.

The problem with this conflation of summary judgment and pre-answer challenges to pleading is the focus on *evidence*. At the summary judgment stage—and certainly at the directed verdict stage—plaintiffs can be expected and required to produce evidence that goes beyond mere allegations or even circumstantial evidence. It is more troublesome to insist that plaintiffs provide such evidence as a prerequisite for withstanding a motion to dismiss. Thus, in *Twombly*, the majority holds that a plaintiff must present something to bolster the “admissible circumstantial evidence [of parallel business behavior] from which the fact finder may infer agreement,” but which falls short of “conclusively establishing agreement . . . or itself constituting a Sherman Act offense.”<sup>108</sup> The Court’s opinion jumps from a description of what is required for a directed verdict or summary judgment to the essential question to be decided in *Twombly*, “what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act,” and assumes a connection between these standards.<sup>109</sup> As Justice Stevens notes, “a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the

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<sup>106</sup> *Twombly*, 127 S. Ct. at 1964.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540–41 (1954)).

<sup>109</sup> *Id.*

complaint stage"<sup>110</sup>—unless it now does.

7. What impact will *Twombly* have in the state courts?

As Justice Stevens noted in his dissenting opinion, "26 States and the District of Columbia utilize as their standard for dismissal of a complaint the [*Conley* 'no facts'] language the majority repudiates."<sup>111</sup> State courts and state practitioners will have to determine whether *Twombly* should apply to state practice and, if so, what application of *Twombly* might mean for state practice.<sup>112</sup>

### CONCLUSION

Much work remains for the lower courts and, perhaps the Supreme Court, in fleshing out the contours of a post-*Twombly* pleading regime.

There remain a number of difficult questions for the courts to resolve: First, if pleadings are to be fact-based pleadings, how much amplification of facts is required? Although detailed factual allegations are not required, "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief," and this necessitates "some factual allegation in the complaint."<sup>113</sup> Does the subject matter or complexity of a case necessarily affect the level of factual detail required? In other words, must plaintiffs plead *more* if discovery is likely to be costly?

Second, *Twombly* requires pleadings to demonstrate "plausibility" rather than mere "possibility" of entitlement. What does a "plausibility" standard add? What does the Second Circuit gloss of "flexible plausibility" add to the Supreme Court's test?

Third, what remains of pleadings on information and belief pleading after *Twombly*?

Fourth, should challenges to a plaintiff's case at different

<sup>110</sup> *Id.* at 1983 (Stevens, J., dissenting).

<sup>111</sup> *Id.* at 1978.

<sup>112</sup> See, e.g., Andree Sophia Blumstein, *A Higher Standard*, 43 TENN. B.J. 12, 14 (2007) ("Tennessee, like many states, views federal interpretations as persuasive or at least as useful guidance . . ."); Halloran, *supra* note 7, at 23 ("Arizona courts typically give considerable weight to the federal interpretations of the rules . . . . Consequently, *Twombly* is likely to have a significant impact on Arizona proceedings.").

<sup>113</sup> *Twombly*, 127 S. Ct. at 1965 n.3 (majority opinion).

stages in a proceeding have to satisfy different tests or should there simply be a single test without regard to whether the

challenge occurs at the pre-answer stage, by summary judgment, or during the course of a trial?

Fifth, and most importantly, is it time to amend Rule 8(a) to clarify the appropriate pleading standard?

Justice Stevens' dissent stated that "[w]hether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer."<sup>114</sup> We are already in that future and his question has probably been answered definitively—at least until the Supreme Court makes some further statement. As to all of the other questions, only time will answer those and, no doubt, raise new questions as well.

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<sup>114</sup> *Id.* at 1988 (Stevens, J., dissenting).

