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### MAKING SENSE OF *TWOMBLY*

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## Abstract

In May 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly* and sent shockwaves throughout the federal civil justice system. *Twombly* has triggered an avalanche of motions to dismiss, which, in turn, have generated thousands of judicial opinions, some of them knee-jerk reactions, other more thoughtful. It also has generated a plethora of academic commentary, much of it shrill and negative.

As the fourth anniversary of the *Twombly* decision approaches, the time for venting is over. *Twombly* is the law of the land; and the Supreme Court, having affirmed that decision in *Iqbal*, is not likely to shift course. Nor is the Advisory Committee likely to act absent empirical data showing that cases which would survive Rule 12(b)(6) motions prior to *Twombly* are now being dismissed. The likelihood of congressional action is even more remote. In short, the legal community is going to have to live with the *Twombly* holding and probably for a long time. Still, the scope of *Twombly* remains unsettled and “[p]leading standards in federal litigation are in ferment. This article will explore how trial courts can adhere to *Twombly*’s core concerns—not allowing speculative claims to open the door to potentially costly discovery and draining of judicial resources by dismissing those complaints “that merely create [ ] a suspicious [of] a legally cognizable right of action,” while at the same time remaining true to the goals of the Federal Rules of Civil Procedure that meritorious litigants shall have their day the court.

Among other things, I suggest that (1) the courts apply a proportionality standard in passing on pleadings under *Twombly*; (2) the courts be circumspect in dismissing cases on the pleadings where information is the exclusive control of the defendants and no discovery has been had; (3) courts as a general rule dismiss claims without prejudice; and (4) the courts avoid the pitfalls of the fact/conclusion dichotomy experienced at common law and under the codes. The article also explores the perverse (and unintended) effect of *Twombly* may be more discovery and even fewer trials.

## MAKING SENSE OF *TWOMBLY*

Edward D. Cavanagh\*

I.	INTRODUCTION .....	98
II.	PROLOGUE: THE ADOPTION OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE ADVENT OF NOTICE PLEADING .....	104
III.	THE <i>TWOMBLY</i> TRILOGY: EXACTLY WHAT DID <i>TWOMBLY</i> DO?.....	109
	A. <i>Twombly</i> .....	109
	B. <i>Erickson</i> .....	113
	C. <i>Iqbal</i> .....	114
IV.	THEMES OF THE <i>TWOMBLY</i> TRILOGY.....	116
	A. <i>Gatekeeper Role</i> .....	116
	B. <i>In Pleading, Facts Matter (Conclusions Don't)</i> .....	120
	C. <i>Context Matters</i> .....	122
	D. <i>Cost Matters</i> .....	127
V.	ANALYTICAL HOLES IN <i>TWOMBLY</i> AND <i>IQBAL</i> .....	128
	A. <i>Fact v. Conclusion</i> .....	128
	B. <i>What Documents Are Properly Before the Court on a Motion to Dismiss?</i> .....	131
	C. <i>Information in Exclusive Control of Defendants</i> .....	133
VI.	SYNTHESIS.....	134
	A. <i>Proportionality</i> .....	134
	B. <i>Assuming the Truth of Allegations in the Pleadings</i> .....	135
	C. <i>Distinguishing Rule 12 and Rule 56</i> .....	136
	D. <i>Special Considerations</i> .....	137
	E. <i>Dismissal Without Prejudice</i> .....	138
VII.	AN ASSESSMENT .....	138
VIII.	CONCLUSION .....	139

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## I. INTRODUCTION

In May 2007, the United States Supreme Court decided *Bell Atlantic Corp. v. Twombly*<sup>1</sup> and sent shockwaves throughout the federal civil justice system.<sup>2</sup> Reversing the Second Circuit, the Court held that an antitrust complaint that alleged mere parallel behavior among rival telecommunications companies, coupled with stray averments of agreement that amounted merely to legal conclusions, failed as a matter of law to state a claim for conspiracy in violation of § 1 of the Sherman Act and had been properly dismissed by the trial court.<sup>3</sup> The Court then proceeded to (1) redefine the concept of notice pleading by “retiring” the half-century old “no set of facts” standard<sup>4</sup> that it had announced in *Conley v. Gibson*;<sup>5</sup> (2) articulate a new “plausibility” standard against which to measure complaints, thereby raising the bar for pleadings in federal courts;<sup>6</sup> and (3) remind district courts that they are gatekeepers, tasked with the responsibility of screening complaints at the motion to dismiss stage—in order to assure that speculative or insubstantial claims that are expensive for parties to litigate and costly for courts to administer<sup>7</sup> are not allowed to “immerse the parties in the discovery swamp—‘that Serbonian bog . . . where armies whole have sunk.’”<sup>8</sup> The upshot of *Twombly* is that defendants should be spared the rigors of discovery “unless the complaint provides enough information to enable

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1. 550 U.S. 544 (2007).

2. See Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 852 (2008) (“*Twombly*’s seismic impact is apparent when one considers that in the first six months after the decision was handed down, it was cited in more than 2,000 district court opinions and 150 circuit court opinions.”).

3. *Twombly*, 550 U.S. at 548–49, 553.

4. *Id.* at 562–63 (“*Conley*’s ‘no set of facts’ language . . . 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.”).

5. 335 U.S. 41, 45–46 (1957) (“[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.” (emphasis added)).

6. *Twombly*, 550 U.S. at 566 (“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.”).

7. See *id.* at 558–59 (“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.” (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)) (alteration in original)).

8. *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625–26 (7th Cir. 2010) (quoting JOHN MILTON, *PARADISE LOST* 138 (Alastair Fowler ed., 2d ed. 1998)) (discussing *Twombly*’s impact of preventing burdensome discovery for claims that should be dismissed), *cert. denied sub nom. Cellco P’ship v. Morris*, 131 S. Ct. 2165 (2011).

an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand.”<sup>9</sup>

*Twombly* has triggered an avalanche of motions to dismiss, which, in turn, has generated thousands of judicial opinions<sup>10</sup>—some of them knee-jerk reactions,<sup>11</sup> and others, more thoughtful.<sup>12</sup> It also has generated a plethora of academic commentary,<sup>13</sup> much of it negative.<sup>14</sup> Legislation has been introduced

9. *Id.* at 625.

10. See McMahon, *supra* note 2, at 852.

11. See, e.g., *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. MD 06-1775(JG)(VVP), 2008 WL 5958061, at \*1 (E.D.N.Y. Sept. 26, 2008) (recommending that the defendants’ motions to dismiss plaintiffs’ federal antitrust claims be granted with leave to replead), *modified*, No. 06-MD-1775(JG)(VVP), 2009 WL 3443405, at \*1 (E.D.N.Y. Aug. 21, 2009) (disagreeing with the magistrate judge’s recommendation and ruling that the plaintiffs’ federal antitrust claims were sufficiently pleaded under *Twombly*).

12. See, e.g., *In re Text Messaging Antitrust Litig.*, 630 F.3d at 626 (analyzing the dangers of “misapplying the *Twombly* standard” and how it could create severe harm); *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 322 (2d Cir. 2010) (analyzing thoroughly the defendants’ actions and how they compare to the *Twombly* standard), *cert. denied*, 131 S. Ct. 901 (2011); *Austen v. Catterton Partners V, LP*, 709 F. Supp. 2d 168, 172 (D. Conn. 2010) (emphasizing the need for the court to continue to utilize good judgment and common sense when ruling on Rule 12(b)(6) motions after *Twombly* and *Iqbal*).

13. See, e.g., Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 849–50 (2010) (examining the effects of *Twombly* and how *Iqbal* widened the scope of these effects); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 876 (2009) (“[This article] views *Twombly* not so much as a pleading decision but rather as a court access decision, one that addresses a general problem of institutional design: how best to prevent undesirable lawsuits from entering the court system.”); Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 560 (2009) (“[*Twombly*] is an invitation to the lower federal courts to screen out complaints in disfavored classes of cases, whether they are disfavored because of their perceived discovery burdens or for some other reason.”); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (noting the “new and foggy test” that *Twombly* and *Iqbal* have provided); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 443 (2010) (discussing how the discrete changes caused by *Twombly* and *Iqbal* have challenged the American system of liberal pleadings); Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 135 (2007) (discussing the implications that *Twombly* will have on future pleadings); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 62 (2007) (noting that the analysis behind *Twombly* is flawed); Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 474–75 (2010) (“[This article] emphasizes *Twombly*’s connection to prior law and suggests ways in which it can be tamed.”); Mark Herrmann, James M. Beck, & Stephen B. Burbank, *Debate, Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141, 141 (2009), <http://www.pennumbra.com/debates/pdfs/PlausibleDenial.pdf> (“[Debating] whether this plausibility standard is a proper ‘recalibration’ of the pleading rules or an illegitimate ‘innovation’ and whether Congress would be wise to overrule it.”); Richard M. Steuer, *Plausible Pleading: Bell Atlantic Corp. v. Twombly*, 82 ST. JOHN’S L. REV. 861, 875 (2008) (“*Twombly* increases the burden by replacing the ‘no set of facts test’ with a ‘show me the facts’ test.”); Ettie Ward, *The After-Shocks of Twombly: Will We “Notice” Pleading Changes?*, 82 ST. JOHN’S L. REV. 893, 895–96 (2008) (acknowledging the difficulties that lie ahead for the lower federal courts after *Twombly*); Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural*

to overturn *Twombly* and to restore the *Conley v. Gibson* standard.<sup>15</sup> *Twombly* was also a major agenda item at the 2010 Conference on Civil Rules held at Duke University School of Law on May 10–11, 2010.<sup>16</sup> Unquestionably, the *Twombly* decision is flawed on many levels:

1. It redefines federal pleading standards generally in order to address perceived problems specific to antitrust and similar complex litigation, including costly and time consuming pretrial discovery.<sup>17</sup>

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*Uniformity*, 108 COLUM. L. REV. 1431, 1431 (2008) (considering if *Twombly* should apply to state claims); Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (2008) (introducing a discussion on the response to *Twombly* in the legal community and an empirical study that examines the results of *Twombly*); Michael C. Dorf, *The Supreme Court Dismisses a 9/11 Detainee's Civil Lawsuit*, FINDLAW (May 20, 2009), <http://writ.news.findlaw.com/dorf/20090520.html> (“*Twombly* led to considerable confusion in the lower federal courts.”).

14. See, e.g., Burbank, *supra* note 13, at 560 (“*Twombly*’s most obvious and immediate consequence has been enormous confusion and transaction costs as a result of uncertainty about the requirements it imposes and its scope of application.”); Clermont & Yeazell, *supra* note 13, at 859 (“*Twombly* and *Iqbal* have introduced a wild card, a factor of substantial instability, at the threshold stage of civil process through which all litigation must pass.”); Ward, *supra* note 13, at 918 (listing five difficult questions for the courts to resolve after *Twombly*).

15. See Notice Pleading Restoration Act of 2010, S. 4054, 111th Cong. (2010); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009). Both of these bills would overrule *Twombly* and restore the status quo ante. See S. 4054 § 3; H.R. 4115 § 2. But see John Thorne, *Congress Overturning Twombly and Iqbal Would be the Real Revolution in Pleading*, METRO. CORP. COUNS., Sept. 2010, at 8 (“[I]n the struggle to devise better language than the Supreme Court has used in explaining the pleading standards of the Federal Rules, the drafters of these bills have ended up proposing—perhaps unintentionally—new and fairly incomprehensible standards that would lead to chaos in the courts and frivolous cases crowding out meritorious ones.”).

16. See JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & THE COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 1, 6 (2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf>.

17. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). This approach is curiously at odds with the Court’s consistent rulings that court-made pleading rules should not be used to address substantive policy concerns. Only weeks before *Twombly* was decided, the Court reiterated these views:

In a series of recent cases, we have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns. Thus, in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), we unanimously reversed the Court of Appeals for imposing a heightened pleading standard in § 1983 suits against municipalities. We explained that “[p]erhaps if [the] Rules . . . were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement . . . . But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.” *Id.*, at 168.

In *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002), we unanimously reversed the Court of Appeals for requiring employment discrimination plaintiffs to specifically allege the elements of a prima facie case of discrimination. We explained that “the Federal Rules do not contain a heightened pleading standard for employment discrimination

2. In place of *Conley's* “no set of facts standard”—a measuring stick that the Supreme Court consistently adhered to for half a century in passing on complaints at the motion to dismiss stage<sup>18</sup>—the Court substituted a “foggy”<sup>19</sup> plausibility test,<sup>20</sup> which is ever murkier in the wake of its subsequent attempts at clarification.<sup>21</sup>
3. The decision shifts the focus of the court in ruling on a motion to dismiss from whether a claim exists, to whether a claim is properly alleged in the complaint, thereby re-introducing into federal practice the very technical pleading requirements that the Federal Rules of Civil Procedure sought to eliminate.<sup>22</sup>
4. As a result, *Twombly* appears to be at odds with the basic thrust of the Federal Rules to encourage trials on the merits over

suits,” and a “requirement of greater specificity for particular claims” must be obtained by amending the Federal Rules. *Id.*, at 515 (citing *Leatherman*). And just last Term, in *Hill v. McDonough*, 547 U.S. 573 (2006), we unanimously rejected a proposal that § 1983 suits challenging a method of execution must identify an acceptable alternative: “Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts.” *Id.*, at 582 (citing *Swierkiewicz*).

*Jones v. Bock*, 549 U.S. 199, 212–13 (2007) (alteration in original).

18. *Twombly*, 550 U.S. at 563.

19. See Clermont & Yeazell, *supra* note 13, at 823.

20. *Twombly*, 550 U.S. at 556.

21. See generally Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–54 (2009) (attempting to clarify the *Twombly* plausibility test).

22. See, e.g., CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 68, at 466–67 (7th ed. 2011) (“The keystone of the system of procedure embodied in the rules is Rule 8 . . . . These provisions state that technical forms of pleading are not required, that pleadings are to be construed liberally so as to do substantial justice . . . .”). Dissenting in *Twombly*, Justice Stevens 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. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. See *Swierkiewicz*, 534 U.S. at 514 (“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.”). Charles E. Clark, the “principal draftsman” of the Federal Rules, put it thus:

“Experience has shown . . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result.” The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure, 23 A. B. A. J. 976, 977 (1937).

*Twombly*, 550 U.S. at 575 (Stevens, J., dissenting) (footnote omitted).

- pretrial dispositions, and it seems to embrace the common law philosophy that trials are to be avoided.<sup>23</sup>
5. The Court pointedly ignores the many management tools available to the courts under the Federal Rules of Civil Procedure short of dismissal of claims.<sup>24</sup>
  6. The opinion suggests that federal trial judges are not effective pretrial managers.<sup>25</sup>
  7. Yet, these very same judges are encouraged to dismiss claims on the merits, perhaps without the benefit of pretrial discovery.<sup>26</sup>
  8. The Court offers no suggestions on how a plaintiff is expected to meet the plausibility test when information crucial to its case, such as the time and place of conspiratorial meetings and the nature and extent of any agreements, is in the exclusive control of the defendant.<sup>27</sup>

On the other hand, *Twombly* is not without its supporters.<sup>28</sup> They view *Twombly* as “unremarkable” in requiring plaintiffs to plead sufficient facts to make a claim plausible.<sup>29</sup> They also maintain that *Twombly* “did little more than restate and apply the federal pleading standard that lower courts had long been implementing.”<sup>30</sup> The fact is that lower courts, with the possible exception of pro se cases,<sup>31</sup> have never applied *Conley* literally.<sup>32</sup> The frequency with which

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23. See *Twombly*, 550 U.S. at 597 (Stevens, J., dissenting) (concluding that “even if there is abundant evidence that the allegation is untrue, directing that the case be dismissed without even looking at any of that evidence marks a fundamental—and unjustified—change in the character of the pretrial practice”); see generally WRIGHT & KANE, *supra* note 22, at 466–77 (discussing the theory underlying the modern pleading standard).

24. See generally Edward D. Cavanagh, *Twombly, The Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN’S L. REV. 877, 883–89 (2008) (discussing other means of controlling pretrial costs such as discovery reform).

25. *Twombly*, 550 U.S. at 559.

26. See *id.* at 558 (“Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be quite expensive.”).

27. See Cavanagh, *supra* note 24, at 892 (recommending that plaintiffs be given access to defendant’s records before the court grants a motion to dismiss).

28. E.g., Thorne, *supra* note 15, at 8 (encouraging corporate counsel to contact Congress in support of *Twombly*).

29. *Id.* (“*Bell Atlantic Corp. v. Twombly* . . . [is] unremarkable in requiring that before a lawsuit can proceed to expensive discovery, the plaintiff must plead a valid cause of action based on facts (not conclusions) that make the claim plausible in the circumstances.”).

30. *Id.*

31. See, e.g., *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944) (granting the pro se plaintiff the benefit of what he reasonably intended in his claims).

32. *Twombly*, 550 U.S. at 562 (“*Conley* has never been interpreted literally.” (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984))).

courts grant motions to dismiss is a testament to this fact.<sup>33</sup> Rather, as noted in *Iqbal*, the courts have always decided motions to dismiss on the basis of “judicial experience and common sense.”<sup>34</sup>

As the fourth anniversary of the *Twombly* decision has come to pass, a new landscape is emerging, and the time for venting is over. *Twombly* is the law of the land; and the Supreme Court, having reaffirmed that decision in *Iqbal*,<sup>35</sup> is not likely to shift course.<sup>36</sup> Nor is the Advisory Committee likely to act in light of the Federal Judicial Center’s March 2011 empirical study, which concludes that, although there was an increase in the number of motions to dismiss filed between 2006 and 2010, there was in general “no increase in the rate of grants of motions to dismiss without leave to amend.”<sup>37</sup> That study suggests that the lower courts have been pragmatic—not dogmatic—in construing *Twombly* and *Iqbal*;<sup>38</sup> and as the dust from those decisions continues to settle, it has become increasingly apparent that the parade of horrors feared by critics has not materialized,<sup>39</sup> making the likelihood of congressional action even more remote. In short, the legal community is going to have to live with the *Twombly* holding, and probably for a long time. Still, the scope of *Twombly* remains unsettled and

33. See, e.g., STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, MOTIONS TO DISMISS INFORMATION ON COLLECTION OF DATA 6 (2010), available at [www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions%20to%20Dismiss\\_042710.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions%20to%20Dismiss_042710.pdf) (displaying success rates for motions to dismiss from 2007–2010, pre- and post-*Twombly* and *Iqbal*); see also Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 599 (2010) (suggesting, through empirical evidence, that courts granted motions to dismiss much more often than was thought under *Conley v. Gibson*, 355 U.S. 41 (1956)).

34. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (quoting *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007), *rev’d*, 129 S. Ct. 1937 (2009)); see Thorne, *supra* note 15, at 8.

35. *Iqbal*, 129 S. Ct. at 1953 (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions.’” (quoting FED. R. CIV. P. 1)).

36. Indeed, the Supreme Court recently denied certiorari in high profile cases from the Seventh Circuit and the Second Circuit. See *Cello P’ship v. Morris*, 131 S. Ct. 2165 (2011); *Sony Music Entm’t v. Starr*, 131 S. Ct. 901 (2011). At the same time, the Court has made it clear that on a motion to dismiss for failure to state a claim, the question is not whether the plaintiff will ultimately prevail, “but whether [the] complaint was sufficient to cross the federal court’s threshold,” and that to survive at the leading stage, a complaint need not contain “an exposition of [the] legal argument.” *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011); see also *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1325 (2011) (holding that the claims were adequately pled but refusing to answer at this stage if the plaintiffs can prove their allegations).

37. See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*, at vii (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf); see also Memorandum from Andrea Kuperman, Rules Law Clerk to Judge Lee H. Rosenthal, to Civil Rules Committee and Standing Rules Committee 4 (Dec. 15, 2010), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal\\_memo\\_121510.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_121510.pdf) (“[C]ase law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency.”).

38. CECIL ET AL., *supra* note 37, at 2–3 (“The courts of appeals have since reversed a number of the early district court decisions and have issued a growing body of case law that requires district courts to be cautious and context-specific in applying *Twombly* and *Iqbal*.” (footnotes omitted)).

39. CECIL ET AL., *supra* note 37, at 21 (finding no significant increase in the rate at which motions to dismiss were granted across the majority of case types).

“[p]leading standards in federal litigation are in ferment.”<sup>40</sup> This article will explore how trial courts can adhere to *Twombly*’s core concerns—not allowing speculative claims to open the door to potentially costly discovery and drain judicial resources—by dismissing those complaints “that merely create[ ] a suspicion [of] a legally cognizable right of action,”<sup>41</sup> while at the same time remaining true to the goals of the Federal Rules of Civil Procedure that meritorious litigants shall have their day in court and that pleadings “be construed so as to do justice.”<sup>42</sup>

## II. PROLOGUE: THE ADOPTION OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE ADVENT OF NOTICE PLEADING

As Arthur Miller has observed, “[h]istory matters,”<sup>43</sup> and because history matters, any analysis of *Twombly* must begin with a discussion of the origins of the Federal Rules of Civil Procedure and the changes in practice and procedure that the Federal Rules effectuated. In 1934, Congress enacted the Rules Enabling Act authorizing the United States Supreme Court to fashion uniform rules of practice and procedure in the federal courts.<sup>44</sup> The Federal Rules of Civil Procedure were thereafter promulgated by the Supreme Court on December 20, 1937<sup>45</sup> and became effective on September 16, 1938, pursuant to the Rules

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40. *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 627 (7th Cir. 2010). Notably, the courts of appeals, in reversing earlier trial court dismissals, have begun to exhibit a cautious and nuanced approach to *Twombly* and *Iqbal*. See, e.g., *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 461 (6th Cir. 2011) (reversing the motion to dismiss because the district court misapplied *Twombly*); *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 431–35 (2d Cir. 2011) (concluding that the claims were plausible after a detailed plausibility analysis); *Gonzalez v. Kay*, 577 F.3d 600, 607 (5th Cir. 2009) (reversing the district court’s dismissal of the plaintiff’s claim that the defendant violated the Fair Debt Collection Practices Act); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 589 (8th Cir. 2009) (reversing the district court’s dismissal of an employee’s class action complaint against his employer alleging a violation of fiduciary duties imposed by the Employee Retirement Income Security Act); see also *CECIL ET AL.*, *supra* note 37, at 2–3 n.6 (listing cases in which the courts of appeals reversed district court decisions granting motions to dismiss).

41. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1216, at 236 (3d ed. 2004)).

42. FED. R. CIV. P. 8(e).

43. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 *DUKE L.J.* 1, 3 (2010).

44. 28 U.S.C. § 2072 (2006). Prior to the adoption of the Federal Rules of Civil Procedure, practice and procedure in the federal courts were governed by the rule of the state in which the federal court was located pursuant to the Conformity Act of 1872, ch. 255, §§ 5–6, 17 Stat. 196, 197. See Conformity Act of 1872, available at <http://www.kentlaw.edu/perritt/conflicts/confact.html>. In 1912, the Federal Rules of Equity were adopted, providing for uniform practice and procedure in federal equity cases. See Rules of Practice for the Courts of Equity of the United States 226 U.S. 649 (1912). The Federal Rules of Civil Procedure “were based on the 1913 Federal Rules of Equity.” Jack B. Weinstein, *Preliminary Reflections on Administration of Complex Litigations*, 2009 *CARDOZO L. REV. DE NOVO* 1, 5 (2009).

45. Orders re Rules of Procedure, 302 U.S. 783 (1937).

Enabling Act after Congress adjourned without enacting an adverse legislation.<sup>46</sup> The new Federal Rules introduced a number of dramatic changes in federal practice and procedure: the merger of law and equity,<sup>47</sup> the elimination of the common law forms of action,<sup>48</sup> the limitation of the number of pleadings to three,<sup>49</sup> liberal procedures for joinder of claims<sup>50</sup> and parties,<sup>51</sup> and the introduction of pretrial discovery.<sup>52</sup> Perhaps the most significant change, however, was the introduction of simplified pleading standards to facilitate trial of meritorious claims.<sup>53</sup> The drafters rejected the common law model with its highly technical pleading rules and endless exchanges of paper designed to avoid trial.<sup>54</sup> They also rejected the code pleading models and their heavy emphasis on pleading facts sufficient to make out a cause of action.<sup>55</sup> The drafters felt that both models tended to focus the court's attention on how a claim had been pleaded instead of the nature of the claim itself and to reward the party whose attorney possessed superior technical skills rather than the party having the meritorious claim or defense.<sup>56</sup>

Instead, the simplified pleading system chosen by the drafters de-emphasized the role of the complaint and answer in the action.<sup>57</sup> Rule 8(a)(2) requires only that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>58</sup> The goal of this simplified pleading standard was to insure that meritorious claims would have their day in court and that claims would not be dismissed simply because they were inartfully

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46. See WRIGHT & KANE, *supra* note 22, § 62, at 429–30.

47. See FED. R. CIV. P. 2.

48. See *id.*

49. FED. R. CIV. P. 7(a) (complaint, answer and reply, if ordered by the court).

50. FED. R. CIV. P. 18.

51. FED. R. CIV. P. 19–20.

52. FED. R. CIV. P. 26–37.

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

54. Miller, *supra* note 43, at 3–4; See Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the Conley-Iqbal Dilemma*, 114 PENN ST. L. REV. 1191, 1202 (2010).

55. Campbell, *supra* note 54, at 1202; Miller, *supra* note 43, at 3; see Ward, *supra* note 13, at 896–97 (criticizing common law pleading and code pleading).

56. See Miller, *supra* note 43, at 4–5; WRIGHT & KANE, *supra* note 22, § 68, at 467–68; Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 518 (1925) (“[T]he purpose especially emphasized has varied from time to time. Thus in common law pleading especial emphasis was placed upon the *issue-formulating* function of pleading; under the earlier code pleading like emphasis was placed upon *stating the material, ultimate facts* in the pleadings; while at the present time the emphasis seems to have shifted to the *notice* function of pleading.”).

57. See Miller, *supra* note 43, at 5; Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL’Y 1107, 1118 (2010) (“A guiding policy behind simplified pleading was that it would be more efficient, in terms of both cost and expediency, to resolve disputes using discovery rather than successive technical pleadings.”).

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

drafted or because the plaintiff did not allege in the complaint each and every element of the cause of action to be proved at trial.<sup>59</sup>

The function of the complaint, with one notable exception involving the pleading of fraud claims,<sup>60</sup> was to provide the adversary with notice of the claim or defense and the grounds upon which it depends.<sup>61</sup> This simplified pleading regimen became popularly known as notice pleading,<sup>62</sup> although the drafters themselves declined to embrace that terminology.<sup>63</sup> Claims could be described generally; it was unnecessary to plead every element of the cause of action to be proven at trial.<sup>64</sup> The drafters eschewed the phrase “cause of action” in favor of “claim for relief.”<sup>65</sup> The details of the claims or defenses could be fleshed out through pretrial discovery.<sup>66</sup> To illustrate this barebones pleading regimen, the drafters included several sample complaints in the Appendix of Forms.<sup>67</sup> Presumably, complaints modeled on these forms would survive a motion to dismiss.<sup>68</sup> Consistent with the approach of the drafters, the Supreme Court in *Conley v. Gibson* held that a complaint must contain notice of the claim as well as the grounds upon which it depends.<sup>69</sup> Further, *Conley* held that a complaint challenged for insufficiency pursuant to Rule 12(b)(6) should not be dismissed at the pleading stage “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>70</sup> Moreover, the courts have been especially solicitous of pro se plaintiffs and have demonstrated a marked reluctance to dismiss pro se complaints at the pleadings stage.<sup>71</sup>

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59. See Miller, *supra* note 43, at 4–5 (“[T]he Federal Rules created a system that relied on plain language and minimized procedural traps, with trial by jury as the gold standard for determining a case’s merits.”); WRIGHT & KANE, *supra* note 22, § 68, at 466–67.

60. FED. R. CIV. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”).

61. WRIGHT & KANE, *supra* note 22, § 68, at 467.

62. See *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957).

63. WRIGHT & KANE, *supra* note 22, at 471 (citing *Padovani v. Bruchhausen*, 293 F.2d 546, 550–51 (1961); Charles E. Clark, *The Federal Rules of Civil Procedure*, 58 COLUM. L. REV. 435, 450–51 (1958)).

64. See Miller, *supra* note 43, at 4–5.

65. Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 187 (1957–58).

66. See Miller, *supra* note 43, at 4 (citing *Conley*, 355 U.S. at 47–48).

67. See, e.g., FED. R. CIV. P., Form 12 (illustrating a form complaint for negligence).

68. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007); *Hamilton v. Palm*, 621 F.3d 816, 818 (8th Cir. 2010) (“The forms in the Appendix [to the Rules] suffice under these rules . . . .” (alteration in original) (quoting FED. R. CIV. P. 84)).

69. 355 U.S. 41, 47 (1957).

70. *Id.* at 45–46.

71. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (“A document filed *pro se* is ‘to be liberally construed’ . . . and ‘a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.’” (citation omitted) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976))).

While the notice pleading concept was not without its detractors,<sup>72</sup> it is fair to say that the transition from fact pleading to notice pleading went smoothly, at least initially.<sup>73</sup> Concern about notice pleading began to mount as litigation grew more complex and more costly in ways that the original drafters could not have foreseen.<sup>74</sup> Critics argued that the Federal Rules had shifted the litigation playing field decidedly in favor of plaintiffs.<sup>75</sup> A threadbare complaint could force a defendant to spend millions of dollars on discovery, irrespective of the merits of the underlying claim.<sup>76</sup> Faced with such costs, a defendant would have little choice from an economic perspective other than to settle the matter, even if the underlying claims were of little or no merit.<sup>77</sup>

A 1955 Advisory Committee on Rules for Civil Procedures resisted calls to change pleading standards.<sup>78</sup> It did, however, take other steps to reduce litigation costs.<sup>79</sup> A package of amendments was introduced in 1983 to curb baseless claims and to police the discovery process more effectively.<sup>80</sup> First, that package contained a revitalized Rule 11 in 1983 to provide for mandatory sanction where a claim or defense is adjudged to have been baseless.<sup>81</sup> Second, it amended Rule 16 to make clear that a court's managerial powers extended to the discovery phase, as well as to the trial phase, of a case, and that failure to participate meaningfully in pretrial conferences would lead to sanctions.<sup>82</sup> Third, it amended Rule 26 to provide that discovery must be proportional to the needs

72. See Claim or Cause of Action: A Discussion on the Need for Amendment of Rule (8)(a)(2) of the Federal Rules of Civil Procedure, 13 F.R.D. 253, 253 (1952) (reporting on the Ninth Circuit's request to return to the code pleading standard).

73. See Schwartz & Appel, *supra* note 57, at 1118–19 (noting the reasons why the drafters' decision to simplify pleading in the 1930s was justified).

74. See The Place of the Pleadings in a Proper Definition of the Issues in the "Big Case," 23 F.R.D. 430, 434–35 (1958); Baim & Blank, Inc. v. Warren-Connelly Co., 19 F.R.D. 108, 109 (S.D.N.Y. 1956) ("The modern 'notice' theory of pleading is not sufficient when employed in a complaint under the anti-trust laws."); Claim or Cause of Action: A Discussion on the Need for Amendment of Rule (8)(a)(2) of the Federal Rules of Civil Procedure, 13 F.R.D. 253, 255 (1952); see also Charles B. Campbell, A "Plausible" Showing After *Bell Atlantic Corp. v. Twombly*, 9 NEV. L.J. 1, 18 (2008).

75. See, 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 (1971) (suggesting that notice pleading is like legalized blackmail because it forces defendants to settle).

76. *Id.*

77. *Id.*

78. Campbell, *supra* note 74, at 18.

79. See *id.* (citing ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 18–19 (1955), reprinted in 12A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, app. F at 665 (3d ed. 2004)).

80. See Edward D. Cavanagh, *The August 1, 1983 Amendments to the Federal Rules of Civil Procedure: A Critical Evaluation and a Proposal for More Effective Discovery Through Local Rules*, 30 VILL. L. REV. 767, 768–69 (1985) (discussing the impact on discovery that the 1983 amendments had).

81. See FED. R. CIV. P. 11 (1983).

82. See FED. R. CIV. P. 16 (1983).

of the case and to sanction discovery that is redundant, not cost effective, or disproportional to the needs of the case.<sup>83</sup> Subsequently, in 1993 the Advisory Committee amended the discovery rules to impose presumptive numerical limits on interrogatories<sup>84</sup> and depositions.<sup>85</sup> Fourth, the 2000 Amendments to the Federal Rules limited the scope of attorney-initiated discovery.<sup>86</sup> Fifth, the 2006 Amendments to the Federal Rules provided a framework for reining in potentially costly electronic discovery.<sup>87</sup>

Nevertheless, concerns about notice pleading persisted and found sympathetic ears in some appellate courts. For example, the Second Circuit in *Ostrer v. Aronwald*<sup>88</sup> imposed a specificity in pleading requirement<sup>89</sup>—akin to Rule 9(b)<sup>90</sup>—for civil rights cases.<sup>91</sup> That approach, however, was short-lived. The Supreme Court in *Leatherman*,<sup>92</sup> and subsequently in *Swierkiewicz*,<sup>93</sup> ruled that courts may not fashion their own rules of particularity in pleading for specific types of cases. Any change would have to come through the Federal Rules of Civil Procedure.<sup>94</sup> As noted above,<sup>95</sup> the 1955 Advisory Committee was disinclined to act on pleadings, and criticism of *Conley* persisted in the lower courts.<sup>96</sup> The Supreme Court chose to re-enter the fray by accepting certiorari in *Twombly*.<sup>97</sup>

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83. See FED. R. CIV. P. 26 (1983).

84. See FED. R. CIV. P. 33 (1993) (25 interrogatories).

85. See FED. R. CIV. P. 30 (1993) (10 depositions per side).

86. FED. R. CIV. P. 26(b)(1) (2000) (attorney-initiated discovery limited in scope to a “claim or defense”).

87. FED. R. CIV. P. 26(a)(1)(B), 26(b)(2), 34(a)(1)(A) (2006).

88. 567 F.2d 551 (2d Cir. 1977).

89. *Id.* at 553 (“This court has repeatedly held that complaints containing only ‘conclusory,’ ‘vague,’ or ‘general allegations’ of a conspiracy to deprive a person of constitutional rights will be dismissed. Diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct. In this case, appellants’ unsupported allegations, which fail to specify in detail the factual basis necessary to enable appellees intelligently to prepare their defense, will not suffice to sustain a claim of governmental conspiracy to deprive appellants of their constitutional rights.” (citations omitted)).

90. FED. R. CIV. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”).

91. *Oster*, 567 F.2d at 552.

92. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993).

93. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514–15 (2002).

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

95. See *supra* text accompanying note 78.

96. See, e.g., *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (citing *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984)) (“*Conley* has never been interpreted literally.”); see also Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998) (“*Conley v. Gibson* turned Rule 8 on its head by holding that a claim is insufficient only if the insufficiency appears from the pleading itself.”).

97. *Bell Atl. Corp. v. Twombly*, 548 U.S. 903 (2006).

III. THE *TWOMBLY* TRILOGY: EXACTLY WHAT DID *TWOMBLY* DO?A. *Twombly*

The *Twombly* case arose against the backdrop of the breakup of AT&T in 1984.<sup>98</sup> That year, AT&T entered into a consent decree with the federal government, and agreed, among other things, to divest its ownership of telephone companies providing local phone services.<sup>99</sup> The consent decree created seven entities, denominated regional Bell operating companies, which were granted monopolies to provide local phone services.<sup>100</sup> These companies were barred from competing in long distance services.<sup>101</sup> Thereafter, mergers reduced the number of regional operating companies from seven to four.<sup>102</sup>

That state of affairs was short-lived. In 1996, Congress enacted the Telecommunications Act of 1996,<sup>103</sup> which, among other things, removed barriers to entry of the market for local telephone services.<sup>104</sup> In order to stimulate competition in local markets, Congress authorized the erstwhile monopolistic regional operating companies, referred to in *Twombly* as incumbent local exchange carriers (“ILECs”), to compete in each other’s territories.<sup>105</sup> In addition, the Act required ILECs to share their technology with companies, referred to by *Twombly* as competitive local exchange carriers (“CLECs”), seeking to enter the newly created competitive markets for local telephone services.<sup>106</sup> Notwithstanding the Act, little changed in the local exchange markets.<sup>107</sup> The ILECs did not seem interested in competing with each other, and they were slow to make technology available to CLECs, frustrating the statutory goal of opening up local telephone service to competition.<sup>108</sup>

*Twombly*, a consumer of local phone and high speed internet services, commenced a putative class action under § 1 of the Sherman Act, alleging that the ILECs (1) had conspired not to compete in each other’s territories; and (2) had agreed to limit the growth opportunities of CLECs by, *inter alia*, limiting access to their networks, overbilling, and undermining relations between CLECs

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98. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 549 (2007).

99. *Id.* at 550 n.1.

100. *Id.*

101. Consolidated Amended Class Action Complaint at ¶ 21, *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003), *rev’d*, 425 F.3d 99 (2d Cir. 2005), *rev’d*, 550 U.S. 544 (2007) [hereinafter Complaint].

102. *Twombly*, 550 U.S. at 550 n.1 (citing Complaint, *supra* note 101, ¶ 21); *see Verizon Directories Corp. v. Yellow Book USA, Inc.*, 338 F. Supp. 2d 422, 425 (E.D.N.Y. 2004).

103. Telecommunications Act of 1996, Pub. L. No. 104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 251 (2006)).

104. *Id.* § 253, 110 Stat. at 70.

105. *Id.* § 251, 110 Stat. at 61–66.

106. *Twombly*, 550 U.S. at 549 (citing *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402 (2004)).

107. *Verizon Commc’ns*, 540 U.S. at 404.

108. *See Twombly*, 550 U.S. at 550 (citing Complaint, *supra* note 101, ¶ 47).

and their customers.<sup>109</sup> The complaint contained no specific factual allegations of any agreements among the ILECs.<sup>110</sup> Rather, it averred that the ILECs pursued a parallel course of conduct and then characterized that conduct as conspiratorial.<sup>111</sup> Defendants moved to dismiss the complaint, arguing that it was defective because proof of mere conscious parallelism, without more, is insufficient as a matter of law to establish an illegal conspiracy; and, therefore, allegations of conscious parallelism render a complaint similarly defective.<sup>112</sup> Defendants further argued that in order to succeed at trial, plaintiffs would have to adduce evidence of agreement beyond parallel conduct—so-called plus factors—and their failure to allege plus factors was fatal to their claim.<sup>113</sup>

The trial court agreed with defendants and granted their motion to dismiss.<sup>114</sup> The Second Circuit reversed, rejecting the trial court's attempt to impose summary judgment standards at the motion to dismiss stage.<sup>115</sup> The Second Circuit concluded that the defendants had fair notice of the plaintiffs' conspiracy claim and that under *Swierkiewicz*, the trial court could not impose a particularity in pleading requirement in cases falling outside the scope of Rule 9(b).<sup>116</sup>

The Supreme Court reversed and ordered dismissal of the complaint.<sup>117</sup> In so doing, it steered a middle course between the decisions below. The High Court declined to endorse the trial court's view that summary judgment standards apply at the motion to dismiss stage.<sup>118</sup> It also rejected the Second Circuit's view that under *Swierkiewicz* and *Conley*, the claims must be upheld and could proceed to discovery.<sup>119</sup> Rather, the Court based its decision on its construction of Rule 8(a)(2), explaining that "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."<sup>120</sup>

In so holding, the Court acknowledged that the Federal Rules had significantly liberalized pleading standards and further, reaffirming the holding in *Swierkiewicz*, that courts are not free to adopt ad hoc heightened pleading standards.<sup>121</sup> The Court then proceeded to redefine notice pleading in terms of the specific language of Rule 8(a)(2) of the Federal Rules of Civil Procedure.<sup>122</sup>

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109. *Id.*

110. *See id.*

111. *Id.*

112. *See id.* at 552 (citing *Twombly*, 313 F. Supp. 2d at 178–79).

113. *See id.* at 553 (citing *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007)).

114. *Twombly*, 313 F. Supp. 2d. at 189.

115. *Twombly*, 425 F.3d. at 119.

116. *Id.* at 107.

117. *Twombly*, 550 U.S. at 553.

118. *See id.* at 569 n.14 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002)).

119. *See id.* at 570.

120. *Id.*

121. *See id.* at 570.

122. *Id.* at 557.

The Court acknowledged that the Federal Rules eased pleading requirements that had been in effect at common law and under the Codes; but at the same time stated that it would be a mistake to suggest “that the Federal Rules somehow dispensed with the pleading of facts altogether.”<sup>123</sup> Rather, the Federal Rules merely relieve a plaintiff of the need to “set out *in detail* the facts upon which he bases his claim.”<sup>124</sup> The Court further opined that factual allegations in the complaint are critical to a plaintiff’s claim.<sup>125</sup>

To satisfy Rule 8(a)(2), a complaint must provide notice of the plaintiff’s claim and the grounds upon which the claim rests.<sup>126</sup> To establish grounds sufficient to make a showing that it is entitled to relief, a pleader must aver “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”<sup>127</sup> Nor are courts “bound to accept as true a legal conclusion couched as a factual allegation.”<sup>128</sup> The facts alleged “must be enough to raise a right to relief above the speculative level.”<sup>129</sup> It is not enough to allege facts “that merely create[ ] a suspicion [of] a legally cognizable right of action.”<sup>130</sup> The complaint must assert plausible grounds to infer wrongdoing.<sup>131</sup> The Court emphasized that simply requiring plausible grounds from which to infer wrongdoing “does not impose a probability requirement at the pleading stage.”<sup>132</sup> Rather, “it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [wrongdoing].”<sup>133</sup>

Applying the plausibility standard to the complaint before it, the Court in *Twombly* held that the claim of conspiracy consisting of “an allegation of parallel conduct and a bare assertion of conspiracy will not suffice”<sup>134</sup> because parallel conduct itself is not unlawful and “could just as well be independent action.”<sup>135</sup> In so ruling, the Court pointedly departed from its fifty year old ruling in *Conley v. Gibson*.<sup>136</sup> The Court concluded that *Conley* had long been misconstrued by lower courts and that the “no set of facts” language “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.”<sup>137</sup> Pointing to

123. *Id.* at 555 n.3.

124. *Id.* (quoting *Conley*, 355 U.S. at 47).

125. *Id.* (“Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.”).

126. *Id.* at 555.

127. *Id.*

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

129. *Id.*

130. *Id.* (second alteration in original) (quoting 5 WRIGHT & MILLER, *supra* note 41, at 236).

131. *Id.* at 556.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 557.

136. *Id.* at 563.

137. *Id.*

criticism leveled at *Conley* by the lower courts, the Court also suggested that judicial support for *Conley* had long ago eroded.<sup>138</sup>

Nevertheless, the contours of the plausibility standard enunciated by the Court are vague, and the Court in *Twombly* provides little guidance.<sup>139</sup> It is clear that the Court intended to raise the bar for pleadings in federal courts. How much higher the bar has been raised and how broadly the *Twombly* holding should be applied remains unclear.<sup>140</sup> A fundamental problem with the *Twombly* standard is that the Court “defines plausibility in terms of what it is not.”<sup>141</sup> It is not a particularity requirement but rather “simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”<sup>142</sup> On the other hand, “it asks for more than a sheer possibility that a defendant has acted unlawfully.”<sup>143</sup> But it does not require “heightened fact pleading of specifics.”<sup>144</sup> We are left with a sort of Goldilocks approach: probability (too much); possibility (too little); plausibility (just right).

Moreover, the Court’s choice of terminology is unfortunate. As Judge Posner points out, “plausibility, probability and possibility overlap.”<sup>145</sup> True, on

138. *Id.* at 562.

139. As Judge Posner pointed out: “*Twombly* is a recent decision, and its scope unsettled (especially in light of its successor, *Iqbal*—from which the author of the majority opinion in *Twombly* dissented; and two of the Justices who participated in those cases have since retired).” *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 626 (7th Cir. 2010); see also Mark Anderson & Max Huffman, *Iqbal, Twombly, and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL’Y 1, 1 (2010) (“How the plausibility standard from *Iqbal* and *Twombly* should operate in the real world is poorly understood.”).

140. *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010). The Seventh Circuit underscored the difficulty of reconciling the Supreme Court’s reaffirmation of notice pleading while at the same time adopting the plausibility standard:

It is by now well established that a plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, *might* suggest that some has happened to her that *might* be redressed by the law. The question with which courts are still struggling is how much higher the Supreme Court meant to set the bar, when it decided not only *Twombly*, but also [*Erickson* and *Iqbal*]. This is not an easy question to answer, as the thoughtful dissent from this opinion demonstrates. On the one hand, the Supreme Court has adopted a “plausibility” standard, but on the other hand, it has insisted that it is not requiring fact pleading, nor is it adopting a single pleading standard to replace Rule 8, Rule 9, and specialized regimes like the one in the Private Securities Litigation Reform Act (“PSLRA”).

*Id.* (citations omitted).

141. *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 628 (E.D. Pa. 2010).

142. *Twombly*, 550 U.S. at 556.

143. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556).

144. *Twombly*, 550 U.S. at 570.

145. *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010). Judge Posner goes on to say:

Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a

a spectrum with possible on one end and probable on the other end, plausible fits somewhere in between. What *Twombly* appears to require is a complaint that establishes a “nonnegligible probability” of a valid claim.<sup>146</sup> Some insight as to the intended breadth of *Twombly* can be gained from reviewing the rationale of the Court. The Court’s reasoning in dismissing the antitrust claim is closely tied to the substantive nature of the case. The Court expressed concern about the high cost of discovery in antitrust cases and the fundamental unfairness of forcing defendants to incur these costs on the basis of generalized, and perhaps speculative, allegations of wrongdoing in the pleadings.<sup>147</sup> The Court also took the view that the courts could not control the content of the pleadings or discovery and that dismissal at the pleading stage was the preferred vehicle for handling such cases.<sup>148</sup>

### B. Erickson

*Erickson v. Pardus*<sup>149</sup> was decided two weeks after *Twombly* but with a very different outcome and a very different rationale. *Erickson* was a pro se civil rights action by a prisoner against prison officials in which the prisoner claimed that officials unlawfully denied him treatment for his hepatitis C condition.<sup>150</sup> The plaintiff claimed that the prison which had been treating his disease ceased treating him after wrongfully concluding that he had used contraband drugs.<sup>151</sup> On the authority of *Twombly*, defendants moved to dismiss the complaint.<sup>152</sup> The trial court granted the motion, ruling that the complaint failed to allege harm caused by discontinuance of the treatment as opposed to harm caused by the progression of the disease.<sup>153</sup> In other words, defendants challenged not the claim itself but rather how the claim had been pleaded.

The Supreme Court reversed and upheld the complaint.<sup>154</sup> Citing *Twombly* and *Conley*, the Court held that a complaint need only provide notice of the claim and its grounds; the detail demanded by the trial court was unnecessary under the Federal Rules.<sup>155</sup> The Court also criticized the Court of Appeals’ “departure from the liberal pleading standards set forth by Rule 8(a)(2)” in pro se

nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as “preponderance of the evidence” connote.

*Id.*

146. *Id.*

147. *Twombly*, 550 U.S. at 557–58.

148. *Id.* at 559.

149. 551 U.S. 89 (2007).

150. *Id.* at 90.

151. *Id.* at 91.

152. *Id.* at 92.

153. *Id.* at 93 (citing *Erickson v. Pardus*, 198 F. App’x 694, 698 (10th Cir. 2006), *rev’d*, 551 U.S. 89 (2007)).

154. *Id.* at 94–95.

155. *Id.* at 93–94 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007)).

cases.<sup>156</sup> *Erickson* sheds some light on the holding in *Twombly*. First, it makes clear that the Court in *Twombly* accepted notice pleading and did not intend to adopt a fact pleading regimen in the federal courts generally.<sup>157</sup> The thrust of the trial court's dismissal of the complaint was that the claim was improperly pleaded, not that a claim did not exist, and the Supreme Court rejected that reasoning.<sup>158</sup> Second, *Erickson*, in reaffirming the traditionally generous treatment of pro se complaints,<sup>159</sup> demonstrates vividly that *Twombly* did not intend to undo some seventy years of case law in its entirety. Simply put, *Erickson* suggests that *Twombly*'s plausibility standard has flexibility and is not to be construed in a wooden manner.

### C. Iqbal

In May 2009, the Supreme Court revisited pleading standards in *Ashcroft v. Iqbal*.<sup>160</sup> The plaintiff, Iqbal, a Muslim from Pakistan who had been arrested in the United States in the wake of the 2001 attack on the World Trade Center and who had subsequently pled guilty to defrauding the United States, brought a civil rights action against federal officials including the Attorney General of the United States and the Director of the FBI.<sup>161</sup> Iqbal alleged that the defendants knowingly condoned a discriminatory policy which led to "harsh conditions of confinement on account of his race, religion or national origin."<sup>162</sup> The lower courts had upheld the complaint.<sup>163</sup>

Reversing, the Supreme Court, in a 5-4 decision, held that the complaint was deficient as a matter of law under *Twombly*.<sup>164</sup> The *Iqbal* decision reaffirms *Twombly* and attempts to add flesh to the skeletal *Twombly* analysis. As a threshold matter, the Court rejected arguments that *Twombly* should be limited to antitrust cases or complex litigation generally, and held that *Twombly* applied to all federal complaints.<sup>165</sup> The Court then underscored "[t]wo working principles [that] underlie our decision in *Twombly*."<sup>166</sup> First, on a motion to dismiss, only well-pleaded factual allegations must be accepted as true; conclusory allegations

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156. *Id.* at 94.

157. *Id.* at 93-94.

158. *Id.* at 94.

159. *See id.* (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). This is not to suggest that pro se complaints automatically survive motions to dismiss. Where claims in pro se complaints are implausible, they may be dismissed under *Twombly*. *See Vargas v. Wughalter*, 380 F. App'x 110, 111 (2d Cir. 2010); *Blakely v. Wells*, 380 F. App'x 6, 8 (2d Cir. 2010).

160. 129 S. Ct. 1937 (2009).

161. *Id.* at 1942.

162. *Id.*

163. *Id.*

164. *Id.* at 1950-51, 54.

165. *Id.* at 1953 ("Our decision in *Twombly* expounded the pleading standard 'for all civil actions,' and it applies to antitrust and discrimination suits alike." (quoting FED. R. CIV. P. 1)).

166. *Id.* at 1949-50.

are not entitled to a presumption of truth.<sup>167</sup> Second, to survive a motion to dismiss, a complaint must state “a plausible claim for relief.”<sup>168</sup> Determining plausibility is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>169</sup> The pleader need not, at the motion to dismiss stage, establish the *probability* of wrongdoing; but at the same time, allegations that raise only the mere *possibility* of misconduct are insufficient as a matter of law to establish “that the pleader is entitled to relief.”<sup>170</sup> Rather, the allegations must be sufficient to “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>171</sup>

Applying these working principles, the Court first weeded out conclusory allegations that it deemed to be nothing more than “formulaic recitation of the elements” of the plaintiff’s constitutionally based claim.<sup>172</sup> The Court, after reviewing the well-pleaded facts, ruled that the complaint failed *Twombly*’s plausibility standard.<sup>173</sup> Here, the Court found that the complaint raised no more than the possibility of wrongdoing.<sup>174</sup> While acknowledging that certain allegations were consistent with the plaintiff’s claims of unlawful conduct, the Court pointed out that in the wake of the 9/11 attacks, the Attorney General had ample reason to detain Arab Muslims illegally present within the United States who might be potentially linked to terrorists.<sup>175</sup> Given the “obvious alternative explanation” for the plaintiff’s detention, the Court found that claims of discrimination and the purposeful discrimination he asked the Court to infer were not plausible.<sup>176</sup> Even if the claims were plausible, the complaint was still

167. *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

168. *Id.* at 1950 (citing *Twombly*, 550 U.S. at 556).

169. *Id.* (citing *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007), *rev’d*, 129 S. Ct. 1937 (2009)).

170. *Id.* at 1950 (quoting FED. R. CIV. P. 8(a)(2)).

171. *Id.* at 1949 (citing *Twombly*, 550 U.S. at 556).

172. *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 555).

173. *Id.* at 1952.

174. *Id.*

175. *Id.* at 1951.

176. *Id.* at 1951–52 (quoting *Twombly*, 550 U.S. at 567). In *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419 (2d Cir. 2011), Judge Scheindlin observed that compliance with *Iqbal* may be easier said than done:

We note that, as plaintiffs carefully heed the admonition to support “legal conclusions” with factual allegations—lest they be deemed “conclusory” and therefore denied a presumption of truthfulness, *Ashcroft v. Iqbal*—trial judges, and appellate judges who review their determinations, are constantly faced with the task of evaluating competing inferences to be drawn *from* those facts. In this sense, *Iqbal* and *Bell Atlantic Corp. v. Twombly* have rendered even more important (and more difficult) both trial judges’ adherence to the most fundamental pleading principles—namely, accepting as true all factual allegations and drawing all reasonable inferences from those facts in plaintiffs’ favor—and appellate judges’ subsequent *de novo* review of the decisions of the district courts.

*Id.* at 429 n.10 (citations omitted).

deficient because it failed to allege facts showing the defendants purposefully adopted a discriminatory detention policy.<sup>177</sup>

In so ruling, the Court not only rejected the argument that *Twombly* should be limited to antitrust complaints,<sup>178</sup> but also rejected the argument that *Twombly* should be tempered in light of the Second Circuit's directive to cabin discovery so as to preserve the defense of qualified immunity.<sup>179</sup> The Court observed that permitting this case to proceed to discovery would exact a heavy toll on government officials, forcing them simultaneously to defend their case and carry out their official duties.<sup>180</sup> In particular, litigation "exact[s] heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government."<sup>181</sup>

Thus, as in *Twombly*, the Court's rationale for dismissing the complaint is closely tied to substantive law. In *Twombly*, the Court ruled that careful scrutiny of antitrust complaints at the motion to dismiss stage is necessary to filter insubstantial claims out of the system and to spare defendants from spending substantial sums of money on discovery to defend claims that cannot possibly succeed at trial.<sup>182</sup> Similarly, in *Iqbal*, the Court called for careful scrutiny of civil rights claims against senior government officials.<sup>183</sup> Also, forcing government officials to comply with even minimal discovery would impose significant burdens that would likely interfere with the execution of official duties.<sup>184</sup>

#### IV. THEMES OF THE *TWOMBLY* TRILOGY

From the *Twombly* Trilogy, several important themes emerge which shed light on the standards for reviewing a complaint at the motion to dismiss stage: (1) trial judge as gatekeeper; (2) pleadings matter; (3) cost matters; (4) context matters; and (5) greater leeway for courts in evaluating complaints.

##### A. Gatekeeper Role

In holding that dismissal was the preferred vehicle for handling complaints that failed the plausibility test,<sup>185</sup> *Twombly* and *Iqbal* directed trial courts to act as gatekeepers and to take a hard look at the pleadings before opening the doors to expensive pretrial discovery. The assignment of yet another gatekeeper role to

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177. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009).

178. *Id.* at 1953.

179. *Id.* at 1953–54.

180. *Id.* at 1953.

181. *Id.*

182. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

183. *Iqbal*, 129 S. Ct. at 1954.

184. *Id.* at 1953.

185. *See supra* text accompanying notes 148, 164–171.

the trial judge is consistent with the trend that began nearly a quarter of a century ago aimed at screening out cases unworthy of trial. In its 1986 *Matsushita*<sup>186</sup> decision, the Supreme Court, in an effort to revitalize summary judgment, directed the trial courts to carefully examine the pleadings and the pretrial record to determine if there is a genuine issue of material fact necessitating a trial and to grant summary judgment if there is not.<sup>187</sup> *Matsushita* demythologized the notion that somehow summary judgment was inappropriate in antitrust cases.<sup>188</sup> Seven years later, in *Daubert*,<sup>189</sup> the High Court tasked trial judges with screening out junk science in the courtroom by making sure, prior to trial, that expert testimony was both relevant and reliable.<sup>190</sup> By pushing the process for vetting experts and their opinion back into the pretrial phase, *Daubert* would save time at trial and eliminate ancillary disputes. More importantly, exclusion of expert testimony could be outcome determinative and thus eliminate the need for trial altogether.<sup>191</sup>

In 2003, the Supreme Court promulgated amendments to Rule 23 of the Federal Rules of Civil Procedure involving class actions,<sup>192</sup> which brought about subtle, but nevertheless significant, changes in class certification procedures.<sup>193</sup> Recognizing that the granting or denying of class certification had significant consequences for the litigation, and effectively could be outcome determinative, the amended rules encouraged courts to consider the issues thoughtfully and not rush the certification decision.<sup>194</sup> The interpretive cases have held that in ruling on certification issues, the trial court must engage in “rigorous analysis.”<sup>195</sup> A

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186. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

187. *See id.* at 585–88, 597–98.

188. *See id.* at 588. In so holding, the Court implicitly rejected the view that its earlier holding in *Poller v. CBS, Inc.*, 368 U.S. 464, 474 (1962) was meant to limit the use of summary judgment in antitrust cases generally.

189. *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579 (1993).

190. *Id.* at 589.

191. *See, e.g., Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 504–05 (9th Cir. 1994) (affirming the grant of summary judgment where expert affidavit was inadmissible under *Daubert* analysis).

192. Amendments to Federal Rules of Civil Procedure, 538 U.S. 1083, 1087 (2003).

193. *See id.* (Amended Rule 23(c)(1)(A) required that “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.”)

194. *See* 5 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 23 app. 7, at 24 (Daniel R. Coquillette et al. eds., 3d ed. 1997) (providing the Advisory Committee notes to amended Rule 23). The amended Rule provides that the certification decision be made “at an early practicable time” instead of “as soon as practicable after commencement of an action” in the prior rule. *Id.* The drafters recognized that it may take time to “gather information necessary” to making the certification ruling, to determine which issues can be tried on a class-wide basis, and to designate class counsel. *Id.*

195. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Falcon*, 457 U.S. at 161); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1180 (11th Cir. 2010); *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 17 (1st Cir. 2008) (citing *Smilow v. Sw. Bell Mobile Sys. Inc.*, 323 F.3d 32, 38 (1st Cir. 2003)); *In re Hydrogen Peroxide Antitrust Litig.*, 552

court must make findings that the pre-requisites for certification have been met; it is not enough that a party has made a “threshold showing” of compliance or that it intends to meet the requirements of Rule 23.<sup>196</sup> In making its findings, the court may have to resolve factual issues and may not avoid that exercise merely because of a concern that certification issues overlap with merits issues.<sup>197</sup> Moreover, where a Rule 23 requirement relies on a novel or complex theory as to injury, the trial judge must engage in a “searching inquiry” as to the viability of that theory and the existence of facts necessary for the theory to succeed.<sup>198</sup> In short, resolution of class certification issues may require significant fact-finding well in advance of trial.<sup>199</sup>

Viewed against this backdrop of developments in summary judgment, expert testimony, and class certification, *Twombly* might be seen simply as the next logical step in a progression through which dispositive decisions are rendered ever earlier on the litigation timeline in order to reduce overall costs and to filter out insubstantial claims from trial dockets.<sup>200</sup> That *Twombly* and *Iqbal* are part of a discernable trend does not necessarily mean that these decisions are wise. Indeed, both the logic of the *Twombly* decision and the direction in which it points the federal courts are troubling.<sup>201</sup> *Twombly* is illogical because the Court

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F.3d 305, 316 (3d Cir. 2008) (quoting *Falcon*, 457 U.S. at 161); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 33 (2d Cir. 2006) (quoting *Falcon*, 457 U.S. at 161).

196. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at 307 (“In deciding whether to certify a class under Fed. R. Civ. P. 23, the district court must make whatever factual and legal inquiries are necessary and must consider all relevant evidence and arguments presented by the parties. In this appeal, we clarify three key aspects of class certification procedure. First, the decision to certify a class calls for findings by the court, not merely a ‘threshold showing’ by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence. Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action. Third, the court’s obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it.”) (citations omitted).

197. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (“Frequently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.”).

198. *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 26 (1st Cir. 2008) (“We do not need to resolve now whether ‘findings’ regarding the class certification criteria are ever necessary, but we do hold that when a Rule 23 requirement relies on a novel or complex theory as to injury, as the predominance inquiry does in this case, the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed.”).

199. *Dukes*, 131 S. Ct. at 2551 (citing *Falcon*, 457 U.S. at 161).

200. See *Miller*, *supra* note 43, at 9–10.

201. See *Miller*, *supra* note 43, at 47 (“[T]he increased risk of dismissal and the resources needed to defend against it may deter the institution of a potentially meritorious case.”).

proposes that complex cases be choked off at the motion to dismiss stage, the very point at which the courts know least about their cases.<sup>202</sup>

Equally troubling is that the Court—at a time when district courts are starving for trial activity in civil cases<sup>203</sup>—appears to be re-embracing the long discredited common law philosophy of avoiding trial on the merits.<sup>204</sup> Scholars<sup>205</sup> and judges<sup>206</sup> have bemoaned the “vanishing” civil trial—reflecting the sharp decline in federal civil trials over the last 50 years. In his 2004 study, Professor Marc Galanter concluded that “[t]he portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002.”<sup>207</sup> He also concluded that at least part of this decline in overall civil trials is due to increased summary judgment activity.<sup>208</sup> Similar empirical data on the effect of *Daubert*, class certification decisions, and *Twombly* on the number of civil trials are difficult to come by; but *Twombly* presents yet another hurdle that has to be negotiated on the road to trial. As one class action lawyer confided in me, a class action plaintiff has to win its case four times before it even gets to trial.<sup>209</sup> An important, but little discussed, spillover effect of the vanishing trial is that bench and bar become less skilled at trying cases and those cases that do get tried are not litigated as well as they might have been.<sup>210</sup> This lack of experience further contributes to the declining number of trials.<sup>211</sup>

A second spillover effect of the vanishing civil trial is the increasing disconnect between discovery and proof at trial.<sup>212</sup> The nature and scope of pretrial discovery was once shaped by the issues to be tried.<sup>213</sup> With the vanishing civil trial, that overarching structure has disappeared.<sup>214</sup> Pretrial

202. See Miller, *supra* note 43, at 51 (“The decision as to whether [a case] can proceed will be based solely on one document, without giving the plaintiff an opportunity to unlock the doors of discovery.”).

203. See Miller, *supra* note 43, at 8–9.

204. See Miller, *supra* note 43, at 12.

205. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004).

206. See Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law, So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1405 (2002).

207. Galanter, *supra* note 205, at 459. See also Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 518 (2010). But see Higginbotham, *supra* note 206, at 1419 (suggesting no discernible rate of change in summary judgment grants between 1981 and 1997).

208. Galanter, *supra* note 205, at 483.

209. A successful class action plaintiff must win (1) a motion to dismiss; (2) a class certification motion; (3) a *Daubert* motion; and (4) a summary judgment motion just to get to trial.

210. Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 755 (2010).

211. *Id.* at 755–56.

212. See *id.* at 750.

213. See Higginbotham, *supra* note 206, at 1417–18.

214. See *id.*

discovery has become an end in itself.<sup>215</sup> Discovery, after all, is time-consuming, and therefore, lucrative for attorneys billing by the hour.<sup>216</sup> Under these circumstances, the tendency is to seek more, not less, discovery, and the more pretrial discovery sought, the higher the cost of litigation.<sup>217</sup> Equally important, lawyers who lack trial experience—and, perhaps, the vision to see the interconnection between discovery and proof at trial—are likely to exercise less discipline in the conduct of discovery.<sup>218</sup> The focus of inexperienced trial lawyers tends to be what they *can get* on discovery, instead of what they *need*.<sup>219</sup> Inevitably, this need-insensitive approach also leads to higher discovery costs.

*B. In Pleading, Facts Matter (Conclusions Don't)*

*Twombly* and *Iqbal* represent a retrenchment from the liberal pleading practices envisioned by the drafters of the Federal Rules as originally promulgated.<sup>220</sup> As discussed above, the overarching goal of the Federal Rules was that meritorious claimants should have their day in court.<sup>221</sup> The drafters were of the view that hypertechnical pleading rules at common law or under the codes had effectively derailed meritorious claims prior to trial.<sup>222</sup> Their solution was to demote the role of the pleadings in federal litigation by de-emphasizing their factual content and underscoring their notice function.<sup>223</sup> Technical proficiency was not required.<sup>224</sup> A complaint could pass muster even if it did not recite all the elements of the cause of action, as long as it described the events and occurrences giving rise to the claim.<sup>225</sup> The facts could be developed on discovery.<sup>226</sup>

Under *Twombly*, however, facts do matter. The Court stated that “[w]ithout some factual allegations in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.”<sup>227</sup> To withstand a motion to dismiss, a complaint must contain “enough factual matter” to make out a claim that is “plausible.”<sup>228</sup> Plausibility has both qualitative and quantitative dimensions. Qualitatively, “conclusory” allegations, “naked assertions,”<sup>229</sup> and

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215. *See id.*

216. *See id.* (“[T]he virtual disconnect between pre-trial and trial has been institutionalized.”).

217. Higginbotham, *supra* note 210, at 750.

218. *Id.* (citing Higginbotham, *supra* note 206, at 1417).

219. *Id.*

220. *See* Miller, *supra* note 43, at 9–10.

221. *See supra* text accompanying note 53.

222. *See* WRIGHT & KANE, *supra* note 22, § 68, at 467.

223. *See id.*

224. *See id.*

225. *See id.*

226. *Id.*

227. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007).

228. *Id.* at 556.

229. *Id.* at 557.

“formulaic recitations”<sup>230</sup> do not count and can be ignored on a motion to dismiss.<sup>231</sup> Despite the fact that history has shown that attempting to distinguish “facts” from “conclusions” is an unproductive exercise,<sup>232</sup> the lower courts have readily embraced this task after *Twombly* and *Iqbal*.<sup>233</sup>

The next step is for the court to determine whether the remaining well-pleaded facts make out a plausible claim, *i.e.*, whether the factual allegations are “enough to raise a right to relief above the speculative level on the assumption that all the [well-pleaded] allegations in the complaint are true.”<sup>234</sup> In the wake of *Twombly* and *Iqbal*, the lower courts have struggled to determine the meaning of “plausible.”<sup>235</sup> On the one hand, by retiring *Conley*, the Supreme Court clearly intended to raise the bar for pleadings in federal court.<sup>236</sup> On the other hand, it is not clear how much the bar has been raised.<sup>237</sup> *Twombly* made clear that the Court was not abandoning notice pleading for fact pleading,<sup>238</sup> and by reaffirming *Swierkiewicz*, the Court eschewed any particularity-in-pleading requirement under Rule 8.<sup>239</sup> *Twombly* also made clear that on a motion to dismiss, the court must accept as true all well-pleaded facts in the complaint,

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230. *Id.* at 555.

231. *Id.* at 555–57.

232. See WRIGHT & KANE, *supra* note 22, § 68, at 467.

233. See, e.g., *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1338 (11th Cir. 2010) (finding deficient and conclusory, allegations that “visco-elastic foam mattresses comprise a relevant product market, or submarket, separate and distinct from the market for mattresses generally, under the federal antitrust laws”); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 326 (3d Cir. 2010) (rejecting “conclusory averments”); *Howard Hess Dental Labs., Inc. v. Dentsply Int’l, Inc.*, 602 F.3d 237, 255 (3d Cir. 2010) (assertions of conspiracy allegations in a “conclusory manner” are deficient); *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 318 n.1 (2d Cir. 2010) (conclusions “are not entitled to the assumption of truth” (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009))); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 258 (4th Cir. 2009) (“bare allegation proves nothing”); *Summer v. Cunningham*, No. 3:10-CV-169, 2011 WL 52554, at \*2 (E.D. Tenn. Jan. 7, 2011) (“[A]n unadorned, the-defendant-unlawfully-harmed me accusation [is insufficient].” (quoting *Iqbal*, 129 S. Ct. at 1959)).

234. *Twombly*, 550 U.S. at 555 (citations omitted).

235. See, e.g., *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010) (courts are “still struggling” with the question of how much higher *Twombly* set the bar for pleadings); *Moss v. U.S. Secret Serv.*, 577 F.3d 962, 968 (9th Cir. 2009) (“Much confusion accompanied the lower court’s initial engagement with *Twombly*.”); *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (“We are not the first to acknowledge that the new formulation is less than pellucid.”); *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (“The issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come.”). Compare *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 n.5 (9th Cir. 2008) (citing *Twombly*, 550 U.S. at 555) (*Twombly* abrogated notice-pleading in antitrust cases), and *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008) (after *Twombly*, Rule 12(b)(6) has “more heft”), with *Aktieselskabet AF 21. November 2001 v. Fame Jeans, Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) (“*Twombly* leaves the longstanding fundamentals of noticed pleading intact.”).

236. *Swanson*, 614 F.3d at 403.

237. *Id.*

238. *Twombly*, 550 U.S. at 570.

239. *Id.* But see *Ward*, *supra* note 13, at 900 (“Courts ‘talk’ notice pleading, but often require more—whether authorized to do so by the Federal Rules or a statute or not.”).

even if the “savvy judge” might disbelieve them.<sup>240</sup> Nor did the Supreme Court purport to alter the legal axiom that allegations in a complaint are to be read as a whole and not in isolation.<sup>241</sup> In light of these facts, one can surely argue that not much has changed after *Twombly*.

*Twombly*'s conflicting cross-currents are “not easily resolved.”<sup>242</sup> The lower courts have articulated the plausibility requirement in various ways: (1) “some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation”;<sup>243</sup> (2) “a right to relief above the speculative level”;<sup>244</sup> (3) “plaintiff plausibly (not just speculatively) has a claim for relief”;<sup>245</sup> and (4) “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>246</sup> Oddly, in purporting to construe *Twombly*, the courts have engaged in the very type of labeling that *Twombly* decried.

### C. Context Matters

Plausibility also involves a quantitative component. How much factual detail is required to cross the plausibility threshold? *Iqbal* held that to determine whether a complaint states a plausible claim for relief, a court must engage in a “context-specific” analysis and “draw on its judicial experience and common sense.”<sup>247</sup> While a complaint need not contain “detailed factual allegations,”<sup>248</sup> it requires “more than an unadorned, the defendant-unlawfully-harmed-me

240. *Twombly*, 550 U.S. at 556. The exception, of course, is that courts can disregard facts “that are sufficiently fantastic [so as] to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experience in time travel.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1959 (2009) (Souter, J., dissenting). See also *Rosenman Family, LLC v. Picard*, 395 F. App’x 766, 768 (2d Cir. 2010) (citing *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007)).

241. See generally *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378, 1381 (9th Cir. 1982) (“[A]llegations of a complaint must ‘be read as a whole’ . . .” (quoting 5 WRIGHT & MILLER, *supra* note 41, § 1363, at 116)).

242. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008); see also *Matson v. Bd. of Educ.*, 631 F.3d 57, 63 (2d Cir. 2011) (“While a complaint need not contain ‘detailed factual allegations,’ it requires ‘more than an unadorned, the defendant-unlawfully-harmed-me accusation.’” (quoting *Iqbal*, 129 S. Ct. at 1949)); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1084 (7th Cir. 2008) (plausibility suggests that plaintiff has a right to relief that goes beyond a “speculative level” (quoting *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007))); *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (a complaint will withstand a motion to dismiss if plaintiff “plausibly (not just speculatively)” has a claim for relief).

243. *Phillips*, 515 F.3d at 234.

244. *Tamayo*, 526 F.3d at 1084 (quoting *Concentra*, 496 F.3d at 776).

245. *Robbins*, 519 F.3d at 1247.

246. *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 321 (2d Cir. 2010) (quoting *Iqbal*, 129 S. Ct. at 1949).

247. *Iqbal*, 129 S. Ct. at 1950 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007), *rev’d*, 129 S. Ct. 1937 (2009)); see also *Kuperman supra* note 37, at 4.

248. *Iqbal*, 129 S. Ct. at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

accusation.”<sup>249</sup> Simply put, where there is an alternative, lawful explanation of defendant’s conduct that is as probable as plaintiff’s claim of illegality, the claim is implausible and may be dismissed.<sup>250</sup> In *Twombly*, the Court held that the plaintiff’s allegations that defendants’ refusal to compete constituted an unlawful conspiracy were implausible because:<sup>251</sup> (1) of the lack of any direct proof of agreement;<sup>252</sup> (2) refusal to compete is not itself unlawful;<sup>253</sup> (3) of the history of telecommunications, where regulated monopoly—not competition—was the norm;<sup>254</sup> (4) history resisting competition can be viewed as routine market conduct;<sup>255</sup> and (5) defendants’ conduct was in line “with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”<sup>256</sup> Where allegations of conspiracy to violate the antitrust laws are based on parallel conduct, “they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.”<sup>257</sup> Put another way, “allegations of conspiracy are deficient if there are ‘obvious alternative explanation[s]’ for the facts alleged.”<sup>258</sup>

Similarly, *Iqbal* was a complex civil rights case in which the plaintiff, a Pakistani Muslim detainee, alleged that the Attorney General and Director of the FBI authorized, and had knowledge of, an unconstitutional policy creating harsh

249. *Id.* (quoting *Twombly*, 550 U.S. at 555).

250. *See id.*

251. *Twombly*, 550 U.S. at 564.

252. *Id.*

253. *Id.* at 553–54 (citing *Brooke Grp., Ltd. v. Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)).

254. *Id.* at 567–68.

255. *Id.* at 568.

256. *Id.* at 554.

257. *Id.* at 557. In a footnote, the Court described three examples of parallel conduct that would make claims of conspiracy plausible: (1) “[P]arallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli or mere interdependence unaided by an advance understanding among the parties,” *id.* at 556 n.4 (quoting 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1425, at 167 (Aspen Law & Business 2d ed. 2002)); (2) “[C]onduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement,” *id.* (alteration in original) (quoting Michael D. Blechman, *Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y.L. SCH. L. REV. 881, 899 (1979)); (3) “[C]omplex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason. . . .” *Twombly*, 550 U.S. at 556 n.4. (quoting Brief for Respondents at 37, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 3089915. *See also* Reply Brief for Petitioners at 12, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (No. 05-1126), 2006 WL 1491258 (“[O]ne would not expect several competitors to adopt a ‘complex and historically unprecedented change[] in pricing’ simultaneously and spontaneously.”) (alteration in original).

258. *In re Ins. Brokers Antitrust Litig.*, 618 F.3d 300, 322–23 (3d Cir. 2010) (quoting *Twombly*, 550 U.S. at 567).

imprisonment on the basis of plaintiff's race, religion and national origin.<sup>259</sup> Asserting qualified immunity, defendants moved to dismiss the complaint.<sup>260</sup>

Dismissing the complaint, the Court held that although the allegations of plaintiff's arrest and detention were consistent with discriminating intent, the more likely explanation for defendants' conduct—intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts—rendered the claims of discrimination implausible.<sup>261</sup> In addition, the Court pointed out that “disruptive discovery”<sup>262</sup> would force expenditure of resources “that might otherwise be directed to the proper execution of the work of the Government”<sup>263</sup> and might deter or detract officials “from the vigorous performance of their duties.”<sup>264</sup>

In *Erickson*, on the other hand, the Court upheld the complaint.<sup>265</sup> There, the civil rights claim was straightforward and uncomplicated.<sup>266</sup> The plaintiff was proceeding pro se.<sup>267</sup> Discovery costs were likely to be minimal and litigation of the claim would not have created a significant diversion of monetary resources or state personnel.<sup>268</sup> National security concerns were not relevant, nor were there concerns about false positives. There was also no obvious alternative and lawful explanation for the facts alleged.

In short, context matters.<sup>269</sup> What emerges from these three Supreme Court cases is a kind of sliding scale for determining plausibility, i.e., whether a complaint will survive a motion to dismiss.<sup>270</sup> As the Seventh Circuit has stated,

259. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942 (2009).

260. *Id.*

261. *Id.* at 1951.

262. *Id.* at 1953 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)).

263. *Id.*

264. *Id.* at 1954.

265. *Erickson v. Pardus*, 551 U.S. 89, 94–95 (2007).

266. *See id.* at 90–91.

267. *Id.* at 94. *Twombly's* plausibility standard is flexible and does not alter the court's hospitable approach to pro se complaints. *Boykin v. KeyCorp.*, 521 F.3d 202, 213–14 (2d Cir. 2008) (citing *Erickson*, 551 U.S. at 93–94).

268. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1617 (2003).

269. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (“Context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case—some complaints will require at least some factual allegations to make out a ‘showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))). *But see* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1472 (2009) (the plausibility test “seems completely subjective,” and “to say that pleading requirements are ‘contextual’ does not much advance the inquiry or practice.”).

270. *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 803–04 (7th Cir. 2008) (“If discovery is likely to be more than usually costly, the complaint must include as much factual detail and argument as may be required to show that the plaintiff has a plausible claim.”); *Austen v. Catterton Partners V, LP*, 709 F. Supp. 2d 168, 172 (D. Conn. 2010) (“Context, good judgment and common sense mattered long before the Supreme court decided *Twombly* and *Iqbal*, and they remain significant in deciding Rule 12(b)(6) motions even after those decisions.”); Schwartz &

“the height of the pleading requirement is relative to the circumstances.”<sup>271</sup> For example, in a straightforward personal injury case, pleadings modeled after the Official Forms in the Appendix to the Rules will suffice.<sup>272</sup> However, in “a complex antitrust or RICO case a fuller set of factual allegations than found in the sample complaints in the civil rules’ Appendix of Forms may be necessary to show the plaintiff’s claim is not ‘largely groundless.’”<sup>273</sup> On the one hand, in antitrust conspiracy cases where the complaint alleges direct evidence of an agreement, a complaint will survive a motion to dismiss without setting forth significant additional factual enhancements.<sup>274</sup> On the other hand, where the plaintiff seeks to infer conspiracy from parallel business behavior without allegations of direct agreements, additional allegations are required to render the conspiracy plausible at the motion to dismiss stage.<sup>275</sup> Thus, in *Starr v. Sony BMG Music Entertainment*,<sup>276</sup> the Second Circuit upheld an antitrust price-fixing conspiracy complaint<sup>277</sup> containing the following factual enhancements:

1. Defendants, through the creation of two joint ventures, controlled about 80% of the Internet music business and used the joint ventures, as well as trade association meetings, to exchange price information.<sup>278</sup>
2. The prices charged by defendants for Internet music were unreasonably high and did not reflect the enormous savings over distribution of music via CDs, nor were terms of sale consumer friendly.<sup>279</sup>
3. Third parties, whom defendants used to distribute Internet music, had to sell to consumers on the same terms as defendants.<sup>280</sup>
4. Defendants used Most Favored Nation clauses in dealing with their joint ventures and tried to hide this fact, lest they attract antitrust scrutiny.<sup>281</sup>

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Appel, *supra* note 57, at 1127 (“Factual specificity is a matter of degree, the demands of which may change depending on the case.”).

271. *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009).

272. *See, e.g., Hamilton v. Palm*, 621 F.3d 816, 818 (8th Cir. 2010) (upholding a Federal Employers’ Liability Act complaint that complied with the FED. R. CIV. P.’s Appendix of Forms).

273. *Limestone Dev.*, 520 F.3d at 803 (citing *Phillips*, 515 F.3d at 231–32).

274. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 32–33 (D.D.C. 2008).

275. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

276. 592 F.3d 314 (2d Cir. 2010).

277. *Id.* at 323 (“[T]he present complaint succeeds where *Twombly*’s failed because the complaint . . . plausibly suggest[s] that the parallel conduct alleged was the result of an agreement among the defendants.”).

278. *Id.*

279. *Id.*

280. *Id.* at 319.

281. *Id.* at 319, 324.

5. Defendants agreed to sell music at a wholesale price of seventy cents per song at a time when rival independent sellers charged twenty-five cents per song.<sup>282</sup>
6. Defendants jointly agreed not to deal with eMusic, the second largest Internet music retailer.<sup>283</sup>
7. Defendants were subject to at least three governmental antitrust investigations.<sup>284</sup>
8. Defendants jointly agreed to raise their price of Internet music from sixty-five cents to seventy cents per song.<sup>285</sup>

Other courts have rejected conspiracy claims based on parallel conduct unless at least one “plus factor” is alleged.<sup>286</sup>

Outside of the antitrust area, courts have upheld tort complaints that comply with the Official Forms appended to the Federal Rules of Civil Procedure.<sup>287</sup> Some courts have gone so far as to suggest that a federal complaint must set forth all of the elements of the cause of action,<sup>288</sup> but this is clearly at odds with *Twombly*.<sup>289</sup> Determining whether the claim is plausible in the factual context in which it is raised, so as to warrant discovery, is a labor-intensive task.<sup>290</sup> A complaint may well contain a range of allegations, some plausible, others

282. *Id.* at 324.

283. *Id.* at 323.

284. *Id.* at 324.

285. *Id.* at 323.

286. *See, e.g., In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 (3d Cir. 2010) (“[P]lus factors are by definition, facts that ‘tend[] to ensure that courts punish concerted action—an actual agreement—instead of the unilateral independent conduct of competitors.’” (quoting *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004))); *see also id.* at 322 (complaint needs to allege “something plausibly suggest[ive of] (not merely consistent with) agreement” (alteration in original) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)) (internal quotation marks omitted)).

287. *See, e.g., Hamilton v. Palm*, 621 F.3d 816, 818 (8th Cir. 2010) (upholding employer negligence claim where complaint alleged status consistent with Form 13).

288. *E.g., Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 456–57 (6th Cir. 2011) (“[T]he complaint must contain either direct or inferential allegations respecting all material elements’ of the offense.” (quoting *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 903 (6th Cir. 2009))); *Phillips v. Bell*, 365 F. App’x 133, 141 (10th Cir. 2010) (a complaint must include “the necessary elements for a cause of action”); *Summer v. Cunningham*, No. 3:10-CV-169, 2011 WL 52554, at \*2 (E.D. Tenn. Jan. 7, 2011) (“[A] complaint must contain allegations supporting all material elements of the claims.” (citing *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008))).

289. *Twombly*, 550 U.S. at 555 (Rule 8(a)(2) “requires only ‘a short plain statement of the claim showing that the pleader is entitled to relief’”); *see also Boykin v. KeyCorp.*, 521 F.3d 202, 212 (2d Cir. 2008) (a complaint need not “allege specific facts establishing a *prima facie* case of discrimination” (quoting *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 (2002))).

290. *See Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011) (describing the difficult task of the court in deciding whether a complaint survives a motion to dismiss) (citing *Francis v. Giacomelli*, 588 F.3d 186, 193 & n.2 (4th Cir. 2009); *Twombly*, 550 U.S. at 558–59)).

fanciful or ungrounded.<sup>291</sup> All of this must be sorted out by the courts. That process is seldom easy. On the other hand, a party “can [easily] plead [itself] out of court by pleading facts that show that [it] has no legal claim.”<sup>292</sup>

#### D. Cost Matters

The outcome in *Twombly* is inextricably linked to the high cost of litigation, specifically the high cost of discovery in antitrust cases.<sup>293</sup> *Twombly* “is designed to spare defendants the expense of responding to bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand.”<sup>294</sup> The Court admonished trial judges considering motions to dismiss not “to forget that proceeding to antitrust discovery can be expensive.”<sup>295</sup> The Court also feared that litigants could use high discovery costs as a lever to extract significant settlements from defendants, irrespective of the merits of the case.<sup>296</sup> Accordingly, deficiencies in claims should “be exposed at the point of minimum expenditure of time and money by the parties and the court.”<sup>297</sup>

Nor was the Court concerned solely about costs in terms of dollars, ruling that deficiencies in claims must be exposed at the motion to dismiss stage because otherwise, “‘a largely groundless’ claim [would] be [permitted] to take up the time of a number of people, with the right to do so representing an *in terrorem* increment of the settlement value.”<sup>298</sup> Similarly, the Court in *Iqbal*

291. *Id.* The Seventh Circuit described the task:

[S]uppose some of the plaintiff’s factual allegations are unrealistic or nonsensical and others not, some contradict others, and some are “speculative” in the sense of implausible and ungrounded. The district court has to consider all these features of a complaint en route to deciding whether the complaint has enough substance to warrant putting the defendant to the expense of discovery . . . .

*Id.* (citing *Francis*, 588 F.3d at 193 & n.2; *Twombly*, 550 U.S. at 558–59).

292. *Id.* (citing *Hecker v. Deere & Co.*, 556 F.3d 575, 588 (7th Cir. 2009); *Tamayo v. Blagojevich*, 526 F.2d 1074, 1086 (7th Cir. 2008); *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 777 (7th Cir. 2007); *Trudeau v. FTC*, 456 F.3d 178, 193 (D.C. Cir. 2006); *Orthman v. Apple River Campground*, 757 F.2d 909, 915 (7th Cir. 1985)).

293. *Id.* (citing *Twombly*, 550 U.S. at 558–59).

294. *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625 (7th Cir. 2010).

295. *Twombly*, 550 U.S. at 558. *But see In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 32 n.3 (D.D.C. 2008) (“Yet as sensitive as courts must be to the cost to litigants of discovery, where plaintiffs have made out a plausible antitrust claim, . . . they are entitled to discovery in order to determine to what relief, if any, they are entitled.”).

296. *Twombly*, 550 U.S. at 559.

297. *Id.* at 558 (quoting 5 WRIGHT & MILLER, *supra* note 41, § 1216, at 234) (internal quotation marks omitted).

298. *Twombly*, 550 U.S. at 558 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

opined that the burden of defending deficient civil rights claims could hinder public officials in carrying out their assigned duties.<sup>299</sup>

Courts have heeded *Twombly*'s admonishment to be mindful of discovery costs in evaluating pleadings at the motion to dismiss stage. The Seventh Circuit has ruled that where anticipated discovery costs are unusually high, the trial court may require more factual detail in assessing plausibility.<sup>300</sup> Courts have also been mindful of discovery costs in assessing threshold issues, such as standing and antitrust injury.<sup>301</sup> Yet, no court has dismissed a claim, without considering the allegations in the complaint, solely because the cost of discovery might be high.<sup>302</sup> Moreover, the courts have recognized that once a complaint passes muster, plaintiffs are entitled to discovery and that discovery may reveal "evidence that further tilts the balance in favor of liability."<sup>303</sup> Finally, *Twombly* should not be read as a blanket bar to discovery prior to the resolution of a motion to dismiss.<sup>304</sup>

## V. ANALYTICAL HOLES IN *TWOMBLY* AND *IQBAL*

### A. *Fact v. Conclusion*

*Iqbal* reaffirmed the *Twombly* ruling that in considering the sufficiency of a complaint on a motion to dismiss for failure to state a claim, the court need only consider properly alleged facts and can ignore allegations that are

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299. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

300. *Limestone Dev. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 803–04 (7th Cir. 2008) ("[T]he complaint must include as much factual detail and argument as may be required to show that the plaintiff has a plausible claim."). *Accord Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008) (quoting *Limestone Dev.*, 520 F.3d at 803–04); *see also* Stephen B. Burbank, *The Continuing Evolution of Securities Class Actions Symposium: Pleading and the Dilemma of "General Rules,"* 2009 WIS. L. REV. 535, 548 (2009) (citing *Limestone Dev.*, 520 F.3d at 803).

301. *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1191 (10th Cir. 2009) (noting that the Supreme Court "warned particularly of the high costs and frequent abuses associated with antitrust discovery, before beginning its analysis of whether the alleged market is cognizable under antitrust laws" (citing *Twombly*, 550 U.S. at 558)); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007) (quoting *Twombly*, 550 U.S. at 558) (granting motion to dismiss on lack of standing); *see Warfield Phila., L.P. v. Nat'l Passenger R.R. Corp.*, No. 09-1002, 2009 WL 4043112, at \*6 (E.D. Pa. Nov. 20, 2009) (dismissal based on insufficient factual support for an antitrust injury).

302. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 32 n.3 (D.D.C. 2008) ("[A]s sensitive as [the] courts must be to the cost to litigants of discovery, where plaintiffs have made out a plausible antitrust claim . . . they are entitled to discovery in order to determine to what relief, if any, they are entitled.").

303. *In re Text Messaging Antitrust Litig.* 630 F.3d 622, 629 (7th Cir. 2010); *see also In re Fla. Cement & Concrete Antitrust Litig.*, 746 F. Supp. 2d 1291, 1317–18 n.23 (S.D. Fla. 2010) (ruling that allegations in the complaints "are specific enough to reduce [the potentially] enormous discovery burden that concerned the Supreme Court in *Twombly*").

304. *In re Graphics Processing Units Antitrust Litig.*, No. C 06-07417 WHA MDL No. 1826, 2007 WL 2127577, at \*4 (N.D. Cal. July 24, 2007).

“conclusory,”<sup>305</sup> “formulaic,”<sup>306</sup> or “bare.”<sup>307</sup> The Court offered no analytic taxonomy to distinguish between “fact” and “conclusion,” as if the differences were self-defining. The reality is, however, that it is very difficult in practice to divine the difference between a factual allegation and a conclusory allegation.<sup>308</sup> A rule that makes the validity of an allegation turn on such a distinction is most unfortunate because it shows that the Court has not learned some important lessons of history.

The Federal Rules of Civil Procedure, which superseded the codes and their fact-pleading regimen, make no mention of any distinction between “facts” and “conclusions.”<sup>309</sup> The Rules specifically state that “no technical form [of pleading] is required.”<sup>310</sup> On the other hand, facts were at the center of the code pleading universe.<sup>311</sup> The codes required that a complaint plead facts “sufficient

305. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (citing *Twombly*, 550 U.S. at 555).

306. *Id.* (quoting *Twombly*, 550 U.S. at 555).

307. *Id.* (citing *Twombly*, 550 U.S. at 555).

308. See Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 57 (2010) (“One of the primary shortcomings of Code pleading was the distinction between ‘ultimate’ facts, which were required to be pleaded, and ‘evidentiary’ facts and ‘conclusions of law,’ which were not to be pleaded. Those distinctions proved unworkable in practice and resulted in a level of technicality and factual detail in the pleadings that became counter-productive.”) (footnotes omitted); Schwartz & Appel, *supra* note 57, at 1114 (“In practice, the difficulty in distinguishing between operative facts, evidentiary facts, and legal conclusions made code pleading a spectacular failure. Like its common law predecessor, code pleading proved immensely technical, and uncertainty in what needed to be pled to give sufficient notice to a party quickly devolved into an overly-inclusive approach to pleading. In the end, the system was ‘excruciatingly slow, expensive, and unworkable.’” (quoting 5 WRIGHT & MILLER, *supra* note 41, § 1202, at 94–95)). See also *Twombly*, 550 U.S. at 590 (Stevens, J., dissenting) (comparing plaintiffs’ allegations in the instant case to Official Form 9, and concluding that “[d]efendants entered into a contract’ is no more a legal conclusion than ‘defendant negligently drove’”); *United States v. Employing Plasterers Ass’n of Chi.*, 347 U.S. 186, 188 (1954) (holding, in an antitrust case, that the Government’s allegations of effects on interstate commerce must be taken into account in deciding whether to dismiss the complaint “[w]hether these charges be called ‘allegations of fact’ or ‘mere conclusions of the pleader’”); *Brownlee v. Conine*, 957 F.2d 353, 354 (7th Cir. 1992) (“The Federal Rules of Civil Procedure establish a system of notice pleading rather than of fact pleading, . . . so the happenstance that a complaint is ‘conclusory,’ whatever exactly that overused lawyer’s cliché means, does not automatically condemn it.”); *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 3–4 (9th Cir. 1963) (“[O]ne purpose of Rule 8 was to get away from the highly technical distinction between statements of fact and conclusions of law . . . .”); *Oil, Chem. & Atomic Workers Int’l Union v. Delta Ref. Co.*, 277 F.2d 694, 697 (6th Cir. 1960) (“Under the notice system of pleading established by the Rules of Civil Procedure, . . . the ancient distinction between pleading ‘facts’ and ‘conclusions’ is no longer significant.”) (citation omitted); 5 WRIGHT & MILLER, *supra* note 41, § 1218, at 267 (“[T]he federal rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties.”). See generally *Twombly*, 550 U.S. at 589–90 (Stevens, J., dissenting) (“The Court’s dichotomy between factual allegations and ‘legal conclusions’ is the stuff of a bygone era. That distinction was a defining feature of code pleading, but was conspicuously abolished when the Federal Rules were enacted in 1938.”).

309. *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 3–4 (9th Cir. 1963).

310. FED. R. CIV. P. 8(d).

311. See CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 19, at 131 (2d ed. 1947).

to constitute a cause of action.”<sup>312</sup> The Achilles’ heel of code pleading became manifest when courts got bogged down on the fact/conclusion distinction in reviewing the pleadings and lost sight of the larger goals of litigation—the just resolution of meritorious claims.<sup>313</sup> The genius of the Federal Rules was that the drafters avoided this pitfall by adept use of language, eliminating any references to “facts” or “conclusions” or “cause of action”<sup>314</sup> and simply required a “claim showing that [a] pleader is entitled to relief.”<sup>315</sup> Unfortunately, *Iqbal* is a step backwards. In asserting that the trial court’s first task in reviewing a complaint is to screen out conclusory allegations,<sup>316</sup> *Iqbal* thrusts litigants and courts right back into the thicket that existed prior to the adoption of the Federal Rules.<sup>317</sup>

312. *Id.* (quoting STATE OF N.Y. COMM’RS ON PRACTICE & PLEADINGS, FIRST REPORT OF THE COMMISSIONERS ON PRACTICE & PLEADINGS §§ 120, 122, 127, at 179–80 (1848)).

313. Simplified Pleading, 2 F.R.D. 456, 460 (1941–43) (detailed pleading under the codes was “at best wasteful, inefficient and time-consuming, and at most productive of confusion as to the real merits of the cause of action and even of actual denial of justice”).

314. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 976 (1987) (“The language ultimately adopted of claim entitling relief avoided the distrusted ‘facts’ and ‘cause of action’ language.”). See generally Simplified Pleading, 2 F.R.D. at 462 (extolling the virtues of simplified pleadings). But see Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure, 13 F.R.D. 253, 276 (1952) (“Opponents of a change in Rule 8 as presently construed stress the difficulty of distinguishing between ‘ultimate fact’ and ‘evidentiary facts’ and between ‘ultimate fact’ and ‘conclusions of law’. [sic] They assume that by adopting a new name, ‘claim for relief’, [sic] in place of the old, ‘cause of action’, [sic] these difficulties vanish. It may be granted that the difficulties sometimes exist. But they are inherent in the materials with which the law must deal. Supplanting ‘cause of action’ by ‘claim of relief’ and then construing ‘claim for relief’, [sic] as no more than a notice of disaffection on the part of the plaintiff do not spirit difficulties away. They merely defer the difficulties to a later point in the litigation. Supplanting the term ‘cause of action’ by ‘claim for relief’ merely indulged a professorial foible and a common fallacy that changing labels achieves reform. The ‘new’ pleader points to the many decisions that grappled with the concept of a cause of action as a reason for abandoning the term. And so we now have many cases dealing with ‘claim for relief’. [sic] Nor have we thereby escaped the basic question which arises in many contexts, such as in the application of res judicata, statute of limitations, and the like.”); Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L. Q. 5, 12 (1938) (“Whether this [elimination of cause of action and facts] will do any good is very doubtful, for both terms are embedded in the literature of the law and in the vocabulary of the profession.”).

315. FED. R. CIV. P. 8(a)(2). See 5 WRIGHT & MILLER, *supra* note 41, § 1216, at 207–08 (“Conspicuously absent from Federal Rule 8(a)(2) is the requirement found in the codes that the pleader set forth the ‘facts’ constituting a ‘cause of action.’ The substitution of ‘claim showing that the pleader is entitled to relief’ for the code formulation of the ‘facts’ constituting a ‘cause of action’ was intended to avoid the distinctions drawn under the codes among ‘evidentiary facts,’ ‘ultimate facts,’ and ‘conclusions’ and eliminate the unfortunate rigidity and confusion surrounding the words ‘cause of action’ that had developed under the codes. The draftsmen of the federal rules obviously felt that the use of a new formulation would emphasize the modern philosophy of procedure espoused by the federal rules, destroy the viability of the old code precedents, which were a source of considerable confusion, and encourage a more flexible approach by the courts in defining the concept of claim for relief.”) (footnotes omitted).

316. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007)).

317. See *supra* notes 55–56 and accompanying text.

Worse, *Iqbal* encourages courts to use the kinds of outcome-determinative labels decried in *Twombly*,<sup>318</sup> and licenses courts to arbitrarily engineer outcomes and ignore inconvenient facts by simply describing them as “conclusions.” The fact/conclusion dichotomy does not provide a workable standard for courts to adjudge the viability of pleadings on a motion to dismiss.<sup>319</sup>

*B. What Documents Are Properly Before the Court on a Motion to Dismiss?*

Historically, on a motion to dismiss a complaint for failure to state a claim, only the complaint is properly before the court, and the defendant accepts all allegations as true for the purposes of the motion.<sup>320</sup> *Twombly* and *Iqbal* have substantially eroded this concept, while at the same time paying it lip service.<sup>321</sup> As discussed above, only factual allegations count; conclusory allegations can be disregarded.<sup>322</sup> Moreover, in both *Twombly* and *Iqbal*, the Court obviously looked to sources outside the complaint to reach its decisions, piecing together “rational” explanations of defendants’ conduct.<sup>323</sup>

In *Twombly*, the Court, relying on economic theory not part of the record before it, treated plaintiffs’ allegations that the defendants jointly frustrated new entry by CLECs into their respective territories with the cruel back of its hand, stating that defendants’ resistance was “the natural, unilateral reaction of each ILEC intent on keeping its regional dominance.”<sup>324</sup> Further, the Court held that “resisting competition is routine market conduct” and that “there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway.”<sup>325</sup> The Court also found that “each ILEC ha[d] reason to . . . avoid dealing with CLECs” and “each ILEC would [have] attempt[ed] to keep CLECs out, regardless of the” other ILECs’ actions.<sup>326</sup>

Similarly, regarding plaintiffs’ assertions that ILECs agreed among themselves not to invade each other’s territories, the Court ruled that “a natural explanation for the noncompetition is that the former [g]overnment-sanctioned monopolists were sitting tight, expecting their neighbors to do the same.”<sup>327</sup>

318. *Twombly*, 550 U.S. at 555.

319. See Stucke, *supra* note 269, at 1472 (criticizing the subjective nature of the plausibility test).

320. *Fletcher v. Burkhalter*, 609 F.3d 1091, 1098 (10th Cir. 2010).

321. *Iqbal*, 129 S. Ct. at 1951 (“We begin our analysis by identifying allegations . . . not entitled to the presumption of truth.”).

322. See *supra* notes 220–233 and accompanying text.

323. See *Twombly*, 550 U.S. at 554 (observing that ILECs’ refusals to deal with CLECs could be viewed as rational business behavior); *Iqbal*, 129 S. Ct. at 1951 (stating that in the aftermath of the 9/11 attacks, the Attorney General had justifiable reason to detain Muslims illegally in the United States who might be linked to terrorists).

324. *Twombly*, 550 U.S. at 566.

325. *Id.*

326. *Id.*

327. *Id.* at 568.

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 regard as profitable, or even a small portion of such markets.”<sup>328</sup> The Court remarked 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.”<sup>329</sup>

In *Iqbal*, again, with only the complaint before it, the Court found that in view of the events of 9/11, arrests overseen by the Director of the FBI were likely lawful and justified by the intent to detain aliens having a link to the 9/11 attacks.<sup>330</sup> This “obvious alternative explanation”<sup>331</sup> for plaintiff’s arrest made his claim of “invidious discrimination . . . not a plausible conclusion.”<sup>332</sup>

At the very least, *Iqbal* and *Twombly* authorize, if not encourage, trial courts to make probabilistic determinations of facts at the motion to dismiss stage.<sup>333</sup>

328. *Id.* at 569 (quoting 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 307d, at 76 (Supp. 2010)).

329. *Id.*

330. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009).

331. *Id.* (quoting *Twombly*, 550 U.S. at 567).

332. *Id.* at 1951–52.

333. See Robert L. Rothman, *Twombly and Iqbal: A License to Dismiss*, LITIG., Spring 2009, at 1.

[I]n a particularly troubling sentence, the Court suggests that a complaint must not only be consistent with the claim asserted, but must also exclude “more likely explanations.” (quoting *Iqbal*, 129 S. Ct. at 1951).

What, exactly, does that mean? At a minimum, it appears to be a standard that invites district court judges to dismiss cases based on their own subjective notions of what is *probably* true—a determination that apparently can be made based on events outside the four corners of the complaint. For example, in *Iqbal*, the plaintiff—a Pakistani Muslim—sued numerous government officials asserting violation of various constitutional rights, alleging that, following the events of September 11, 2001, he was classified as a “high interest” detainee and held in extremely harsh conditions as a matter of policy based “solely on account of [his] religion, race, and/or national origin, and for no legitimate penological reason.” (quoting *Iqbal*, 129 S. Ct. at 1959). Although conceding his allegations, taken as true, are consistent with his theory of being classified as “of high interest” based on race, religion or national origin, the Court nonetheless found *Iqbal*’s allegations of discriminatory treatment implausible. . . .

Thus, *Iqbal* has the potential to short-circuit the adversary process by shutting the doors of federal courthouses around the nation to large numbers of legitimate claims based on what amounts to a district court judge’s effectively irrefutable, subjective assessment of probable success. This is so notwithstanding a complaint containing well-pled factual allegations that, if allowed to proceed to discovery and proved true at trial, would authorize a jury to return a verdict in the plaintiff’s favor.

*Id.* at 2 (second alteration in original). See also David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 137–38 (2010) (citing FED. R. CIV. P. 12(d)) (“[T]he apparent simplicity of the Court’s diktat obscures important questions about the adjudication of motions to dismiss after *Iqbal*. First, courts are in the business of providing reasons. They do not simply announce decisions, but explain why they follow from accepted premises. Second, various legal rules governing how a court is supposed to evaluate a motion to dismiss are designed to *limit* the information the court may consider. A court, for example, must convert a motion to dismiss into a motion for summary judgment if the motion presents matters outside the pleadings. For both these reasons, the sources

This not only preempts the fact-finding function at trial, but also threatens to substitute fact-based decision-making with decision-based fact finding *prior to trial*, contrary to the Federal Rules of Civil Procedure.<sup>334</sup>

### C. *Information in Exclusive Control of Defendants*

Neither *Twombly* nor *Iqbal* directly addresses the question of what should be done where the facts are in the exclusive control of the defendants or otherwise not readily available to plaintiffs, thereby putting plaintiffs at a serious disadvantage at the pleading stage.<sup>335</sup> *Iqbal* seems to say that whether information is in the exclusive control of a defendant is irrelevant on a motion to dismiss.<sup>336</sup> In antitrust conspiracy cases, for example, it is not unusual for the conspirators to meet and agree covertly and then do whatever is necessary to cover their tracks.<sup>337</sup> Not surprisingly, under those circumstances, the plaintiff may not have access to facts evidencing agreement prior to the filing of any complaint. Dismissal for failure to allege facts showing agreement seems unfair, as does the end-result of letting conspirators go free, because the defendants were careful enough to conceal the damning evidence. Similarly, in civil rights cases, discrimination claims are often proven statistically using data in the exclusive control of defendants and available via discovery only after an action is filed.<sup>338</sup> The fact that the Court did not address the problem of asymmetry of

of information a court relies on to substantiate its 'judicial experience and common sense' are important. If 'judicial experience and common sense' constitutes a license to rely on broad new categories of extrinsic information at a motion to dismiss, the critics' fears that motion to dismiss practice will be unduly influenced by individual judges' differing views of life, the universe, and everything may be warranted. If, on the other hand, 'judicial experience and common sense' introduces only a few new premises into courts' analysis, the critics' fears may be overstated.'')

334. *Cf. Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (recognizing that *Twombly* and *Iqbal* do not require courts "to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences"); *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 767 F. Supp. 2d 880, 899 (N.D. Ill. 2011) ("[T]he inference of an agreement need not be more reasonable than the inference of independent parallel conduct." (citing *Swanson*, 614 F.3d at 404)).

335. See Cavanagh, *supra* note 24, at 889.

336. See *Iqbal*, 129 S. Ct. at 1954 ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."); *New Albany Tractor, Inc. v. Louisville Tractor, Inc.*, 650 F.3d 1046, 1051 (6th Cir. 2011) ("Without discovery, pricing information or any fact that would support an allegation of illegal economic collusion becomes far harder to obtain.").

337. See Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1126 n.459 ("Antitrust conspiracies routinely are inferred from such ambiguous evidence as unexplained secret meetings, unnatural identity of prices or parallelism of certain conduct, and geographically adjacent conspiracies.").

338. See Suzette M. Malveaux, *Salvaging Civil Rights Claims: How Plausibility Discovery Can Help Restore Federal Court Access After Twombly and Iqbal*, AM. CONST. SOC'Y FOR L. & POL'Y, Nov. 2010, at 12, available at <http://www.acslaw.org/files/Malveaux%20issue%20brief%20-%20Fed%20Access%20after%20Twombly.pdf>.

information, when faced with the very types of cases where asymmetry is not atypical—*Twombly* (antitrust) and *Iqbal* (civil rights)—is troubling.

## VI. SYNTHESIS

Based on the foregoing discussion, the following principles of construction of Rule 8(a)(2) in the wake of *Twombly* and *Iqbal* may prove useful to the courts.

### A. Proportionality

The level of factual content in a pleading required by *Twombly* and *Iqbal* is directly proportional to the complexity of the case and the likely costs of pretrial discovery.<sup>339</sup> Underlying the call for heightened scrutiny of the complaints in *Twombly* and *Iqbal* were the special cost concerns presented in complex cases.<sup>340</sup> In *Twombly*, the Supreme Court held that defendants should not be forced to shoulder the heavy financial burdens of pretrial discovery based on threadbare allegations of a complex antitrust conspiracy coupled with stray claims of consciously parallel behavior.<sup>341</sup> The Court was also concerned with the cost of false positives,<sup>342</sup> 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.”<sup>343</sup> In *Iqbal*, the Court similarly ruled that forcing the Attorney General of the United States and the Director of the FBI to defend civil rights claims based on broad allegations that raised no more than the possibility of wrongdoing would be costly to the public because it would likely impair the ability of these officials to execute their responsibilities to the public.<sup>344</sup> The rationale underlying the pleading standards in *Twombly* and *Iqbal* “thus applies where both the cost and the likelihood of false positives are

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339. *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009) (“[T]he height of the pleading requirement is relative to circumstances.”); see also *supra* note 269 and accompanying text.

340. See *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625–26 (7th Cir. 2010) (reprimanding district courts for misapplying the *Twombly* standard in complex cases and encouraging massive discovery); *Cooney*, 583 F.3d at 971 (noting that the complex circumstances in *Twombly* and *Iqbal* led to the heightened pleading standard); *Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009).

341. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007).

342. See *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (False positives—the mistaken inferences of anticompetitive effects—“are especially costly because they chill the very conduct the antitrust laws are designed to protect.” (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986))); see generally Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 LOY. U. CHI. L.J. 629, 637 (2010) (“[T]he mistaken inference of anticompetitive effect [is] especially costly, because [it] chill[s] the very conduct the antitrust laws are designed to protect.” (quoting *Trinko*, 540 U.S. at 414) (alterations in original)).

343. *Twombly*, 550 U.S. at 554.

344. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

high.”<sup>345</sup> On the other hand, where the expected cost is not high, the enhanced pleading standards implemented in *Twombly* and *Iqbal* “[are] not justified.”<sup>346</sup>

*B. Assuming the Truth of Allegations in the Pleadings*

Although neither *Twombly* nor *Iqbal* countermand the time honored practice of assuming the truth of the allegations in the complaint on a motion to dismiss, those cases do, of course, distinguish between well-pleaded allegation of fact, which must be accepted as true, and mere conclusory allegations, which can be ignored.<sup>347</sup> Indeed, *Iqbal* encourages courts, as a first step, to peruse the pleadings for conclusory statements that can be immediately tossed aside.<sup>348</sup> As discussed above,<sup>349</sup> that exercise is easier said than done because “the distinction between a ‘conclusion’ and a ‘fact’ is not always easy to discern.”<sup>350</sup> It may be tempting for a court to draw that distinction in the twinkling of an eye. However, history has taught us that this exercise is at best unproductive, if not futile, and that is precisely the reason the Federal Rules of Civil Procedure abandoned so-called fact pleading.<sup>351</sup> Accordingly, courts must be wary of the fact/conclusion divide.

This is not to say that every statement in every pleading must be taken as true. As the court in *Austen v. Catterton Partners V, LP* observed, “[c]ontext, good judgment and common sense mattered long before the Supreme Court decided *Twombly* and *Iqbal* . . . .”<sup>352</sup> The court in *Austen* provides an apt example of how *Twombly* and *Iqbal* should sensibly be applied in passing on the sufficiency of the complaint without entering the thorny fact/conclusion thicket:

If a plaintiff says that a defendant intended to, and did, punch the plaintiff in the nose, is that a statement of fact about the defendant’s act and intent, or is it a conclusion since none of us is a mind reader? In most circumstances, the Court would consider that statement to be one of fact that the Court would be required to assume is true for purposes of a Rule 12(b)(6) motion. On the other hand, if a plaintiff baldly [sic] asserts that she was subjected to a “hostile work environment” without more, the Court would consider that statement be a mere conclusion—in the parlance of the Supreme Court, a “threadbare recital”—to which the Court need not defer. In the latter example, further facts would be

345. Mark Anderson & Max Huffman, *Iqbal, Twombly, and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL’Y 1, 66 (2010).

346. *Id.*

347. *See Iqbal*, 129 S. Ct. at 1950.

348. *See id.*

349. *See supra* notes 232–233 and accompanying text.

350. *Austen v. Catterton Partners V, LP*, 709 F. Supp. 2d 168, 171 (D. Conn. 2010).

351. *See supra* note 22 and accompanying text.

352. *Austen*, 709 F. Supp. 2d at 172.

needed (and in this example, the plaintiff certainly would know what environment she had been subjected to) in order to provide adequate notice to the defendant of the basis for the lawsuit and to make the plaintiff's hostile work environment claim plausible.<sup>353</sup>

Context, good judgment and common sense—not any quick fact/conclusion bucketing—should decree the court's decision on a motion to dismiss.<sup>354</sup>

### C. Distinguishing Rule 12 and Rule 56

*Twombly's* formulation of the pleading standard for antitrust conspiracy cases draws heavily from summary judgment cases, but the standards for dismissal applicable on a Rule 12(b)(6) motion and dismissal on a motion for summary judgment remain distinct.<sup>355</sup> The Court in *Twombly* aligned the standards for Rule 12(b)(6) and Rule 56 but declined to merge them.<sup>356</sup> Moreover, the lower courts have correctly recognized that there may be situations where allegations of parallel behavior may not be sufficient to get to a jury, and thus fail on summary judgment, but may be enough to justify further discovery, and thus defeat a motion to dismiss.<sup>357</sup> *Twombly* itself supports this position and would uphold a pleading with "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."<sup>358</sup> Summary judgment, on the other hand, tests the sufficiency of the claim; the court has before it not only the pleadings, but also all evidence adduced during discovery.<sup>359</sup> Even an admittedly well-pleaded antitrust conspiracy complaint may fall short if plaintiff cannot proffer evidence to support its allegations of joint activity or defendants can adduce uncontroverted evidence to undermine the conspiracy claims.<sup>360</sup>

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353. *Id.* at 171–72.

354. *See id.*

355. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 323 n.21 (3d Cir. 2010).

356. *See id.*

357. *Id.* (“[E]ven in those contexts in which an allegation of [conspiracy based on] parallel conduct will not suffice to take an antitrust plaintiff’s case to the jury, it will sometimes suffice to overcome a motion to dismiss and permit some discovery, perhaps leaving the issue for later resolution on a motion for summary judgment.” (second alteration in original) (quoting *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 329 (2d Cir. 2010) (Newman, J., concurring))).

358. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

359. *See generally* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (noting that summary judgment can only be granted if there is “no genuine issue of material fact”); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (describing the summary judgment standard).

360. *See generally* Brian Thomas Fitzsimons, *The Injustice of Notice & Heightened Pleading Standards for Antitrust Conspiracy Claims: It Is Time to Balance the Scale for Plaintiffs, Defendants, and Society*, 39 RUTGERS L.J. 199, 199–202 (2007) (discussing how heightened pleading standards in antitrust cases are negatively impacting putative plaintiffs, especially in the discovery process).

#### D. *Special Considerations*

*Erickson* makes clear that *Twombly* does not alter the federal courts' longstanding policy of liberal pleading standards for pro se complaints.<sup>361</sup> District courts should similarly be circumspect in considering a motion to dismiss a complaint in cases where there is an asymmetry of information, as is frequently the case in antitrust conspiracy and civil rights cases.<sup>362</sup> Dismissal is harsh in such cases precisely because the plaintiffs do not have access to all the facts.<sup>363</sup> Rather than terminate the litigation with prejudice, the better approach would be to provide limited and specifically targeted discovery before entertaining the motion to dismiss.<sup>364</sup> The amount of access and costs thereof would be governed by the proportionality standards embedded in the Federal Rules and the sound discretion of the trial court.<sup>365</sup> Similarly, antitrust complaints in private enforcement actions that are follow-ons to successful government enforcement actions should be dismissed at the pleading stage on *Twombly* grounds only in the most unusual circumstances.<sup>366</sup> The fact that the government has already been successful in a public enforcement action should allay any fears that the private action might be largely groundless.<sup>367</sup> In these circumstances, a poorly drafted complaint is best handled by a remedy other than dismissal. On the other hand, if a government investigation is merely ongoing and no action has been filed, the presumption of merit of the private claim would not pertain.<sup>368</sup>

361. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); see *Boykin v. KeyCorp.*, 521 F.3d 202, 213 (2d Cir. 2008).

362. See, e.g., *Bausch v. Stryker Corp.*, 630 F.3d 546, 558 (7th Cir. 2010). Ruling that a defective products claim had been improperly dismissed prior to discovery, Judge Easterbrook stated:

In applying [the plausibility] standard to claims for defective manufacture of a medical device in violation of federal law, moreover, district courts must keep in mind that much of the product-specific information about manufacturing needed to investigate such a claim fully is kept confidential by federal law. Formal discovery is necessary before a plaintiff can fairly be expected to provide a detailed statement of the specific bases for her claim. Accordingly, the district court erred in this case by dismissing plaintiff's original complaint and by denying her leave to amend her complaint.

*Id.*

363. See *Fitzsimons*, *supra* note 360, at 200.

364. See *Cavanagh*, *supra* note 24, at 892.

365. See FED. R. CIV. P. 26(b)(2)(C) (giving judges discretion to limit discovery).

366. See generally Edward D. Cavanagh, *Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Antitrust Enforcement*, 28 REV. LITIG. 1, 31 (2008) (discussing that prior governmental prosecutions indicate merit of claims).

367. Cf. *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775(JG)(VVP), MDL No. 1775, 2009 WL 3443405, at \*1 (E.D.N.Y. Aug. 21, 2009) ("The additional fact that numerous defendants have pled guilty to criminal charges of fixing prices on air cargo shipments further supports that conclusion [of upholding the complaints].").

368. See, e.g., *In re Elevator Antitrust Litig.*, 502 F.3d 47, 51–52 (2d Cir. 2007) (investigation was not enough to make complaint plausible).

### E. Dismissal Without Prejudice

If the complaint is found deficient on a motion to dismiss, the preferred remedy is dismissal without prejudice.<sup>369</sup> That is, the plaintiff ordinarily should be given a second shot at stating a claim. Nevertheless, the trial court should and does retain the power to dismiss those claims that lack legal merit and cannot be resuscitated by any amount of pleading.<sup>370</sup>

## VII. AN ASSESSMENT

In the short term, *Twombly* has proven to be neither the death knell to federal civil litigation, as its critics had feared, nor the quick-fix for the perceived problem of out-of-control discovery costs and burdensome litigation that the Court sought to achieve.<sup>371</sup> Instead, it has sowed a great deal of confusion among federal courts as to the meaning of plausibility,<sup>372</sup> and, unfortunately, has shifted the focus to whether a claim is *well-pleaded*, instead of whether a claim has *merit*.<sup>373</sup> This is not surprising; the Court has simply chosen the wrong tool. If the goal is truly to reduce discovery costs, the court needs to address that problem directly through existing procedural rules already at their disposal that limit discovery and encourage active pretrial management by trial courts.

*Twombly* gives short-shrift to this approach.<sup>374</sup> The Court simply throws up its hands and, somewhat incredulously, asserts that discovery is beyond the practical ability of the courts to control.<sup>375</sup> This assertion ignores developments

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369. See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, Nos. M 07-1827 SI, C 09-5840 SI, MDL No. 1827, 2010 WL 2610641, at \*3 (N.D. Cal. June 28, 2010) (“The Ninth Circuit has ‘repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.’” (quoting *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000))); see also *Peñalbert-Rosa v. Fortuño-Burset*, 631 F.3d 592, 595–96 (1st Cir. 2011) (“Without trying to lay down a mechanical rule, it is enough to say that sometimes a threadbare factual allegation bears insignia of its speculative character and, absent greater concreteness, invites an early challenge—which can be countered by a plaintiff’s supplying of the missing detail.”); *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) (“Had the District Court required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged. In making the contrary assumption for purposes of our decision, we are perhaps stretching the rule of *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957), too far. Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”).

370. See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, Nos. M 07-1827 SI, C 09-5840 SI, MDL No. 1827, 2010 WL 2610641, at \*3 (N.D. Cal. June 28, 2010) (quoting *Lopez*, 203 F.3d at 1130).

371. See *supra* note 37 and accompanying text.

372. See *supra* notes 235 and 245 and accompanying text.

373. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (“[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable . . .”).

374. *Id.* at 559.

375. See *id.*

in the Federal Rules of Civil Procedure over the last three decades that provide presumptive limits on discovery and empower the trial courts to actively manage the pretrial phase of the case by, *inter alia*, tailoring discovery to the particular needs of the case.<sup>376</sup>

Moreover, the *Twombly* approach has at least three inherent contradictions. First, it insists on greater factual content in the complaint (and logically *more* discovery) while at the same time decrying the runaway costs of pretrial discovery.<sup>377</sup> Second, it encourages trial judges—the very same trial judges who cannot effectively control discovery—to dismiss claims at the outset of the case,<sup>378</sup> the time when the court knows least about them. Third, *Twombly* invites motions to dismiss in every case, thereby increasing, not decreasing, the burdens on the courts.<sup>379</sup>

In the long term, *Twombly* is likely to be viewed as a lost opportunity. Its lasting impact is likely to be at the margins—perhaps a few more dismissals than would have occurred pre-*Twombly* and perhaps a bit more detailed pleading by plaintiffs to combat motions to dismiss in complex cases, at least where the plaintiff can plead in detail without the benefit of discovery. True cost savings, however, are not likely to be achieved until the Supreme Court and the district courts address the problem of excessive discovery costs through the finely tuned discovery rules already in place. The tools are there; they just need to be utilized.

If the initial complaint is found deficient on a motion to dismiss, any dismissal order should be without prejudice.<sup>380</sup>

### VIII. CONCLUSION

The *Twombly* and *Iqbal* decisions have not proven to be the *de facto* death sentence to federal civil litigation that many had feared. Still, the Court's choice to use heightened scrutiny of complaints at the motion to dismiss stage as the vehicle for addressing the problem of excessive discovery costs is puzzling, especially in light of the availability of existing tools in the Federal Rules directly addressing the amount and scope of discovery and the collateral damage that can be inflicted by use of such a blunt instrument to effectuate change. Accordingly, courts should heed Judge Posner's admonition that *Twombly* "must not be overread"<sup>381</sup> and should remain vigilant to assure preservation of the fundamental goals of the Federal Rules of Civil Procedure—that the pleadings be construed so as to do justice and ensure that meritorious litigants have their day in court. Courts must also take seriously their case management

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376. *See id.*

377. *Id.* at 558.

378. *Id.*

379. *See supra* note 22 and accompanying text.

380. *See supra* note 362.

381. *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 803 (7th Cir. 2008).

responsibilities and, where appropriate, actively impose the discovery limitations authorized by the Federal Rules of Civil Procedure.