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Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler and the Uncertain Future of Antitrust Enforcement

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Abstract

The Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) is a watershed ruling whose impact on private litigation, especially antitrust litigation, will reverberate for decades. *Twombly* has redefined notice pleading and has clearly raised the bar for plaintiffs. To survive a motion to dismiss, a complaint must be "plausible," that is, it must contain enough facts to raise a reasonable expectation that pretrial discovery will reveal evidence of illegal conduct. Conclusory allegations or formulaic recitations of the elements of a claim are not sufficient and can be ignored by the court. In so ruling, the Court explicitly abrogated the plaintiff-oriented "no set of facts standard" set forth in *Conley v. Gibson*, 355 U.S. 41 (1957), which had governed pleadings for half a century.

Twombly, however, is not simply about pleadings. Underlying the decision were the Court's broader policy concerns about the need to (1) rid the system of baseless litigation; and (2) cabin the high cost of pretrial discovery. The Court concluded these concerns were best addressed at the motion to dismiss stage. Substantively, *Twombly* has engineered a dramatic shift in the balance of power in antitrust litigation from plaintiffs to defendants, reversing a trend that Milton Handler had bemoaned over forty years ago.

Nor is *Twombly* without its critics. The decision is at odds with the fundamental tenets of notice pleading and the vague plausibility standard has created much uncertainty that will take years for the lower courts to resolve. Moreover, to the extent the Court's ruling was motivated by the high cost of discovery, that concern might be better addressed by enforcement of existing discovery limitations rather than by wholesale revision of pleading standards. Unquestionably, the path to victory for plaintiffs in private antitrust litigation has become more arduous in the wake of *Twombly*.

Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement

Edward D. Cavanagh*

I. INTRODUCTION

In a 7–2 decision, the Supreme Court in *Bell Atlantic Corp. v. Twombly* reversed the Second Circuit and held that a complaint that alleged mere parallel behavior among rival telecommunications companies, coupled with stray statements of agreement that amounted to legal conclusions, failed as a matter of law to state a claim for an antitrust conspiracy in violation of the Sherman Act.[1] The Court ruled that in order to withstand a motion to dismiss, an antitrust conspiracy complaint must plead such factual material that,

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1. 127 S. Ct. 1955 (2007); *see also* Sherman Act § 1, 15 U.S.C. § 1 (2006) (prohibiting antitrust conspiracies); Clayton Act § 4, 15 U.S.C. § 15 (2006) (providing a private cause of action for injuries caused by violation of the antitrust laws).

if taken as true, would suggest that the defendants have entered into an unlawful agreement.[2] Plaintiffs need not set forth detailed factual allegations, but the Court emphasized that the grounds showing entitlement to relief must be "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[3] Rather, a complaint must contain "plausible grounds to infer an agreement" and allege enough facts to raise a reasonable expectation that discovery will reveal evidence of illegality.[4]

II. BACKGROUND

Twombly arose against the backdrop of the AT&T break-up in 1982. For much of the 20th century, AT&T dominated the markets for local and long distance telephone services, as well as the markets for telephone equipment and research. In 1974, the Antitrust Division filed a monopolization suit seeking to break up AT&T.[5] After nearly eight years of pretrial wrangling, AT&T agreed to enter into a Consent Decree in 1982.[6] As part of that Consent Decree, AT&T agreed to divest ownership of local telephone companies.[7] The Consent Decree established a system of seven regional Bell operating companies, which were granted monopolies in providing local phone services.[8] The Consent Decree also created a competitive long distance market from which the newly established regional operators were excluded.[9]

But a decade later Congress enacted the Telecommunications Act of 1996, which fundamentally restructured the market for local phone service by ending the regional monopolies held by each of the regional Bell operating companies.[10] In an effort to stimulate competition in local markets, the Telecommunications Act permitted

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2. *Twombly*, 127 S. Ct. at 1965.
3. *Id.*
4. *Id.*
5. United States v. AT&T Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).
6. *Id.* at 141.
7. *Id.* at 160.
8. *Id.* at 201.
9. *Id.* at 186–89.
10. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of titles 15, 18, and 47 U.S.C.).

each of the regional companies to compete in each others' markets and required each of the regional companies to share its technology with companies seeking to enter the new competitive local markets for telephone services.[11] In the years immediately following the enactment of the Telecommunications Act, the regional operating companies, referred to as Incumbent Local Exchanges Carriers (ILECs) by the Court in *Twombly*, were slow to comply with the mandates of the Telecommunications Act.[12] Indeed, Bell Atlantic had been fined $10 million by the New York Public Service Commission for its failure to make its facilities available to AT&T.[13]

The *Twombly* action was commenced against this backdrop. Twombly, a consumer of local phone and high speed internet services, brought a putative class action against the ILECs alleging that the ILECs (1) had conspired to inhibit the growth of rival local service providers in their respective territories by, among other things, overbilling, limiting their rivals' access to their networks, and sabotaging rivals' relationships with their customers; and (2) had agreed among themselves not to compete with each other in their respective service areas.[14] But the complaint was devoid of any specific factual allegations of conspiracy.[15] Rather, the complaint simply alleged a parallel course of conduct by the defendants, and characterized this conduct as a conspiracy in violation of § 1 of the Sherman Act.[16]

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11. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1984 (2007); *see* Verizon Commc'ns Inc. v. FCC, 535 U.S. 467, 488 (2002) (explaining the effect of the Telecommunications Act on competition between telephone service providers).

12. *See, e.g.*, Verizon Commc'ns Inc. v. Law Office of Curtis V. Trinko, L.L.P., 540 U.S. 398, 403–04 (2004) (involving telephone customer complaints of lack of access to competitors in violation of Telecommunications Act).

13. *Id.* at 404.

14. *Twombly*, 127 S. Ct. at 1962.

15. *Id.* at 1962–63.

16. *Id.* The complaint alleged:

> 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 [(Competitive Local Exchange Carriers)] 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

Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted.[17] They argued that proof of conscious parallelism, without more, is insufficient as a matter of law to establish a conspiracy.[18] Defendants further argued that plaintiffs would have to adduce additional evidence beyond parallel conduct—so-called plus factors—in order to succeed at trial, and its failure to allege plus factors in the complaint was fatal to its claim.[19]

A. The Trial Court Decision

The trial court granted the defendants' motion to dismiss.[20] It reasoned that as a matter of substantive antitrust law that proof of mere conscious parallelism is not itself sufficient to establish the requisite "contract, combination . . . or conspiracy in restraint of trade or commerce" giving rise to a § 1 violation.[21] Applying a summary judgment standard at the pleading stage, the court concluded that absent allegations of plus factors in addition to parallel behavior, the plaintiffs' claims were deficient as a matter of law.[22] The court also ruled that the complaint contained no facts suggesting that either the decision to frustrate the ability of new entrants to compete in the market for local phone services or the decision by Competitive Local Exchange Carriers (CLECs) not to enter into each others' territories was contrary to the individual defendant's self-interest.[23] Consequently, there was no factual basis upon which to infer that the defendants' actions were the result of a conspiracy.[24] The court further found that the defendants' conduct was consistent with self-interest:

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speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.

Id.

17. *Id.* at 1963.

18. *Id.*

19. *Id.*

20. Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 176 (S.D.N.Y. 2003), *rev'd*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007).

21. *Id.* at 179 (quoting Sherman Act § 1, 15 U.S.C. § 1 (2000)).

22. *Id.* at 180–82.

23. *Id.* at 182.

24. *Id.* at 188.

> For an ILEC to compete as a CLEC in an adjoining ILEC's territory would not be simply to extend their existing business into a neighboring region, but rather would be to invest in undertaking an entirely different kind of business. Given the obstacles to becoming a successful CLEC, defendants' uncontested market power in their own territories, the fact that being a CLEC is a different business model from being an ILEC, defendants' reluctance to branch out into the CLEC market is perfectly consistent with independent decisions that their economic interests were better served by concentrating on their traditional businesses as ILECs, or, for that matter, investing in entirely different enterprises. It is no more surprising, and raises no more inference of concerted action, that the ILECs have not gone into business as CLECs than that they have all collectively failed to enter some other line of business.[25]

The trial court acknowledged[26] that its decision might be "somewhat in tension with" the standards for pleading under the Federal Rules.[27] Nevertheless, it ruled that failure to allege plus factors in the complaint was fatal to the plaintiffs' antitrust claim.[28]

B. The Second Circuit Ruling

The Second Circuit reversed and reinstated the complaint.[29] It ruled that the trial court erred in applying a summary judgment standard at the pleading stage.[30] As a threshold matter, the Second Circuit observed that the notice pleading standards embodied in the Federal Rules of Civil Procedure do not require detailed factual pleading and that the Federal Rules do not contemplate use of

25. *Id.*
26. *Id.* at 180.
27. FED. R. CIV. P. 8(a)(2).
28. *Twombly*, 313 F. Supp. 2d at 181.
29. Twombly v. Bell Atl. Corp., 425 F.3d 99 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007).
30. *Id.* at 106.

motions to dismiss at the complaint stage to weed out cases.[31] While the decisions have not provided any bright-line rules "for identifying the factual allegations required to state an antitrust claim, they suggest that the burden is relatively modest."[32] The Court then concluded:

> As a general matter, then, a Section 1 plaintiff must allege that (1) the defendants were involved in a contract, combination, or conspiracy that (2) operated unreasonably to restrain interstate trade, together with the factual predicate upon which those assertions are made.[33]

Furthermore, the Second Circuit rejected the trial court's finding that to sustain the complaint, the plaintiffs must plead plus factors.[34] The Second Circuit reasoned that the plus factors requirement would be contrary to the holding in *Swierkiewicz v. Sorema N.A.* that courts may not by local rule or practice formulate particularity in pleading requirements beyond those contained in Rule 9(b) of the Federal Rules of Civil Procedure.[35]

As long as conspiracy was in the realm of "plausible" possibilities, the complaint would survive a motion to dismiss.[36] Pleading parallel conduct by the defendants could "suffice to state a plausible claim for conspiracy."[37] Thus, under the Second Circuit's reasoning, plaintiffs *may* plead plus factors, but they are not *required* to do so.[38]

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31. *Id.* at 106–07.
32. *Id.* at 112.
33. *Id.* at 113.
34. *Id.* at 113–14.
35. *Twombly*, 425 F.3d at 107 (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002)).
36. *Id.* at 114.
37. *Id.*
38. *Id.*

III. THE SUPREME COURT

A. The Rationale

The Supreme Court reversed the Second Circuit decision and held that the *Twombly* complaint failed to state a claim upon which relief could be granted and must be dismissed.[39] In analyzing the issue before it, the Supreme Court steered a middle course between the rulings of the trial court and the Second Circuit. The Court declined to endorse the trial court's view that summary judgment standards are applicable at the motion to dismiss stage.[40] It also rejected the Second Circuit's view that, under *Swierkiewicz* and *Conley v. Gibson*, the complaint must be upheld.[41]

Instead, the high court viewed the issue as involving construction of Rule 8(a)(2), which provides that a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[42] The Court acknowledged that the Federal Rules eased pleading requirements from those extant under common law or under the Codes, but at the same time, the Court said that it would be a mistake to suggest "that the Federal Rules somehow dispensed with the pleading of facts altogether."[43] Rather, the Federal Rules merely relieve the plaintiff of the need to "set out *in detail* the facts upon which he bases his claim."[44] The Court further reasoned that factual allegations are critical to a plaintiff's claim:

> Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim

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

40. *Id.* at 1974.

41. *Id.* at 1969 (citing Conley v. Gibson, 355 U.S. 41 (1957)); *id.* at 1973 (citing *Swierkiewicz*, 534 U.S. at 508).

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

43. *Twombly*, 127 S. Ct. at 1965 n.3 ("The dissent greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether."). *But see id.* at 1979 (Stevens, J., dissenting) ("[A]s the *Conley* Court well knew, the pleading standard the Federal Rules meant to codify does not require, or even invite, the pleading of facts.").

44. *Id.* at 1965 n.3 (majority opinion) (quoting *Conley*, 355 U.S. at 47).

> rests. (Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").[45]

To make a "showing" that he or she is "entitled" to relief, a pleader must assert "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[46] Nor are courts "bound to accept as true a legal conclusion couched as a factual allegation."[47] Allegations of fact "must be enough to raise a right to relief above the speculative level."[48] A pleading must contain more than facts "that merely create[] a suspicion [of] a legally cognizable right of action."[49] The Court concluded that:

> In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.[50]

With respect to the specific issues before it, the Court stated:

> It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply

45. *Id.* (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004)) (citation omitted).

46. *Id.* at 1965.

47. *Id.* (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)).

48. *Id.*

49. *Id.* (quoting WRIGHT & MILLER, *supra* note 45, § 1216).

50. *Id.*

> facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.[51]

Thus, to survive a motion to dismiss, a complaint must set forth facts "plausibly suggesting (not merely consistent with) agreement."[52] An allegation of conscious parallelism without more "stays in neutral territory."[53] While that allegation "gets the complaint close to stating a claim, . . . without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'"[54]

In promulgating the "plausibility" standard, the Court was driven by pragmatic concerns involving (1) the need to stem what it deemed baseless litigation and (2) the high costs of pretrial discovery.[55] First, the Court stated that deficiencies in pleadings should "be exposed at the point of minimum expenditure of time and money by the parties and the court,"[56] that is, at the motion to dismiss stage. Otherwise, "a largely groundless claim" would be permitted to "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."[57]

Secondly, the Court cautioned lower courts not "to forget that proceeding to antitrust discovery can be expensive."[58] The potential of astronomical discovery costs itself may push defendants to settle early in the proceedings, irrespective of the merits of the complaint.[59] The Court then reasoned that claims failing to meet the plausibility test must be eliminated at the pleading stage because the tools traditionally used to ferret out infirm claims—careful case

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51. *Id.* at 1966.
52. *Id.*
53. *Id.*
54. *Id.* (quoting FED. R. CIV. P. 8(a)(2)) (alteration in original).
55. *Id.* at 1966–67.
56. *Id.* at 1966 (quoting WRIGHT & MILLER, *supra* note 45, § 1216).
57. *Id.* (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).
58. *Id.* at 1967.
59. *Id.*

management, judicial supervision of discovery, summary judgment, and jury instructions—simply do not work:

> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries;" the 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'" to support a § 1 claim.[60]

In addition, the plausibility standard enumerated in *Twombly* marks a clear departure from *Conley v. Gibson*, which for half a century was viewed as the standard governing the adequacy of a complaint on a motion to dismiss under Rule 12(b)(6).[61] *Conley* stated that a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."[62]

The Court justifies this departure by urging that *Conley* had long been misconstrued by the lower courts.[63] It argued that the "no set of facts" language in *Conley* must be viewed in light of the detailed factual allegations of racial discrimination therein "which the Court quite reasonably understood as amply stating a claim for

60. *Id.* (internal citations omitted) (alteration in original).
61. 355 U.S. 41, 45–46 (1957).
62. *Id.*
63. *Twombly*, 127 S. Ct. at 1969.

relief."[64] Accordingly, what *Conley* was really saying was 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."[65] Put another way, *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."[66] The Court then officially "retired" *Conley* as the standard for judging the adequacy of the complaint at the motion to dismiss stage.[67] In consigning *Conley* to the boneyard, the Court also observed that the lower courts had questioned the "no set of facts" test, thereby suggesting that support for *Conley* had long ago eroded.[68] Curiously, the majority did not point out, as Justice Stevens did in his dissent, that *Conley* had been repeatedly cited by the Supreme Court *with approval* notwithstanding some discontent among lower courts.[69]

B. Plausibility: The New Pleading Standard

In jettisoning *Conley*, the Court has embraced a new standard under Rule 8(a)(2)—plausibility.[70] But, what does that mean for day-to-day pleading practice in federal courts? On this score, as the Second Circuit aptly observed, the Court has sent mixed signals which "create some uncertainty as to the intended scope of the Court's decision."[71] On the one hand, *Twombly* suggests a

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64. *Id.*

65. *Id.* (emphasis added).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 1978 (Stevens, J., dissenting) ("If *Conley's* 'no set of facts' language is to be interred, let it not be without eulogy. That exact language, which the majority says has 'puzzle[ed] the profession for 50 years,' has been cited as authority in a dozen opinions of this Court and four separate writings. In not one of those sixteen opinions was the language 'questioned,' 'criticized' or 'explained away.' 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." (internal citations omitted) (alteration in original)).

70. *Id.* at 1968 (majority opinion).

71. Iqbal v. Hasty, 490 F.3d 143, 157 (2d Cir. 2007). The court then expanded on the nature of the mixed signals:

Some of these signals point toward a new and heightened pleading standard. First, the Court explicitly disavowed the oft-quoted statement in *Conley* of "'the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Bell Atlantic* asserted that this "no set of facts" language "has earned its retirement" and "is best forgotten."

Second, the Court, using a variety of phrases, indicated that more than notice of a claim is needed to allege a § 1 violation based on competitors' parallel conduct. For example, the Court required "enough factual matter (taken as true) to suggest that an agreement was made;" "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement;" "facts that are suggestive enough to render a § 1 conspiracy plausible;" "allegations of parallel conduct . . . placed in a context that raises a suggestion of a preceding agreement;" "allegations plausibly suggesting (not merely consistent with) agreement;" a "plain statement" (as specified in Rule 8(a)(2)) with "enough heft" to show entitlement to relief ; and "enough facts to state a claim to relief that is plausible on its face," and also stated that the line "between the factually neutral and the factually suggestive . . . must be crossed to enter the realm of plausible liability," and that "the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible."

Third, the Court discounted the ability of "'careful case management,'" "to weed[ ] out early in the discovery process" "a claim just shy of a plausible entitlement."

Fourth, the Court encapsulated its various formulations of what is required into what it labeled "the plausibility standard." Indeed, the Court used the word "plausibility" or an adjectival or adverbial form of the word fifteen times (not counting quotations).

On the other hand, some of the Court's linguistic signals point away from a heightened pleading standard and suggest that whatever the Court is requiring in *Bell Atlantic* might be limited to, or at least applied most rigorously in, the context of either all § 1 allegations or perhaps only those § 1 allegations relying on competitors' parallel conduct. First, the Court explicitly disclaimed that it was "requir[ing] heightened fact pleading of specifics" and emphasized the continued viability of *Swierkiewicz*, which had rejected a heightened pleading standard.

Second, although the Court faulted the plaintiffs' complaint for alleging "merely legal conclusions" of conspiracy, it explicitly noted with approval Form 9 of the Federal Civil Rules, Complaint for Negligence, which, with respect to the ground of liability, alleges only that the defendant "negligently drove a motor vehicle against plaintiff who was then crossing [an identified] highway." The Court noted that Form 9 specifies the particular highway the plaintiff was crossing and the date and time of the accident, but took no notice of the total lack of an allegation of the respects in which the defendant is alleged to have been

heightened pleading standard applicable across the board in federal litigation.[72] It expressly overrules *Conley v. Gibson*, which for 50 years provided the legal standard for determining the sufficiency of a complaint on a motion to dismiss, stating that the "no set of facts" language "has earned its retirement" and "is best forgotten."[73] The Court states that where the complaint purports to allege conspiracy based on parallel conduct but fails to allege any facts showing agreement, merely putting the defendants on notice that the gist of the plaintiff's complaint is conspiracy is not enough to survive a motion to dismiss.[74] The Court then articulates a variety of formula-

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negligent, i.e., driving too fast, crossing the center line, running a traffic light or stop sign, or even generally failing to maintain a proper lookout. The adequacy of a generalized allegation of negligence in the approved Form 9 seems to weigh heavily against reading *Bell Atlantic* to condemn the insufficiency of all legal conclusions in a pleading, as long as the defendant is given notice of the date, time, and place where the legally vulnerable conduct occurred.

Third, the Court placed heavy emphasis on the "sprawling, costly, and hugely time-consuming" discovery that would ensue in permitting a bare allegation of an antitrust conspiracy to survive a motion to dismiss, and expressed concern that such discovery "will push cost-conscious defendants to settle even anemic cases." These concerns provide some basis for believing that whatever adjustment in pleading standards results from *Bell Atlantic* is limited to cases where massive discovery is likely to create unacceptable settlement pressures.

Fourth, although the Court expressed doubts about the ability of district courts to "*weed[ ] out*" through case management in the discovery process "a claim just shy of a plausible entitlement to relief," the Court did not disclaim its prior statement that "federal courts and litigants must rely on summary judgment and control over discovery to *weed out* unmeritorious claims sooner rather than later." Leaving *Leatherman*[, 507 U.S. 163 (1993),] and *Crawford-El*[, 523 U.S. 574 (1998),] undisturbed (compared to the explicit disavowal of the "no set of facts" language of *Conley*) further suggests that *Bell Atlantic*, or at least its full force, is limited to the antitrust context.

Fifth, just two weeks after issuing its opinion in *Bell Atlantic*, the Court cited it for the traditional proposition that "[s]pecific facts are not necessary [for a pleading that satisfies Rule 8(a)(2)]"; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"

Id. at 155–57 (citations omitted).

72. *Id.* at 155.

73. *Twombly*, 127 S. Ct. at 1969.

74. *Id.* at 1965–66, 1974.

tions as to what would constitute a valid complaint.[75] These formulations together are labeled the "plausibility standard."[76] Finally, the Court underscores the need for lower courts to scrutinize complaints more carefully at the pleading stage because of the perceived inability of trial judges to weed out insubstantial claims early on in the discovery phase of the case.[77]

However, the use of the term *plausible* to describe the heightened pleading standard seems like an odd choice. The dictionary definition of *plausible*—"superficially fair, reasonable or valuable but often specious"; "superficially pleasing or persuasive"; "appearing worthy of belief"[78]—suggests a very forgiving standard, perhaps even *lower* than that in *Conley*. Moreover, litigants are given few clues as to what constitutes a "plausible" claim beyond some descriptive terminology. *Twombly* says that "possible" or "speculative" claims are deficient but explains little beyond that.[79] The Court itself appears to be relying more on the labels that the opinion decries in articulating the new pleading standard.[80] Thus, *Twombly* now allows trial courts to dismiss claims viewed as speculative or implausible without giving a second thought as to whether the claims themselves—as opposed to the way the claims are described in the complaint—have merit and warrant trial.

Similarly, although the Court states that "conclusory" allegations and "formulaic" recitations of claims do not meet the plausibility test, it says nothing about what distinguishes a proper factual allegation from a deficient conclusory claim, and for good reason.[81] The line separating fact from conclusion is not easy to draw and never has been.[82] Indeed, the Achilles heel of code

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75. *Id.* at 1965–66.

76. *Id.* at 1968.

77. *Id.* at 1967.

78. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 950 (11th ed. 2003).

79. *Twombly*, 127 S. Ct. at 1965–66.

80. *Id.* at 1965 (Rule 8(a)(2) "requires more than labels and conclusions, and the formulaic recitation of the elements of a cause of action will not do.").

81. *Id.*

82. *Id.* at 1976 (Stevens, J., dissenting) ("[I]t is virtually impossible logically to distinguish among 'ultimate facts,' 'evidence' and 'conclusions.' Essentially, any allegation in a pleading must be an assertion that certain occurrences took place. The pending spectrum, passing from evidence, through ultimate facts to conclusions, is largely a continuum varying only in degree of particularity with which the occurrences are described." (quoting Jack B. Weinstein & Daniel H.

pleading became apparent when the courts got bogged down on the fact/conclusion distinction and lost sight of the larger goals of litigation.[83]

The short of it is that the Court has needlessly re-ignited an ancient debate that was settled long ago with the promulgation of the Federal Rules of Civil Procedure. Once again, trial courts are assigned the task of fathoming the unfathomable—the distinction between allegations that are "factual" and hence valid, and those which are merely "conclusory" and hence deficient.[84] Trial courts prefer to avoid jumping into the thicket; and, after *Twombly*, they are more likely simply to dismiss claims pleaded in a conclusory manner rather than give plaintiffs a chance to rehabilitate those claims.

On the other hand, some language in *Twombly* suggests that the opinion has a much narrower focus.[85] First, the majority eschews any notion of creating a court-made particularity in pleading requirement in antitrust cases and specifically reaffirms its earlier holding in *Swierkiewicz* that any such requirement must come from the Federal Rules and not from the courts.[86] Second, although *Twombly* certainly reinterprets the concept of notice pleading, it does not herald a return to fact pleading. In *Erickson v. Pardus*, decided two weeks after *Twombly*, the Court in a per curiam opinion made clear that *Twombly* did not abnegate notice pleading.[87] *Erickson* was a pro se civil rights case brought by a prisoner suffering from Hepatitis C who sued prison officials for injuries sustained when the prison discontinued his treatment for the disease.[88] The trial court dismissed the complaint for failure to allege harm caused by discontinuance of the treatment for hepatitis, as opposed to harm

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Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520–21 (1957))).

83. *See, e.g.*, WRIGHT & MILLER, *supra* note 45, § 1216 ("The substitution of 'claim showing that a pleader is entitled to relief' for the code formation of 'facts' constituting a 'cause of action' was intended to avoid the distinctions drawn under the codes among 'evidentiary facts,' 'ultimate facts' and 'conclusions' . . . .").

84. *See* Weinstein & Distler, *supra* note 82, at 520–21.

85. Iqbal v. Hasty, 490 F.3d 143, 156 (2d Cir. 2007).

86. *Twombly*, 127 S. Ct. at 1973–74.

87. 127 S. Ct. 2197, 2200 (2007) (per curiam) ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and grounds upon which it rests.'" (quoting *Twombly*, 127 S. Ct. at 1964)).

88. *Id.* at 2197.

caused by the hepatitis itself.[89] Reversing the trial court, *Erickson* held that the plaintiff's allegations that the prison's discontinuance of treatment caused him injury were not too conclusory under *Twombly*.[90] In so ruling, the Court in *Erickson* was mindful that the plaintiff was proceeding pro se and that the federal courts have given considerable leeway to pro se litigants.[91]

Third, the Court observed in *Twombly*, in a footnote, that the barebones allegations in Official Form 9 of the Federal Rules of Civil Procedure would be sufficient to pass its new pleading standards.[92] The Court observed that Form 9 did provide the time and place of the alleged tortious conduct,[93] but elided the fact that the acts of alleged wrongdoing are encompassed in the term "negligent."[94] On the other hand, the allegations of parallel conduct in *Twombly*, even though they may have been indicative of a conspiracy, were nevertheless held to be deficient because they were also equally consistent with lawful behavior.[95] Under this analysis, are simple allegations of the time and place of alleged negligent behavior similarly consistent with lawful behavior?

Fourth, *Twombly*'s specification for more factual detail inculpating defendants at the pleading stage is closely related to the Court's concern regarding the high cost of discovery in antitrust cases and the fundamental unfairness of forcing defendants to incur such costs on the basis of generalized, and perhaps speculative, allegations of wrongdoing in the pleadings.[96] Accordingly, particularly after *Erickson*, it would not be unreasonable for lower courts to rule that the *Twombly* plausibility standard is limited to complex cases or cases where the projected costs of discovery are high and the allegations of wrongdoing thin. The lower courts have not adopted this narrow view; to the contrary, *Twombly* has been applied

89. *Id.* at 2200.

90. *Id.* at 2198 ("The [Court of Appeals] holding departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure that we . . . vacate the court's judgment and remand the case for further consideration.").

91. *Id.* at 2200.

92. *Twombly*, 127 S. Ct. at 1970 n.10.

93. *Id.*

94. Iqbal v. Hasty, 490 F.3d 143, 156 (2d Cir. 2007) (citing *Twombly*, 127 S. Ct. at 1970 & n.10).

95. *Twombly*, 127 S. Ct. at 1965–66.

96. *Id.* at 1967 n.6.

widely to a variety of cases to dispatch complaints at the motion to dismiss stage.[97]

Nevertheless, the Second Circuit in *Iqbal* ruled that *Twombly* did not require "a universal standard of heightened fact pleading" in all federal actions.[98] Rather, the court ruled that *Twombly* enunciated a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where amplification is needed to render a claim *plausible*."[99] In other words, detailed factual allegations in a complaint are not needed, except where they are needed. Perhaps what the Court in *Iqbal* was trying to say was that amplification is required in those cases where additional facts are required "to nudge [the plaintiffs'] claims across the line from conceivable to plausible."[100] Still, the Second Circuit's articulation of the *Twombly* standard seems hopelessly circular.

IV. IMPACT OF *TWOMBLY*

The ripple effects of *Twombly* are being felt across the board in federal pleading and practice. Nevertheless, three areas of impact merit close attention: (1) the demise of notice pleading; (2) the shift in the litigation playing field in favor of defendants; and (3) the Supreme Court's lack of confidence in the ability of the lower courts and the Federal Rules of Civil Procedure to manage federal litigation in a cost-effective manner.

A. Demise of Notice Pleading

The *Twombly* holding marks a significant retreat from the concept of notice pleading and certainly the end of notice pleading as envisioned by the drafters of the Federal Rules. Procedurally,

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97. *See, e.g.*, Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663 (7th Cir. 2007) (dismissing a breach of contract and Racketeer Influenced and Corrupt Organizations Act (RICO) case); *Iqbal*, 490 F.3d 143 (dismissing an unlawful detention case); Porter v. Unknown, No. CIV S-07-1139 LKK DAD P, 2007 WL 2729121 (E.D. Cal. Sept. 18, 2007) (dismissing a civil rights case); RxUSA, Inc. v. Capital Returns, Inc., No. 06-C-00790, 2007 WL 2712958 (E.D. Wis. Sept. 14, 2007) (dismissing a RICO case).

98. *Iqbal*, 490 F.3d at 157.

99. *Id.*

100. *Twombly*, 127 S. Ct. at 1974.

Twombly represents the culmination of decades of guerilla warfare on notice pleading.[101] The defense bar never accepted the concept of notice pleading as embodied in the Federal Rules of Civil Procedure adopted in 1938. The Federal Rules require that a complaint provide only "a short and plain statement of the claim showing that the pleader is entitled to relief."[102] To illustrate complaints that would meet this standard, the drafters included a series of Official Forms which were appended to the Federal Rules as promulgated. A review of the Official Forms reveals that the drafters intended a minimalist approach to pleading. Most courts, including antitrust courts, understood the concept of notice pleading.[103] A half-century ago, the Supreme Court ruled that Rule 8(a)(2) obligated the plaintiff to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[104] The Court further held that under this standard "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."[105]

Conley, however, has not been without its detractors. Critics have railed against its plaintiff-friendly standard, urging that a complaint is defective if it fails to plead "facts" sufficient to state a "cause of action."[106] In other words, the complaint must meet the

101. *See* WRIGHT & MILLER, *supra* note 45, § 1201 (describing how Judge Clark's decision in *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944), created a movement to amend Rule Eight and require the complaint to plead a "cause of action").

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

103. *See* Thompson v. Washington, 362 F.3d 969, 970 (7th Cir. 2004) ("The federal rules replaced fact pleading with notice pleading."); Hammes v. AAMCO Transmission, Inc., 33 F.3d 774, 782 (7th Cir. 1994) (noting that a plaintiff need not plead the particulars of his claim, and a heightened pleading standard is not required). *But see* Syncsort Inc. v. Sequential Software, Inc., 50 F. Supp. 2d 318, 326 (D.N.J. 1999) (dismissing complaint for failure to allege relevant market); George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 139 (2d Cir. 1998) (dismissing complaint for failure to allege antitrust injury); *cf.* Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 528 n.17 (1983) (suggesting that a court may require greater specificity in pleading before allowing an antitrust case to proceed to potentially expensive discovery).

104. Conley v. Gibson, 355 U.S. 41, 47 (1957).

105. *Id.* at 45–46.

106. *See, e.g.*, Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989) (noting that *Conley* provided "conflicting guideposts" for notice pleading); Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir.

standards set forth in the state law pleading codes that preceded the Federal Rules. The drafters of the Federal Rules rejected this approach because they believed that it would be unfairly burdensome to require a plaintiff *at the pleading stage* to have its claim prepackaged and its proof ready, especially when the key facts may be in the exclusive control of the defendants.[107]

Accordingly, the drafters rejected the fundamental tenets of fact pleading and effectively demoted the complaint, relegating it to a notice-giving function. No longer would the complaint play a major role in the litigation. The details of the claims and defenses could be fleshed out in discovery. The goal of the drafters was to facilitate moving meritorious claims to trial and to make certain that technical rules of pleading would no longer be a stumbling block for a legitimate claim, as had been the case under the codes and at common law, where the goal had been to avoid trial.[108] In short, the adoption of the Federal Rules marked a sea-change in the standards for pleadings and the role of the complaint in the overall litigation.

Modern critics of notice pleading accept this fact. The problem today, they claim, is that the drafters of the Federal Rules lived in a different time, long before the onset of the big case era, and simply did not anticipate the enormous costs of liberal pretrial discovery to all litigants.[109] They argue that a defendant, once a motion to dismiss has been denied, can easily spend millions of dollars on discovery. Thereafter, faced with enormous discovery costs and the inherent riskiness of litigation, that defendant may have no choice but to settle the litigation, no matter how thin the plaintiff's claim.[110] The solution, as they see it, is to tighten pleading

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1984) ("*Conley* has never been interpreted literally."); *see also* Geoffrey C. Hazard, *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998) ("[*Conley*] turned Rule 8 on its head.").

107. *See* Hickman v. Taylor, 329 U.S. 495, 501 (1947) ("The new [notice pleading] rules . . . restrict the pleadings to the task of general notice-giving and invest the deposition discovery process with a vital role in the preparation of trial.").

108. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1976 (2007) (Stevens, J., dissenting) ("Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in.").

109. *E.g.*, Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9–12 (1971).

110. *Id.*

standards so as to permit the courts to throw out weak cases at the pleading stage.[111]

This is precisely the approach adopted by the Court in *Twombly*. By "retiring" *Conley*, the Supreme Court abrogated the presumption implicit in the Federal Rules in favor of the complaint and with it fifty years of well-established precedent.[112] The Court's decision to give *Conley*'s "no set of facts" language the cruel back of the hand is troublesome, but even more troublesome is its willingness to marginalize the long accepted rule that on a motion to dismiss, the facts pleaded in the complaint must be assumed to be true.[113] *Twombly* beats a hasty retreat from that standard by ruling that "a legal conclusion couched as a factual allegation" or "formulaic" recitations of elements of a claim are not "facts" and need not be accepted as true.[114] That move, however, does not fully explain the Court's conclusion that defendants' acts were fully consistent with independent business judgment. To get there, the Court apparently relies on the "facts" contained in defendants' legal briefs; but these "facts" are not part of the record before the Court. Still, the Court seems to have had little difficulty weaving defendants' legal contention into the factual record.[115]

Will the "plausibility" standard adopted in place of *Conley* produce a consistent line of case law in the long term? It certainly has not done so in the short term. One thing is certain: the "plausibility" standard will make it much easier for courts to dismiss complaints at the pleading stage and much harder for meritorious, but weakly documented, complaints to get to trial. It also puts plaintiffs who do not have access to proof exclusively in the hands of defendants at a significant disadvantage in pleading and prosecuting their claims. For example, the *Twombly* Court does not even attempt to explain how the victim of an antitrust conspiracy can escape a motion to dismiss in cases where defendants have concealed information and successfully covered their tracks so as to leave no

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111. *Id.* at 11–12.

112. *See Twombly*, 127 S. Ct. at 1967–69 (explaining that *Conley* has been interpreted broadly to allow almost any plausible theory of a claim to suffice for the pleadings).

113. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1 (2002) (On a "motion to dismiss, we must accept as true all of the factual allegations contained in the complaint.").

114. *Twombly*, 127 S. Ct. at 1965.

115. *See infra* notes 143, 174 and accompanying text.

evidence—beyond that demonstrating parallel conduct—of any agreement among them. The short answer is that such cases will be eliminated on motion to dismiss and the full story will never be known. The Court thus seems more concerned with false positives, entertaining cases that should not have been brought in the first place for lack of merit, than it is with letting meritorious claims slip through the system simply because the defendants have been able to keep the lid on their scheme.[116] Here, *Twombly*'s new pleading rules take on substantive overtones.

B. Substantive Effects of the Twombly *Holding*

The second area of *Twombly*'s impact is directly substantive. *Twombly* has engineered a dramatic shift in the balance of power between the plaintiffs and the defendants in antitrust cases. The late Milton Handler, it seems, has triumphed after all. A generation ago, Handler published an influential article in which he argued that permissive pleading standards, coupled with broad pretrial discovery, liberal standards for certifying class actions, and a reluctance by courts to grant summary judgment, had stacked the deck in favor of plaintiffs and against defendants in antitrust cases.[117] As a result, defendants were subjected to "legalized blackmail"; faced with enormous discovery costs as well as trial costs, not to mention potential treble damages and attorneys' fees, defendants had little choice but to settle antitrust cases, irrespective of their merits.[118]

In the intervening thirty-five years, the courts and the Advisory Committee have swung in Handler's direction. Summary judgment is now routinely granted in antitrust cases.[119] Courts are more circumspect in certifying class actions.[120] The Advisory Committee, in an effort to make discovery more cost-effective, has introduced presumptive limits on the scope, amount, and length of

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116. *See infra* note 173 and accompanying text.

117. Handler, *supra* note 109.

118. *Id.* at 9–12.

119. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 595 (1986) ("[T]here is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage such conspiracies.").

120. *See* FED. R. CIV. P. 23(c)(1)(A) ("When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.").

discovery.[121] Discovery that is abusive or not proportional to the needs of the case is subject to mandatory sanctions.[122] Nevertheless, the *Twombly* holding is Handler's crowning achievement. *Twombly* directs antitrust courts to perform serious triage at the pleading stage and eliminate weak cases *before* plaintiffs have had an opportunity for discovery. From Handler's perspective, defendants now have a meaningful vehicle to get claims dismissed and thus avoid the perceived "extortionate" tactics of plaintiffs and their lawyers.

Whether Handler was right in his assessment of the antitrust world thirty-five years ago is an open question. Certainly, at the time of the *Twombly* decision, given developments in the courts and under the Federal Rules, Handler's case was vastly overstated. After *Twombly*, however, it is clear that Handler's views have triumphed and that the balance of power in antitrust litigation has shifted decidedly in favor of defendants.

C. *Lack of Confidence in Federal Judges and the Federal Rules of Civil Procedure*

Third, *Twombly* expresses skepticism about the ability of federal judges to manage litigation and a pessimism about the usefulness of the Federal Rules as a tool to promote cost-efficient litigation that yields just outcomes. The Court gives short shrift to any argument that baseless claims in federal court can be eliminated by careful case management, control of discovery, summary judgment, or carefully crafted jury instructions:

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

121. FED. R. CIV. P. 26(b)(1) (limiting attorney-initiated discovery to matter relevant to parties' claims and defenses); FED. R. CIV. P. 30(a)(2)(A) (presumptively limiting each side to ten depositions); FED. R. CIV. P. 30(d)(1) (presumptively limiting the length of depositions to "one day of seven hours").

122. FED. R. CIV. P. 26(b)(2)(C)(iii), (g)(3).

> evidence at the summary judgment stage," much less "lucid instructions to juries"; the 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'" to support a § 1 claim.[123]

The *Twombly* approach represents a marked departure from its ruling a decade earlier in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, wherein Chief Justice Rehnquist, writing for the Court, categorically rejected judicially created enhanced pleading in favor of summary judgment and judicial control of discovery as vehicles to eliminate infirm claims:

> Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. *In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.*[124]

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123. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007) (citations omitted) (alteration in original).

124. 507 U.S. 163, 168–69 (1993) (emphasis added). That the *Twombly* Court was purposeful in departing from *Leatherman* is clear from the fact that its language tracks carefully that used in *Leatherman*. The Court reasoned:

> 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," . . . [a]nd it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage."

Twombly, 127 S. Ct. at 1967.

Pessimism about the efficacy of judicial management under the Federal Rules of Civil Procedure may be linked to Judge Easterbrook's observation in a 1989 law review article that courts are virtually powerless to control the costs of discovery.[125] That assessment, while perhaps correct in 1989, is certainly not the case today. Although it is true that parties control the claims to be presented *in the first instance*, courts—contrary to Judge Easterbrook's statement—are not powerless. For example, Rule 16 permits courts sua sponte to dismiss claims lacking in merit.[126] Courts may also order targeted discovery with respect to limited issues with a goal of entertaining a summary judgment motion at an early stage in the lawsuit.[127]

Nor is it true that the courts have no control over the discovery process. With the 1983 Amendments, the Federal Rules began to encourage active management of discovery by the judge. Rule 26(b)(3) was added to limit discovery to that which is proportional to the needs of the case.[128] Where the cost of discovery outweighs its benefits, the party seeking such discovery faces mandatory sanctions.[129] Similarly, a party could be sanctioned for seeking discovery that was redundant or not cost-effective.[130]

The judicial role in supervising discovery was broadened significantly by the 1993 Amendments to the Federal Rules. Rule 26(f) was added to provide that prior to the initial pretrial conference, the parties had to meet and confer on an overall discovery plan for the litigation and that discovery could not proceed until such a plan was adopted by the court.[131] The 1993 Amendments also imposed, for the first time, numerical limitations designed to improve the cost-effectiveness of discovery, including presumptive limits on the number of interrogatories (twenty-five)[132] and presumptive limits on the number of depositions in a given case

125. Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989).

126. FED. R. CIV. P. 16(c)(2)(A).

127. *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 459 (1992).

128. FED. R. CIV. P. 26(b)(3).

129. FED. R. CIV. P. 26(g).

130. *Id.*

131. FED. R. CIV. P. 26(f).

132. FED. R. CIV. P. 33(a).

(ten per side).[133] Subsequently, the length of a deposition was limited presumptively to one seven-hour day.[134] Each of these presumptive limits was subject to modification by the court.[135] In 2000, the Federal Rules were amended to narrow the scope of attorney-initiated discovery to claims and defenses in the case.[136] At the same time, the court was given broad discretion to grant additional discovery with respect to the subject matter of the lawsuit.[137] In 1993, Rule 23 was amended to eliminate conditional class certification and slow down the certification process, lest a class be erroneously certified in haste.[138] It is simply not possible that the Court in *Twombly* was unaware of these developments under the Federal Rules. Similarly, it is highly unlikely that the Court was unaware of empirical research demonstrating that discovery abuse leading to excessive pretrial costs was not a problem in the vast majority of cases filed in the federal courts.[139] The real question is why the Court chose to ignore these developments.

In any event, the Court's solution to the problem—eliminate suspect claims at the pleading stage—seems counterintuitive. The pleading stage marks the time when the parties and the courts know the least about the respective claims. Yet the Court endorses the most drastic solution—dismissal prior to any discovery. This approach puts prospective plaintiffs at a severe disadvantage because it denies them equal access to proof. Indeed, the *Twombly* Court never even attempts to explain how an antitrust plaintiff could craft a plausible conspiracy complaint against defendants who have exclusive control over all evidence of conspiracy and overt acts in furtherance thereof. It would seem that the Court is saying that the problems of false positives are so great in antitrust conspiracy cases

133. FED. R. CIV. P. 30(a)(2)(A).
134. FED. R. CIV. P. 32(d)(1).
135. FED. R. CIV. P. 30(a)(2)(A), 32(d)(1), 33(a).
136. FED. R. CIV. P. 26(b)(1).
137. *Id.*
138. FED. R. CIV. P. 23(c)(1)(A).
139. *See, e.g.*, Wayne D. Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 A.B.A. J. 450 (1981) (discussing empirical research that suggests that the discovery system is more effective in smaller cases and complaints with the discovery system were limited to larger cases); Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787 (1980) (discussing the perceived adequacy of the discovery system).

that the goal of eliminating false positives justifies allowing some (or many) conspiracies to go undetected because of an absence of pretrial discovery—the vehicle necessary to present "plausible" complaints.

The solution offered by the majority in *Twombly* makes little sense unless it had another goal in mind: tort reform through reduction in the number of private civil enforcement suits in the federal courts.[140] Tort reform is the unspoken principle at the heart of the *Twombly* decision. Without citation to authority, the Court seems to assume that *all* antitrust conspiracy claims are lacking in merit. Rather than recognize the importance of deterring antitrust violations, the Court focuses on the high cost of discovery, which may force defendants to settle for economic reasons rather than to litigate on the merits, and on the burdens that labor-intensive antitrust litigation impose on the courts.[141] The Court pays only lip service to the well-recognized rule that on a motion to dismiss, all

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140. Concern about the ever-increasing litigiousness of American society is not new. Judge Selya described the phenomenon in colorful terms:

> Hypertrophy is the pathologic "overgrowth . . . of an organ or part . . . resulting from unusually steady or severe use . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1114 (1981). Metaphorists seem to find the condition irresistible. Thus, hypertrophy has been used as a partial explanation for the collapse of entire intellectual systems, *e.g.*, [THOMAS S.] KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970), and detailed mechanical intellectual artifacts, *e.g.*, [Richard A.] Posner, *Goodbye to the Bluebook*, 5[3] U. CHI. L. REV. 1343 (1986). We succumb today to the same temptation, for we find the metaphor especially apt in discussing the rampant growth of the civil docket in the United States.
>
> We need not belabor the point. Increased resort to the courts, and the consequent tumefaction of already-swollen court calendars, have received considerable attention, *see, e.g.*, [Wolf] Heydebrand & [Carroll] Seron, *The Rising Demand [f]or Court Services[: A Structural Explanation of the Caseload of U.S. District Courts]*, 11 JUST. SYS. J. 303 (1986); [Marc] Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); [JETHRO K.] LIEBERMAN, THE LITIG[IOUS] SOCIETY (1981), so we merely note the phenomenon and do not comment further upon it.

Securities Indus. Ass'n v. Connolly, 883 F.2d 1114, 1116 (1st Cir. 1989). The approach to this issue by the Court in *Twombly* is both novel and potentially far-reaching.

141. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1966–67 (2007).

facts alleged in the complaint must be deemed true.[142] Even though the defendants have not filed answers and must be deemed to have accepted as true the facts in the complaint, the Court works hard to derive a counter story that characterizes the defendants' conduct as pro-competitive or at least competitively neutral.[143]

V. THE UNCERTAIN FUTURE OF PRIVATE ANTITRUST ENFORCEMENT

The *Twombly* decision bodes ill for future private antitrust litigation. Plaintiffs seem to be left with little resolution for their complicated, difficult-to-prove claims. Defendants, on the other hand, may be receiving a pass on what is potentially devastating economic misconduct.

A. Echoes of Trinko

Twombly follows in the footsteps of its first cousin, *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, in calling for a more tolerant approach to firms' behavior in the marketplace.[144] In *Trinko*, a customer of AT&T brought a monopolization action against Verizon, alleging that Verizon's failure to provide AT&T access to its technology as required under the Telecommunications Act of 1996 had impaired AT&T's ability to provide local phone service in New York City, thereby injuring the customer.[145] The Court dismissed the complaint, holding that Verizon's refusal to share its infrastructure—mandated by the Telecommunications Act of 1996—did not give rise to a claim for monopolization under traditional antitrust standards because Verizon's conduct was not anticompetitive.[146] In dismissing the

142. *Id.* at 1965.

143. *Id.* at 1971.

144. 540 U.S. 398 (2004).

145. *Id.* at 404.

146. *Id.* at 407–08. The Court reasoned that firms may acquire monopoly power by creating an infrastructure that "renders them uniquely suited to serve their customers." *Id.* at 407. Forced sharing of those infrastructures would run counter to basic antitrust principles for several reasons. First, forced sharing could chill innovation and at the same time cast judges in the role of central planners—a role for which they are ill-suited. *Id.* at 408. Forced sharing would lead rivals to

complaint, the Supreme Court struck four distinctly pro-business themes. First, the Court suggests that dominant firm conduct is either benign or of no concern to the antitrust laws.[147] Rather than focusing on the anticompetitive effects flowing from monopolistic conduct, the Court stresses the benefits of a monopolist's behavior.[148] The Court describes monopoly power as "an important element of the free-market system."[149] The Court further observes that "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place."[150]

Second, *Trinko* cautions that the "cost of false positives counsels against an undue expansion of § 2 liability" under the Sherman Act.[151] The Court expressed concern that Verizon's failure to provide services required by the Telecommunications Act may be unrelated to alleged antitrust exclusion:

> One false-positive risk is that an incumbent LEC's [Local Exchange Carrier] failure to provide a service with sufficient alacrity might have nothing to do with exclusion. Allegations of violations of § 251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations. Amici States have filed a brief asserting that competitive LECs are threatened with "death by a thousand cuts"—the identification of which would

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negotiate with each other and enhance the risk of collusive behavior, a cardinal sin under the antitrust laws. *Id.* Mandatory access would undermine the basic right of a seller to choose its customers. *Id.* Consequently, Verizon's refusal to share its network did not constitute unlawful monopolization. *See generally* Edward D. Cavanagh, Trinko*: A Kinder, Gentler Approach to Dominant Firms Under the Antitrust Laws?*, 59 ME. L. REV. 111, 116 (2007) (discussing the Supreme Court's decision that advocated a more tolerant approach to dominant firms).

147. *Trinko*, 540 U.S. at 407.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 414 (citation omitted).

> surely be a daunting task for a generalist antitrust court. Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to a actively pursued by competitive LECs.[152]

The Court further notes that even under the best of circumstances, the application of the antitrust laws "can be difficult"[153] and that the mistaken inference of anticompetitive effect "[is] especially costly, because [it] chill[s] the very conduct the antitrust laws are designed to protect."[154]

Third, *Trinko* expresses a lack of confidence in the court system to achieve correct outcomes in exclusionary conduct cases. The Court points out that Verizon's failure to comply with sharing requirements under the Telecommunications Act may be difficult for an antitrust court to evaluate "not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex and constantly changing interaction" of the parties.[155] Accordingly, identifying exclusionary behavior would prove a "daunting task" for "generalist" antitrust courts.[156] *Trinko* also suggests that antitrust courts are ill-equipped to handle the day-to-day supervision of the implementation of a "highly detailed decree."[157] At the very least, antitrust intervention in the telecommunications field is likely to lead to costly "interminable litigation."[158] *Trinko* urges judicial self-restraint, concluding that the Sherman Act "does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."[159]

Fourth, *Trinko* expresses a distinct preference for regulation over antitrust intervention. The Court urges that the greater the

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152. *Id.*

153. *Id.* at 407 (quoting United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001)).

154. *Id.* (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).

155. *Id.*

156. *Id.*

157. *Id.* at 415.

158. *Id.* at 414.

159. *Id.* at 415–16.

regulatory overlay, the less appropriate the use of antitrust interaction.[160] *Trinko* reasons that in certain cases "regulation significantly diminishes the likelihood of major antitrust harm."[161] The Court further concludes that antitrust intervention in highly regulated industries is likely to lead to duplicative enforcement and liability.[162] Finally, *Trinko* maintains that regulation rather than generalist courts are best suited to supervise and evaluate complicated decrees.[163]

Twombly echoes these themes. In particular, *Twombly* reiterates the need to avoid false positives, refusing to condemn conduct "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."[164] The Court also states that "resisting competition is routine market conduct" that, without more, cannot be condemned under § 1.[165]

In addition, *Twombly* expresses skepticism about the ability of the judiciary to manage complex litigation.[166] However, whereas concerns in *Trinko* were tied to whether courts could achieve reasoned substantive outcomes, *Twombly* appears more concerned with procedural issues, specifically the perceived inability of courts to rein in discovery and manage complex litigation in a complex manner.[167]

*B. Pleading Conspiracy Post-*Twombly

Twombly makes it abundantly clear that mere allegations of parallel conduct are not enough in stating a conspiracy claim; to avoid a motion to dismiss, one or more "plus factors" must be alleged.[168] The Court, however, is conspicuously silent on how to plead conspiracy claims in those cases where parallel conduct exists, conspiracy is suspected (and even logical), but the defendants have been successful in covering their tracks, leaving no tangible evidence

160. *Id.* at 412.
161. *Id.* (quoting Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990)).
162. *Id.* at 411–13.
163. *Id.* at 414–15.
164. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007).
165. *Id.* at 1971.
166. *Id.* at 1967.
167. *See supra* notes 123–39 and accompanying text.
168. *Twombly*, 127 S. Ct. at 1966.

of conspiratory behavior. In such a scenario, it appears that *Twombly* mandates dismissal, thereby denying the plaintiff discovery.

Twombly creates a disturbing Catch-22 situation. Plaintiff cannot properly allege a conspiracy, and thus be entitled to discovery, unless it alleges conspiratorial acts. On the other hand, plaintiff cannot identify conspiratorial acts, and hence meet the *Twombly* standard, until discovery is obtained. The ineluctable conclusion is that some, perhaps many, antitrust conspiracies will go unpunished.

The inevitable result is diminution of the private remedy. *Twombly* will have little practical effect on government enforcement actions. The government is authorized to obtain precomplaint discovery through Civil Investigative Demands.[169] It would thus be inexcusable for a government pleading to fail the *Twombly* test. Private litigants are not entitled to precomplaint discovery, and to some extent they are dependent on facts developed in a government enforcement action to develop their claims. In private follow-up actions, it would again be inexcusable for plaintiffs to fail under *Twombly*.

Accordingly, the real impact of *Twombly* will be felt in private actions that are independent of government prosecution. Congress intended the private remedy to complement public enforcement.[170] While Congress made it easy for private parties to benefit from government enforcement, private actions are in no way limited by government actions under the statutory scheme. *Twombly*, however, creates a de facto dependency which threatens the deterrent function of private antitrust actions.

C. *Easing the Defendant's Burden on a Motion to Dismiss*

The majority in *Twombly* barely pays lip service to the long-recognized rule that on a motion to dismiss all allegations in the

169. Antitrust Civil Process Act § 3, 15 U.S.C. § 1312 (2006).

170. *See* Clayton Act § 5(a), 15 U.S.C. § 16(a) (2006) (stating that litigated government actions in which a defendant is found to have violated the antitrust laws are given prima facie effect in any subsequent private civil action against that defendant on the same facts).

complaint must be accepted as true.[171] Rather, it quibbles with whether the complaint contains plausible "factual allegations" rather than "labels and conclusions, and a formulaic recitation of the elements of a cause of action."[172] The decision to dismiss the complaint at the pleading stage "seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency."[173] Even though defendants did not answer the complaint, leaving the factual record before the Court devoid of any response or explanation of the defendants' conduct, the Court nevertheless scoured the motion papers filed by defense counsel and pieced together a "rational" explanation of defendants' conduct.[174]

With respect to the claim that the defendants jointly frustrated the entry of CLECs into their respective territories, the Court found that resistance to entry was "the natural unilateral reaction of each ILEC intent on keeping its regional dominance."[175] The Court further found that "resisting competition is routine market conduct" and "there is no reason to infer that companies had agreed among themselves to do what was only natural anyway."[176] The Court also adopted the view of the trial court that "each ILEC has reason to avoid dealing with CLECs," and "each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs."[177]

With respect to the claim that the ILECs agreed not to invade each other's territories, the Court found that "a natural explanation for the noncompetition alleged is that the former [g]overnment-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing."[178] Moreover, relying on a treatise, the Court found that *as a matter of fact* "[f]irms do not expand without limit and none of them enters every market that an outside observer might

171. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1 (2002).
172. *Twombly*, 127 S. Ct. at 1965.
173. *Id.* at 1975 (Stevens, J., dissenting).
174. *Id.* at 1971–72 (majority opinion).
175. *Id.* at 1971.
176. *Id.*
177. *Id.* (quoting Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 184 (S.D.N.Y. 2003)).
178. *Id.* at 1972.

regard as profitable, or even a small portion of such markets."[179] The Court concluded that "Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, but the disappointment does not make conspiracy plausible."[180]

The Court took a similar approach in dismissing the complaint in *Trinko*.[181] This willingness to entertain complicated factual arguments by defendants without the benefit of a factual record makes it even more difficult for an antitrust plaintiff to get beyond a motion to dismiss. It also significantly devalues the content of the complaint, contrary to the intent of the Federal Rules.[182]

VI. CONCLUSION

Twombly is a watershed decision whose impact will reverberate for decades. Substantively, *Twombly* has engineered a dramatic shift in the balance of power in antitrust litigation from plaintiffs to defendants, reversing the trend that Milton Handler bemoaned some 40 years ago. Procedurally, the Court has answered Handler's call "to take stock of our procedures and to distinguish with care those which serve the cause of judicial efficiency from those which add needlessly to the scope and complexity of litigation and impose burdens on the courts that cannot possibly be discharged."[183] At the same time, the decision is at odds with the fundamental tenets of notice pleading. The "plausibility" standard has created much uncertainty that will take years for the lower courts to resolve. The ball is now in the Advisory Committee's court to provide meaningful guidance to litigants and lower courts. In the meantime, private antitrust plaintiffs face yet another hurdle to successful outcomes.

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179. *Id.* at 1973 (quoting 6 PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 307d (Supp. 2006)).

180. *Id.*

181. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, L.L.P., 540 U.S. 398, 407, 410 (2004).

182. As Justice Stevens aptly observed, "Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in." *Twombly*, 127 S. Ct. at 1976 (Stevens, J., dissenting).

183. Handler, *supra* note 109, at 5.