Hold-Ups and Highway Robberies: A Proposal to Return to the Pre-Bell Atlantic 12(b)(6) Pleading Standard While Subsidizing Defendants' Discovery Costs (Including Discovery-Related Attorney Fees) in Meritless Cases

Anthony C Biagioli, Georgetown University
HOLD-UPS AND HIGHWAY ROBBERIES:
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(INCLUDING DISCOVERY-RELATED ATTORNEY FEES)
IN MERITLESS CASES

Anthony Biagioli
acb67@law.georgetown.edu
617-835-6854
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I. INTRODUCTION

Antitrust pleading practice is plagued by a normative dilemma. Under a lenient pleading standard, plaintiffs may proceed to discovery on a showing of parallel conduct alone, leading undeserving plaintiffs to extort blameless defendants into settling meritless lawsuits through the threat of imposing on defendants prohibitive discovery costs. Under a more stringent pleading standard, plaintiffs might be required to plead more than parallel conduct, leading deserving plaintiffs to see their complaints dismissed at the pleading stage due to a lack of sufficient factual support for their claims. The latter is a function of blameworthy defendants’ asymmetric information advantage through which defendants who know whether they behaved unlawfully make strategic economic and litigation decisions against plaintiffs who have no idea whether the defendants behaved unlawfully.

The Supreme Court in Bell Atlantic v. Twombly rejected the five-decades-old pleading standard from the seminal Supreme Court holding in Conley v. Gibson and attempted to fashion a more stringent pleading standard, but it failed to specify the contours of pleading practice outside the antitrust context. Lower courts have accordingly interpreted Bell Atlantic’s import in wildly divergent manners. Irrespective of that confusion, the Bell Atlantic standard is undesirable even in the antitrust context. This Paper articulates an alternative standard.
II. PROPOSALS

This Paper makes two interrelated proposals. First, other than conclusory complaints and complaints in which the facts alleged, if proven, do not give rise to any inference of unlawful activity, a defendant’s 12(b)(6) motion to dismiss should be denied. This establishes a lenient pleading standard in which all complaints proceed to discovery when the facts alleged therein, if proven, give rise to even the smallest inference of unlawful activity. Second, in the antitrust context and similar contexts characterized by (a) information asymmetries in which the defendant, not the plaintiff, knows whether it behaved unlawfully, and (b) relatively substantial discovery costs, the government should reimburse the discovery costs of blameless defendants in meritless cases. A meritless case is one which is dismissed before trial on the merits or which is held on appeal that the case should have been dismissed before trial on the merits.¹ This proposal will capture almost all of the accuracy advantages of the pre- and post-Bell Atlantic worlds and will avoid almost all of the accuracy disadvantages of both worlds and thus is likely to be comparatively advantageous over both worlds. It will do so at what is unlikely to be a prohibitive cost.

¹ While the Proposal might alternatively reimburse defendants when they obtain a favorable ruling on the merits at any stage of the litigation process (e.g. at trial), such a proposal probably would not affect the incentives discussed in this paper. Defendants who did not behave unlawfully are likely to believe they will prevail after discovery (and will thus not require a trial), when a showing beyond parallel conduct is necessary to proceed to trial on a Sherman Act claim. The extent to which this is not true is a limitation on my analysis.
III. THE NEW 12(B)(6) PLEADING STANDARD

A. *Conley v. Gibson* and the “no set of facts” language.

The story of *Bell Atlantic* began in *Conley v. Gibson.*[^2] In that case, African-American railway workers sued to force their union to represent them without discrimination. The complaint alleged that a railroad employer discharged or demoted 45 African-American workers under the pretext that the jobs were being abolished but that those jobs were in fact subsequently filled by whites. The complaint further alleged that the union did little to protect the African-American workers—especially compared with the treatment the union afforded white employees—and that in general the union failed to represent the African-American employees equally and in good faith, as was required by the Railway Labor Act.[^3] The Court held that complaints need only give defendants fair notice of a claim and the grounds supporting the claim, and accordingly the Court decided that the plaintiffs’ complaint stated enough to proceed past the pleading stage.[^4] Specifically, the Court noted that the Federal Rules of Civil Procedure dispensed with the requirement that pleadings set out *in detail* the facts supporting recovery.[^5]

In a phrase that lay at the center of *Bell Atlantic*, the *Conley* Court stated that “a complaint should not be dismissed for failure to state a claim unless it appears beyond

[^3]: See id. at 43.
[^4]: See id. at 47.
[^5]: See id. at 47; FED. R. CIV. PRO. 8(a)(2) (stating that a complaint must contain a “a short and plain statement of the claim showing that the pleader is entitled to relief”). The history of the transition from code/fact pleading to notice pleading under the federal rules is spelled out infra section IV, see infra notes 29 & 30.
doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Accordingly, under the “no set of facts” language, for fifty years many courts presumed that a claim could proceed to discovery if there was any set of facts that could possibly (i.e. conceivably) support the plaintiff’s claim for recovery. Indeed, the “no set of facts” language appeared dispositive in the Second Circuit’s approval of the complaint in *Bell Atlantic*. This is not to say, of course, that the pleaded facts need not be relevant and probative; the facts, if true, must in some way make the required element more likely than it would have been had the fact not obtained.

**B. *Bell Atlantic v. Twombly* and the “plausibility” requirement**

*Bell Atlantic* rejected the “no set of facts” language and the concomitant, lenient requirement that the pleadings merely leave open the possibility that some set of facts,

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6 See *Conley*, 355 U.S. at 46.


8 See *Twombly v. Bell Atlantic*, 425 F.3d 99, 114 (2d Cir. 2005) (“[T]o rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.”).

9 I found no recorded case suggesting that a plaintiff could plead facts that did not increase the likelihood at all that the defendant behaved unlawfully. For example, an ostensibly-irrelevant fact such as the color of a defendant CEO’s automobile, while technically consistent with a claim for recovery, would never on its own satisfy *Conley* if it in no way made the required element more likely than it would have been had the color of the defendant’s car not obtained. Instead, *Conley* seemed to mandate that, once a relevant and probative pleaded fact increased the likelihood that the defendant behaved unlawfully, courts would not at the pleading stage measure the likelihood that, on the basis of the pleaded fact, the defendant behaved unlawfully. See *Conley*, 355 U.S. at 46.
somewhere down the road, might support recovery. The court noted, “the ‘no set of facts’ language has been questioned, criticized, and explained away long enough by courts and commentators, and is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once [and only once] a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” Thus, Conley merely “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.” Bell Atlantic thus held that complaints do not need “detailed factual allegations, but [they] do need more than labels and conclusions, or a formulaic recitation of the elements of a cause of action.” Courts “are not bound to accept as true a legal conclusion couched as a factual allegation.”

Bell Atlantic addressed a dispute arising out of the Telecommunications Act of 1996 (“Act”). The Act withdrew approval of incumbent local exchange carriers’ (ILECs) regional telephone service monopolies and attempted to facilitate market entry by competitive local exchange carriers (CLECs). The Act accomplished this by forcing ILECs to share their networks with CLECs, by, for example, allowing CLECs to

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11 See id. at 1959-60.

12 See id. at 1960. This presumably resolves the apparent conflict between the Court’s rejection of the “no set of facts” language and subsequent affirmation of the “accepted pleading standard” that “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” According to the Bell Atlantic Court, the interpretive error in which lower courts engaged after Conley was in applying the “no set of facts” language to the question of a complaint’s adequacy in the first instance, not the requisite level of factual detail once a complaint was adequately stated. See id. I question this characterization infra section III.C.

13 See id. at 1964-65.

14 Id. at 1965 (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)).
purchase phone service, lease an ILEC’s network, or interconnect a CLEC’s own facilities with an ILEC’s network. Consumers subsequently brought a putative class action against ILECs alleging an antitrust conspiracy, in violation of the Sherman Act, both to prevent the formation of competitive markets and to avoid competing with each other in their respective markets.\footnote{See id. at 1961-62.}

To recover under the Sherman Act, the plaintiffs needed to establish a conspiracy among ILECs to restrict trade among CLECs.\footnote{See id. at 1962.} The complaint alleged that ILECs restricted trade in two ways. First, the complaint alleged that ILECs “engaged in parallel conduct” in their respective service areas to inhibit the growth of upstart CLECs (i.e. making similar, unfair agreements with CLECs for access to ILEC networks and providing inferior connections to the networks).\footnote{See id.} Second, the complaint alleged agreements by ILECs to refrain from competing against each other. This was to be inferred from a common failure “meaningfully to pursue” attractive business opportunities in contiguous markets where they possessed substantial competitive advantages.\footnote{See id.}

\footnote{See id. The complaint alleged:}

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

\footnote{Id. at 1962-63. The complaint further alleged:}

\begin{quote}
Beginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract,
Even though, under the *Conley* “no set of facts” language, the first “parallel conduct” allegation seemed to put the defendant on notice of the claim, was relevant and probative to the issue at hand, and could conceivably have been supported by some set of facts, the court dismissed the claim.\(^{19}\) The Court held that an allegation of parallel conduct alone was not enough for a claim of conspiracy to proceed to discovery because there existed legitimate business reasons, even in the absence of conspiracy, for the ILECs to act independently as they did.\(^{20}\)

Similarly, the second allegation of a common failure to “meaningfully pursue” attractive business opportunities did not support a claim of conspiracy because, given the history of the industry, it would have made perfect business sense for ILECs to “sit tight, expecting their neighbors to do the same.”\(^{21}\)

The Court also noted the high costs associated with litigating anti-trust suits and disapproved of allowing those cases to survive a motion to dismiss without raising a sufficient plausibility of recovery.\(^{22}\) The Court made specific note that it was not requiring “heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face.”\(^{23}\) In *Bell Atlantic*, however, the plaintiffs did not

\(^{19}\) See *id.* at 1962.

\(^{20}\) See *id.* at 1971.

\(^{21}\) See *id.* at 1972.

\(^{22}\) See *id.* at 1967 & n.6.

\(^{23}\) See *id.* at 1974.
“nudge[] their claims across the line from conceivable to plausible.” Accordingly, the complaint was dismissed.

C. A comment on Bell Atlantic’s characterization of the pre-Bell Atlantic pleading standard

As discussed in note 12 supra, the Bell Atlantic Court stated that Conley merely “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.” This description of the pre-Bell Atlantic pleading standard seems inaccurate. Unquestionably, “[f]actual allegations [in a complaint] must be . . . [sufficient] to raise a right to relief above the speculative level.” How, though, if not by reference to the potential for alleged facts, if proven, to give rise to some inference of unlawful activity, is a court to assess a complaint’s adequacy? If the “no set of facts” language merely “described the breadth of opportunity to prove what an adequate complaint claims,” it remains entirely unclear how complaints were deemed adequate in the first instance.

24 See id.
25 See id.
26 See id. at 1960.
27 This Paper disputes Bell Atlantic’s characterization of the pre-Bell Atlantic pleading standard. It does so because this Paper envisions its first proposal as being as lenient as the pre-Bell Atlantic pleading standard. Bell Atlantic, however, characterizes the pre-Bell Atlantic pleading standard as assessing the sufficiency of the pleaded facts in an inquiry subsequent to the determination of the adequacy of the complaint. If this is the case, then this Paper’s proposal—which assesses the sufficiency of the pleaded facts in determining the adequacy of the complaint in the first instance—seems a radical deviation from modern American pleading practice. Even if the Court’s characterization is accurate, however, this Paper’s proposal should be evaluated on its merits. Nevertheless, this analysis is to insulate the proposal from charges that it represents an unprecedented departure from contemporary pleading standards.
28 See Bell Atlantic, 127 S. Ct. at 1965; cf. Fed. R. Civ. P. App. Form 9 (implicitly noting that the factual allegations of the place and time of the accident, that the defendant drove the car, and that the plaintiff was injured—along with the conclusory allegation that the defendant drove negligently—raised the right to relief above the speculative level).
One possible explanation for the *Bell Atlantic* Court’s characterization of the pre-*Bell Atlantic* pleading standard is that the Court’s characterization was merely rhetorical, designed to make it appear as though *Bell Atlantic* was less a departure from prior precedent than it arguably is. In any event, this Paper assumes that, contrary to the characterization in *Bell Atlantic*, the language of the pre-*Bell Atlantic* Court’s pleading jurisprudence demonstrates that the pre-*Bell Atlantic* pleading standard was as follows: outside of purely conclusory complaints (which the Court, independent of its commentary on the meaning of *Conley*, alleged was present in *Bell Atlantic*), all complaints should proceed to discovery when the facts alleged, taken as true, increase the likelihood even infinitesimally that the defendant behaved unlawfully. Accordingly, this Paper’s proposal—which assesses the sufficiency of a complaint’s alleged facts in evaluating the adequacy of a complaint in the first instance—is not a marked departure from prior pleadings practice.

IV. A MODEL OF POSSIBLE PLEADING FRAMEWORKS

The *Conley* “no set of facts” requirement and the *Bell Atlantic* plausibility standard are not the only possible standards within a notice pleading paradigm, nor is a notice pleading paradigm the only possible pleading framework. The possible frameworks are described in Table 1. I expound on the possible sub-categories within the notice pleading framework (Framework (c)) because both the pre- and post- *Bell Atlantic* pleading standards (as well as my own) fall within it.
Table 1: Possible Pleading Frameworks

<table>
<thead>
<tr>
<th>Pleading Framework</th>
<th>Requirements</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Code (Fact) Pleading I</td>
<td>A plaintiff must plead all the facts establishing each element of her claim but need not situate those facts within a legal theory.</td>
</tr>
<tr>
<td>(b) Code (Fact) Pleading II</td>
<td>A plaintiff must plead all the facts establishing each element of her claim and must situate those facts within a legal theory.</td>
</tr>
<tr>
<td>(c) Notice Pleading I</td>
<td>A plaintiff must plead enough relevant and probative facts to put the defendant on notice of the factual basis of the lawsuit but need not situate those facts within a legal theory.</td>
</tr>
<tr>
<td>(d) Notice Pleading II</td>
<td>A plaintiff must plead enough relevant and probative facts to put the defendant on notice of the factual basis of the lawsuit and must also situate those facts within a legal theory.</td>
</tr>
<tr>
<td>(d)(1) Notice Pleading II Sub-Category</td>
<td>The complaint does not make any factual allegations at all.</td>
</tr>
</tbody>
</table>

29 Despite the modern jurisprudential rejection of code pleading, see, e.g., United States v. Uni Oil, Inc., 710 F.2d 1078, 1080 n.1 (5th Cir. 1983), the Federal Rules in several cases retain elements of heightened fact pleading. See, e.g., Fed. R. Civ. P. 9(b) (requiring that in “all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity”). The Court in Bell Atlantic, however, explicitly disavowed an intent to “require heightened fact pleading of specifics.” See Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007).

30 This represents the notice pleading requirements of the Federal Rules of Civil Procedure. The requirements were “designed to escape the complexities of fact pleading under the codes, which had generated great confusion about how to allege the required ‘ultimate facts’ while avoiding forbidden ‘conclusions’ and ‘mere evidence.’ See Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 433 (1986); see also Charles E. Clark, The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure, 23 A.B.A.J. 976, 977 (1937).
| (d)(2) Notice Pleading II Sub-Category 2 | The complaint makes only **conclusory factual allegations** with respect to at least one material element of a cause of action.  
(In other words, beyond a reformulation of the legal conclusion in the form of a factual allegation (i.e. the factual allegation that “the defendants conspired to restrain competitive entry”), the complaint pleads no relevant and probative facts at all with respect to a material element.) |
| (d)(3) Notice Pleading II Sub-Category 3 | The complaint makes specific additional factual allegations, but the facts alleged, even taken as true, do not increase the likelihood even infinitesimally that the defendant behaved unlawfully. |
| (d)(3)(A) “Notice plus Conley” | The complaint pleads facts that not only do not increase the likelihood that the defendant behaved unlawfully, but that are actually **inconsistent** with recovery. |
| (d)(4) Notice Pleading II Sub-Category 4 | The complaint alleges facts that, taken as true, give rise to inferences of both lawful and unlawful activity and thus might conceivably support a claim for recovery. Within this fourth category, there exists a range of possible complaints:  
from (A) where the complaint makes factual allegations which, taken as true, only infinitesimally increase the likelihood that the defendant behaved unlawfully,  
to (B) where the complaint makes factual allegations which, taken as true, increase the likelihood that the defendant behaved unlawfully to the point just before certainty that the defendant behaved unlawfully. |

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This and the following four sub-categories explain the possible forms a complaint might take within the notice pleading framework.
(d)(5) Notice Pleading II Sub-Category 5

The complaint alleges facts that, taken as true—and disregarding possible affirmative defenses—give rise to an inference only of unlawful activity, i.e. that increase the likelihood that the defendant behaved unlawfully to the point of certainty.

Notes:
Willging articulates a similar but not identical model. The proposal allows complaints in categories (d)(4) and (d)(5) to proceed to discovery.

The Bell Atlantic Court criticized two of the allegations in the complaint. First, it criticized the allegation that “[b]eginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs,” the defendants unlawfully conspired to prevent competitive entry into their respective markets. The Court labeled this a conclusory allegation, a characterization falling within sub-category (d)(2) of this Paper’s theoretical model.

Second, since parallel conduct was consistent with both lawful and unlawful activity, the Court criticized the complaint’s allegation of

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32 See THOMAS E. WILLGING, USE OF RULE 12(B)(6) IN TWO FEDERAL DISTRICT COURTS 16 (1989). Willgin’s model of the range of possible plaintiff complaints is as follows:

(0) No legal theory whatsoever (a frivolous case)
(1) A pure issue of law, with two or more competing, plausible theories
(2) Absence of any factual allegation relating to an essential element of an established legal theory
(3) Conclusory or general allegations on an essential element of an established legal theory
(4) Highly improbable factual allegations on an essential element of an established legal theory
(5) Conceivable set of facts alleged in support of each essential element of an established legal theory.

See id.

33 See Bell Atlantic, 127 S. Ct. at 1963 n.2.

34 See id. at 1966 (“[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.”).
parallel conduct as insufficient to give rise to a plausible inference of unlawful activity.\textsuperscript{35} That characterization falls within sub-category (d)(4) of this Paper’s theoretical model.

Sub-category (d)(1) of the notice pleading framework of the theoretical model involves complaints that make no factual allegations at all. This is the only form of a complaint that appears to engender near-universal agreement that the complaint should be dismissed because the lack of any factual context at the very least deprives the defendant of notice as to the context in which the defendant allegedly behaved unlawfully.\textsuperscript{36}

Sub-category (d)(2) of the notice pleading framework involves “conclusory complaints”\textsuperscript{37} that make only conclusory factual allegations with respect to at least one material element of a cause of action.\textsuperscript{38} In other words, the complaint might plead no facts at all with respect to a material element beyond its allegation of a “fact” that is simply a reformulation of the complaint’s legal conclusion (e.g. that the defendants unlawfully conspired). \textit{Bell Atlantic} characterized the plaintiffs’ conspiracy allegation as “conclusory,” a characterization that is technically accurate but substantively irrelevant.\textsuperscript{39}

\textsuperscript{35} See id. at 1966 (“Without more, parallel conduct does not suggest conspiracy.”).

\textsuperscript{36} See, e.g. Willging, supra note 32, at 16 (noting that only the other possible forms of complaints are “troubling” in determining whether to grant a defendant’s 12(b)(6) motion).

\textsuperscript{37} “Conclusory complaints” is a term used in this Paper, not one used in existing academic or jurisprudential literature.

\textsuperscript{38} Nearly all complaints contain conclusory allegations in the following sense: at some point in the complaint, the complaint states a legal conclusion. The question, however, is not whether that allegation is conclusory, but whether there has been pleaded sufficient additional material to give rise to an inference of unlawful activity. The term “conclusory allegation” is thus somewhat of a misnomer because even properly-pleaded complaints contain a legal conclusion based on pleaded facts. Instead, complaints with only a legal conclusion and nothing more should be thought of as “conclusory complaints,” devoid of supporting factual material that might give rise to an inference of unlawful activity.

\textsuperscript{39} Every properly-pleaded complaint in the notice pleading framework makes a conclusory allegation. There is nothing wrong with making a conclusory allegation (e.g. the factual allegation that the defendants conspired) so long as that allegation is supplemented by additional factual allegations that, if true, increase the likelihood of unlawful activity to some requisite level. The Court’s charge that the additional pleaded fact of “parallel conduct” was insufficient to support a claim for recovery was the only legitimate
The term “conclusory allegations” is better understood as the limiting case in the spectrum of the sufficiency of possible pleaded facts. In other words, the statement that an allegation is “merely conclusory” really just begs the question of the sufficiency of the pleaded facts; if the complaint is “conclusory,” the plaintiff did not allege facts in support of the legal conclusion and instead simply restated her legal conclusion.\(^{40}\)

As an example of my proposition that the presence of a conclusory allegation does not render a complaint conclusory (which only occurs when the conclusory allegation lacks additional pleaded factual material in support of the allegation), consider Form 9: Complaint for Negligence in the Federal Rules of Civil Procedure.\(^{41}\) The Bell Atlantic Court implicitly reaffirmed the validity of the Form 9 complaint even though it alleged the fact that the defendant drove negligently, which of course was merely the plaintiff’s legal conclusion.\(^ {42}\) Accordingly, the presence of a conclusory factual allegation did not render the complaint invalid where the conclusory allegation was supplemented by additional factual allegations. Were the complaint merely to state, “the defendant negligently harmed the plaintiff” and nothing else, a court might label that allegation conclusory and dismiss the complaint. Unlike the complaint in

\footnotesize{independent argument in favor of granting the defendants’ 12(b)(6) motion. The plaintiffs’ complaint was not a “conclusory complaint” and should thus not have been criticized on those grounds because the plaintiffs pleaded additional (albeit, according to the Court, insufficient) factual material (i.e. the presence of parallel conduct).} 

\(^{40}\) See Willging, supra note 32, at 16.

\(^{41}\) FED. R. CIV. P. APP. Form 9

On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway. . . . As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Form 9, in the complaint stating merely that “the defendant negligently harmed the plaintiff,” the plaintiff merely restated her legal conclusion as a factual allegation. Once the plaintiff, however, inserted the allegation that the defendant was driving the car that struck the plaintiff, the complaint became sufficient. All that was missing to make the complaint nonconclusory, then, were additional factual allegations, beyond a statement of the legal conclusion, that increased the likelihood that the defendant behaved unlawfully.

Similarly, a conclusory complaint in Bell Atlantic would merely have stated that the defendants conspired and would not have been supported by the allegation of parallel conduct. The Bell Atlantic plaintiffs, however, did allege parallel conduct. The presence of parallel conduct increases the likelihood that the defendants unlawfully conspired because parallel conduct might be (although is not necessarily) indicative of unlawful activity, while defendants who did not at all act in a manner parallel to other defendants by definition could not have intentionally acted in a manner parallel to other defendants. In Bell Atlantic, then, the additional allegation of parallel conduct beyond the legal conclusion that the defendants unlawfully conspired should have shielded the plaintiffs from the argument that their complaint was conclusory. Instead, the Court appeared to give the presence of a conclusory factual allegation independent weight in rejecting the complaint. A court interpreting the Form 9 complaint, however, could just as easily have severed the legal conclusion of negligence from the pleaded fact of the

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43 The factual allegation that the defendant was driving the car that struck the plaintiff, taken as true, increases the likelihood that the defendant drove the car negligently because a person who drove the car might have (albeit not necessarily) driven the car negligently, while, by definition, the defendant who did not drive the car could not possibly have driven the car negligently.

44 See Bell Atlantic, 127 S. Ct. at 1962.
defendant driving a car and dismissed the complaint as conclusory.\textsuperscript{45} In it’s affirmation of Form 9, the Court foreclosed such a possibility.

In conclusion, then, a better way to conceptualize conclusory allegations is that “conclusory complaints” contain conclusory allegations that state legal conclusions as factual allegations but make no other factual allegations in support of the legal conclusion. Accordingly, in this Paper’s model, the \textit{Bell Atlantic} complaint alleging parallel conduct is properly evaluated in sub-category (d)(4), in which the facts alleged, if proven, are consistent with both lawful and unlawful activity.\textsuperscript{46}

\textbf{Sub-category (d)(3)} of the notice pleading framework involves complaints that make specific additional factual allegations, but the facts alleged, even taken as true, do not increase the likelihood even infinitesimally that the defendant behaved unlawfully. For example, a plaintiff might sue a defendant for wearing a green hat on Thursdays. Assume there is no law barring a defendant from wearing a green hat on Thursdays. The allegations in the plaintiff’s complaint, even if true, would alone thus not give rise to any inference of unlawful activity.

\textbf{Sub-category (d)(3)(A)} of the notice pleading framework involves complaints that plead facts that not only do not increase the likelihood that the defendant behaved unlawfully, but that are actually \textit{inconsistent} with recovery. This is a phenomenon to

\textsuperscript{45} Form 9 and the \textit{Bell Atlantic} complaint proceed in nearly identical manners. The complaints allege that the defendants acted in certain manners that, in and of themselves, were not necessarily illegal (driving a car; acting similarly to other companies). The complaints then alleged that the plaintiffs were injured. Finally, the complaints alleged legal conclusions (that, therefore, the defendant must have driven negligently; and that, therefore, defendants must have conspired to prevent competitive entry into their markets). \textit{See Bell Atlantic}, 127 S. Ct. at 1962-63; FED. R. CIV. P. APP. Form 9.

\textsuperscript{46} The Court ultimately analyzed the complaint in what this Paper calls Category 4 of the Paper’s theoretical model. For the purposes of developing that model, however, it was necessary to criticize the Court’s characterization of the complaint’s “conclusory allegations” as grounds for criticism independent of the alleged insufficiency of the factual material pleaded elsewhere in the complaint.
which some courts refer as “pleading [oneself] out of court.”\footnote{See, e.g., Bennett v. Schmidt, 153 F.3d 516, 519 (7th Cir. 1998) (“Litigants may plead themselves out of court by alleging facts that establish defendants' entitlement to prevail.”).} For example, the plaintiff might attach documents to the complaint that directly contradict an allegation in the complaint.\footnote{See Matter of Wade, 969 F.2d 241, 249 (7th Cir. 1992). In \textit{Wade}, the plaintiff attached a letter to his complaint stating that government officials found no records relevant to plaintiff’s Freedom of Information Act request. The plaintiffs attached the letter to demonstrate a government cover-up, as indicated by the presence of another document in which a government agent purportedly indicated that the government was in possession of the documents. The complaint discussed both documents. However, the Court ruled that the document purporting to demonstrate government possession of the documents did no such thing, and the letter denying government possession of the letters served only to contradict the allegations in the complaint. The complaint was accordingly dismissed. \textit{See id.}}

Irrespective of what subsequent experience has shown to be practical, only complaints that may be categorized in sub-category (d)(3)(A) or in an antecedent category of this Paper’s notice pleading framework appear to have been intended by the drafters of the Federal Rules of Civil Procedure to be invalidated under 12(b)(6) motions.\footnote{See Clark, supra note 30, at 977 (stating that the initial intent of the Federal Rules of Civil Procedure was to avoid dismissing deserving claims at the pleading stage); \textit{see also} \textsc{Fed. R. Civ. P.} 12(b)(6) (stating that “failure to state a claim on which relief \textit{can} [not should or plausibly could] be granted” and thus implying that complaints should proceed past the pleading stage when they raised a \textit{possible} inference (i.e. increased the likelihood) of unlawful activity); \textit{cf.} \textsc{Fed. R. Civ. P.} 8(a)(2) (requiring a “short and plain statement of the claim showing that the pleader is entitled to relief”).}

\textbf{Sub-category (d)(4)} of the notice pleading framework involves complaints that allege facts that, taken as true, give rise to inferences of both lawful and unlawful activity and thus might conceivably support a claim for recovery. Within this fourth category, there exists a range of possible complaints: from (A) where the complaint makes factual allegations which, taken as true, only infinitesimally increase the likelihood that the defendant behaved unlawfully, to (B) where the complaint makes factual allegations which, taken as true, increase the likelihood that the defendant behaved unlawfully to the
point just before certainty that the defendant behaved unlawfully. In the antitrust context, parallel conduct is consistent with both lawful (independent action in each defendant’s economic self-interest) and unlawful (illegal agreement) activity.\(^50\) Bell Atlantic is thus properly analyzed in this fourth doctrinal category.

Sub-category (d)(5) of the notice pleading framework involves complaints that allege facts that, taken as true—and disregarding possible affirmative defenses—give rise to an inference only of unlawful activity, i.e. that increase the likelihood that the defendant behaved unlawfully to the point of certainty. For example, a complaint alleging destruction of property might allege that the plaintiff witnessed the defendant setting fire to the plaintiff’s house. Absent an affirmative defense (for example, a third party might have threatened to kill the defendant should he not commit the illegal act), the allegations give rise to an inference only of unlawful activity.

V. THE NORMATIVE DILEMMA

A. The accuracy and economic disadvantages of the pre- and post-Bell Atlantic worlds

Both the pre- and post-Bell Atlantic worlds entail normative advantages and disadvantages in the promotion of accurate outcomes and the avoidance of economic costs.\(^51\)


\(^51\) The importance of the accuracy model is developed infra section V.B. The subsequent argument will be that subsidizing defendants’ discovery costs in meritless suits achieves almost all of the accuracy advantages of the pre- and post-Bell Atlantic world and avoids almost all of the accuracy disadvantages of both worlds and is thus likely to be comparatively advantageous over both worlds. That at some point the economic costs of achieving increased accuracy might be too great is conceded for the purpose of this paper. This paper accordingly does not explore in great depth utilitarian balancing models of procedural
The accuracy problem pre-*Bell Atlantic* was a manifestation of plaintiffs’ *in terrorem* settlement advantage over antitrust defendants, whereby undeserving plaintiffs “held up” faultless defendants who were compelled to settle meritless claims to avoid the substantial discovery costs that attend antitrust suits.\(^{52}\) Thus, while deserving plaintiffs often recovered due to the ease with which they could proceed to discovery and uncover defendants’ wrongdoing (an accurate outcome),\(^{53}\) undeserving plaintiffs were also often reimbursed through blameless defendants’ pre-discovery settlement decisions (an obvious inaccurate outcome).\(^{54}\) Post-*Bell Atlantic*, however, meritorious claims are susceptible to dismissal at the pleading stage because, as is very often the case in an antitrust context characterized by information asymmetries in favor of defendants\(^ {55}\), the only way


\(^{55}\) By “information asymmetries in favor of defendants” I mean situations in which the defendant knows whether it behaved unlawfully and the plaintiff has no idea whether it behaved unlawfully. I assume in this paper that all antitrust cases in which plaintiffs observe and allege no more than parallel conduct are characterized by information asymmetries in favor of defendants.
plaintiffs might obtain information to demonstrate the veracity of their anti-trust claims is through the discovery process itself.\textsuperscript{56} Post-\textit{Bell Atlantic}, defendants might thus commit highway robbery of plaintiff consumers and get away with it so long as there exists no smoking gun. This outcome, whereby the victims of anticompetitive behavior are not reimbursed—either due to dismissal of their complaints at the pleading stage or to deterrence against bringing a claim in the first instance—is a different inaccurate outcome than that created by the pre-\textit{Bell Atlantic} standard, but it is still a very real one.\textsuperscript{57}

It might not be possible to quantify and compare the accuracy advantages and disadvantages of the pre- and post-\textit{Bell Atlantic} worlds. In the pre-\textit{Bell Atlantic} world, it is uncertain – and presumably impossible to uncover – what percentage of settlements were motivated by a blameworthy defendant’s knowledge of its own unlawful anticompetitive behavior instead of a blameless defendant’s desire to avoid substantial discovery costs in a meritless complaint. In the post-\textit{Bell Atlantic} world, it is uncertain – and presumably impossible to uncover, since, by definition, discovery will never take place in cases dismissed at the pleading stage – what percentage of dismissed complaints

\textsuperscript{56} See Scott Dodson, \textit{Pleading Standards After Bell Atlantic Corp. v. Twombly}, 93 VA. L. REV. IN BRIEF 121, 124-25 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=995592 (“Antitrust plaintiffs often do not possess evidence of an agreement to conspire, and requiring such evidence prior to discovery may prevent them from ever having it.”); A. Benjamin Spencer, \textit{Plausibility Pleading}, Washington & Lee Legal Studies Paper No. 2007-17, at 47 (July 30, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003874&download=yes (“Indeed, it is a greater shame that discovery is foreclosed for such complainants in circumstances where the needed supporting facts lie within the exclusive possession of the defendants, which can be the case in antitrust cases lacking direct evidence of a conspiracy.”); Brian Thomas Fitzsimons, \textit{The Injustice of Notice and Heightened Pleading Standards for Antitrust Conspiracy Claims: It is Time to Balance the Scale for Plaintiffs, Defendants, and Society}, 39 RUTGERS L.J. (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=981058 (“[T]he required conspiratorial evidence is often in the hands of the would-be defendant. Thus, without access to the process of discovery, the private party will have little or no hope of bringing a successful claim against the manufacturer, and any potential harmful misconduct will proceed unchecked” (citation omitted)).

\textsuperscript{57} See Dodson, supra note 56, at 124-25; Spencer, supra note 56, at 47; Fitzsimons, supra note 56.
would have uncovered unlawful anticompetitive behavior and thus were dismissed despite their merits. Accordingly, attempts to balance the accuracy advantages and disadvantages of the pre- and post-*Bell Atlantic* worlds are likely to run into considerable difficulties.  

From an economic costs perspective, the problem pre-*Bell Atlantic* was that blameless defendants incurred either substantial early settlement costs or massive discovery costs in cases where they chose not to settle. Conversely, however, the costs of at least some anticompetitive behavior were presumably deterred due to the ease with which plaintiffs could proceed to discovery. Post-*Bell Atlantic*, where complaints are dismissed at the pleading stage, blameless defendants will avoid settlement costs with undeserving plaintiffs as well as the substantial discovery costs incurred when defendants choose not to settle. Companies, however, might be more likely to engage in anticompetitive behavior in the first instance because, given the stricter pleading standard, they are less likely to be held liable. This has an economic cost as well.  

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58 Resolution of this dilemma is not necessary for this Paper’s proposal. Regardless of the absolute level of accuracy gain and loss in the pre- and post-*Bell Atlantic* world, this Paper’s argument is that the Proposal captures almost all of the accuracy gains of both worlds and avoids almost all of the accuracy losses of both worlds and is thus likely to be comparatively advantageous over both worlds.


60 The assumption of this conclusion is that there is an inverse relationship between the leniency of a pleading standard and a potential defendant’s anticompetitive behavior. Were there no antitrust laws—and thus, by definition, an insurmountable pleading standard for antitrust plaintiffs since no antitrust claim would ever state a claim on which relief could be granted, i.e., that the defendant behaved unlawfully—businesses would presumably conspire to engage in anticompetitive behavior all the time. If, by contrast, antitrust laws did exist, and plaintiffs could proceed to discovery on merely conclusory complaints—thereby subjecting businesses to a de facto state of constant surveillance—businesses would presumably never conspire to engage in anticompetitive behavior. Thus, since the pre-*Bell Atlantic* and the Proposal’s pleading standard both allow plaintiffs to proceed past the pleading stage on allegations of parallel conduct alone—and since the post-*Bell Atlantic* standard disallows such plaintiffs from proceeding to discovery—the Proposal avoids any anticompetitive behavior that exists in the post-*Bell Atlantic* world but that would not exist in the pre-*Bell Atlantic* world.
It is unclear whether the economic costs of the pre- and post-*Bell Atlantic* worlds can be quantified and compared. Presumably, one could calculate all defendants’ aggregate discovery costs in antitrust suits, and in most cases it could be delineated whether discovery uncovered evidence of unlawful conduct. Many cases, however—whether due to early settlement or dismissal at the pleading stage—never proceed to discovery and thus do not reflect whether a cost (i.e. an unmeritorious payment) was incurred or not. It seems similarly unquantifiable how much anticompetitive behavior was deterred by the more liberal, pre-*Bell Atlantic* pleading standard. Even if it could be ascertained what percentage of pre-*Bell Atlantic* early settlements occurred in meritless claims and what percentage occurred in meritorious claims (it seems unclear how this could be done), there appears no basis for comparing those costs to the costs of anticompetitive behavior in the post-*Bell Atlantic* world because, due to the stricter pleading standard in the post-*Bell Atlantic* world, it will often remain unknown whether the defendant’s behavior in a case dismissed at the pleading stage constituted unlawful anticompetitive behavior or not.

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61 The cost described in this paper is the cost of discovery or settlement in meritless suits. Paying for discovery or settlement in a case where a defendant behaved unlawfully may be a “cost” in the ordinary sense of the word, but this paper means “cost” in the sense that it is undesirable—such as the costs of anticompetitive behavior or of discovery and settlement in meritless claims—not any expense, such as the costs of defending a meritorious claim. This paper defines “cost” as such on the assumption that it is normatively justified to force defendants to pay for their own defense when they behave unlawfully, but that it is not normatively justified for defendants to impose externalities on society with their unlawful conduct or for blameless defendants to incur discovery costs in meritless suits.
B. Why jurisprudential accuracy gains are normatively desirable

This section of the paper argues that striving for accurate adjudications is normatively justified. In articulating theories of procedural justice, some procedural theorists “focus[] exclusively on accuracy, or the correct application of the law to the facts.” The utopian version of the accuracy model—the ideal of perfect procedural justice—seeks accurate outcomes in all cases. This view:

assumes that the purpose of adjudication is to determine each party’s legal rights accurately. Because rights trump social utility, a deprivation of a right cannot be justified by direct appeal to the aggregate social benefits the offending activity makes possible. Thus, if an erroneous result counts as a deprivation of substantive right, procedures that increased error cannot be justified simply by citing the aggregate benefits to all resulting from reduced litigation and delay costs.

The applicability of this accuracy model to the antitrust context—and, indeed, to any context characterized by information asymmetries where the defendant is the knowledgeable party—is obvious. To paraphrase Bone, a refusal to determine an antitrust plaintiff’s legal rights by dismissing the plaintiff’s complaint at the pleading stage cannot be justified by direct appeal to the aggregate social benefits (i.e. avoidance of defendants’ discovery costs in meritless suits) that the offending activity (i.e. dismissal

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62 See generally Solum, supra note 51, at 244-52 (2004) (describing an accuracy model of procedural justice). Many of the citations in this section of the paper are cited and discussed therein.

63 See Patrick Johnston, Civil Justice Reform: Juggling Between Politics and Perfection, 62 FORDHAM L. REV. 833, 882 n.1 (1994) (“I will use the term ‘procedural justice’ broadly to suggest an assessment of the quality or success of procedural law in providing dispute-resolution participants what they think they are due.”).

64 See Solum, supra note 51, at 244.

65 See id.

at the pleading stage) makes possible.\textsuperscript{67} Similarly, a de facto refusal to determine an antitrust defendant’s legal rights occurs by allowing meritless claims to proceed to discovery because defendants settle meritless cases to avoid high discovery costs.\textsuperscript{68} Because rights trump social utility, deprivation of a defendant’s legal right not to settle meritless claims cannot be justified by direct appeal to the aggregate social benefits of deterred anticompetitive behavior (which, this paper will argue, would occur in any system in which plaintiffs could more easily proceed to discovery).\textsuperscript{69}

The accuracy model thus crystallizes the normative dilemma articulated in section V.A \textit{supra}. The facts that “on the surface, it seems obvious that the system strives for correct outcomes”\textsuperscript{70} and that “[c]ourts frequently articulate the \textit{telos} of the civil litigation system as a ‘search for truth’”\textsuperscript{71} provide helpful starting points for normatively justifying the pursuit of accurate outcomes. Similarly, the facts that the Federal Rules of Civil Procedure are often construed liberally “in the search for truth as ultimate justice”\textsuperscript{72} and that discovery rules in particular “aim to provide the parties with all the relevant evidence for their case”\textsuperscript{73} as a general matter seem to support liberal pleading and discovery rules.

\textsuperscript{67} Cf. \textit{id}. Taken to its logical conclusion, this might mean that there ought be no pleading standard at all, thereby removing all obstacles to the accurate adjudication of an antitrust plaintiff’s legal rights.

\textsuperscript{68} Cf. \textit{id}.

\textsuperscript{69} Cf. \textit{id}.

\textsuperscript{70} See Solum, \textit{supra} note 51, at 244.

\textsuperscript{71} See \textit{id}.

\textsuperscript{72} See Mahler v. Drake, 43 F.R.D. 1, 3 & n.8 (D.S.C. 1967); Solum, \textit{supra} note 51, at 244 & n.159.

\textsuperscript{73} See Solum, \textit{supra} note 51, at 244-45 & n.160; \textit{see, e.g.}, Burke v. N.Y. City Police Dep’t., 115 F.R.D. 220, 225 (S.D.N.Y. 1987) (noting that “the overriding policy is one of disclosure of relevant information in the interest of promoting the search for truth in a federal question case”); Myers v. St. Francis Hosp., 220 A.2d 693, 697 (N.J. Super. Ct. App. Div. 1966) (“The discovery rules are to be construed liberally, for the search for truth in aid of justice is paramount. Concealment and surprise are not to be tolerated in a modern judicial system.”).
They do not, however, offer a great deal of assistance in choosing between two competing systems, both of which are afflicted with different accuracy problems.\textsuperscript{74}

That there exist accuracy advantages and disadvantages in both the pre- and post- \textit{Bell Atlantic} worlds, however, does not foreclose the possibility that a third pleading paradigm could capture all or almost all of the accuracy advantages and avoid all or almost all of the accuracy disadvantages of both worlds.\textsuperscript{75} Were such a paradigm to exist, its enactment and the resulting accuracy gains would be normatively desirable. Specifically in the antitrust context, accurate outcomes reflect entitlements; undeserving plaintiffs do not deserve to extort settlements from blameless defendants,\textsuperscript{76} while blameworthy defendants with information monopolies do not deserve to exploit plaintiffs who lack the information to uncover defendants’ unlawful behavior.\textsuperscript{77} In both cases the stronger party exploits the weaker party to attain that to which the stronger party is not entitled.\textsuperscript{78} In a vacuum, then (i.e. absent prohibitive costs), it seems relatively uncontroversial to strive for accurate outcomes.

Two traditional criticisms of the accuracy model seem surmountable in this context. Solum explicates the first criticism: “Given that civil procedure imposes real

\textsuperscript{74} See \textit{supra} section V.A.

\textsuperscript{75} This paper describes how the Proposal achieves that effect \textit{supra} section VII.A.


\textsuperscript{77} See \textit{Spencer}, \textit{supra} note 56, at 47.

\textsuperscript{78} See \textit{Allen E. Buchanan, Ethics, Efficiency, and the Market} 87 (1985) (“[T]o exploit a person involves the \textit{harmful, merely instrumental utilization} of him or his capacities, for one's own advantage or for the sake of one's own ends.”); \textit{Joel Feinberg, Harmless Wrongdoing} 176-79 (1988); (“[E]xploitation . . . can occur in morally unsavory forms . . . .”) \textit{Robert E. Goodin, Reasons for Welfare} 147 (1988) (“Exploitation of persons consists in . . . wrongful behavior [that violates] the moral norm of \textit{protecting the vulnerable}.”).
costs on litigants and society at large, it is difficult to argue that the smallest marginal gain in accuracy is worth the largest investment of resources. Justice has a price, and there is a point at which that price is not worth paying.\footnote{79} Again, however, there are compelling reasons to believe the cost of subsidizing defendants’ discovery costs in meritless antitrust claims will not be prohibitive.\footnote{80} If this is assumption is incorrect, this Paper’s proposal may well be a failed experiment. But since we do not know for sure the assumption is incorrect, and since there are compelling reasons to believe the assumption is correct, under conditions of uncertainty, we should strive for greater accuracy.

VI. THE SUPREME COURT’S UNCERTAIN RATIONALE IN BELL ATLANTIC

A. The justification for \textit{Bell Atlantic} is difficult to derive from the decision itself

Despite its retirement of \textit{Conley}’s “no set of facts” language and its pronouncement of a new plausibility standard applicable at a minimum in antitrust cases, the \textit{Bell Atlantic} Court refrained from articulating a universal principle to guide future dispositions of defendants’ 12(b)(6) motions. This is reflected in subsequent academic and jurisprudential confusion as to \textit{Bell Atlantic}’s import. The Court did promulgate seeds of an implicit balancing justification in its criticism of the substantial costs to defendants of proceeding to discovery in antitrust cases.\footnote{81} To engage in substantive cost-

\footnote{79} See Solum, supra note 51, at 247.

\footnote{80} See discussion infra section VII.C.

\footnote{81} See \textit{Bell Atlantic}, 127 S. Ct. at 1966-67; see also id. (Stevens, J., dissenting):

Two practical concerns presumably explain the Court's dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions.
benefit analysis, however, the Court would have had to argue something like that a complaint alleging parallel conduct alone was less likely to succeed on the merits than a complaint alleging parallel conduct and additional factual material suggesting unlawful behavior (for example, the argument might say that it is not worth the discovery costs to proceed to discovery when complaints allege parallel conduct alone because of the unlikelihood in those cases that the defendant behaved unlawfully).\textsuperscript{82}

The Court, however, engaged in no substantive analysis as to why a complaint alleging parallel conduct alone would be less likely to succeed on the merits—and whose discovery costs would presumably be less justified—than a complaint alleging parallel conduct and additional factual material suggesting unlawful behavior. Where there exists a defendant’s asymmetrical access to information, as in the antitrust context, neither meritless claims nor deserving claims will plead specific facts beyond parallel conduct (unless, for example, by luck the plaintiff has filed a complaint in the rare case in which she has obtained a smoking gun indicating unlawful activity, such as an audio recording of a backroom deal). It thus appears questionable for courts to utilize the specificity of pleaded facts as an ex ante proxy for the likelihood of uncovering unlawful activity ex post. \textit{Bell Atlantic}, taken to its logical conclusion given its implicit balancing justification, did precisely that. But the questionable nature of the balancing argument

\textsuperscript{82} The argument, of course, could proceed differently. The point is, the argument that the price of a policy is too expensive is usually relational, not absolute. When cost animates a purchaser’s decision not to buy, it is often due to the buyer’s calculation that the benefit he will derive is not worth the price. The Court in \textit{Bell Atlantic} made no mention of the benefits—or lack thereof—of the pre-\textit{Bell Atlantic} pleading standard. Subsequent courts were thus left with no principle to guide their decisions. It is possible that cost might prohibit a prospective purchaser from buying irrespective of her expected benefit of the purchase; for example, the cost might be greater than the prospective purchaser’s total assets. The Court, however, did not make that argument either.
ostensibly implicit in the Court’s reasoning is overshadowed by its lack of an explicit enunciation of a general principle to guide future courts.

B. Subsequent courts and commentators expressed confusion as to Bell Atlantic’s import

Given the uncertainty surrounding the justifications underlying Bell Atlantic, considerable confusion remains as to the character (i.e. the level of factual detail required in civil complaints) and scope (i.e. the categories to which Bell Atlantic applies) of the post-Bell Atlantic pleading standard. It is first unclear what Bell Atlantic required on its own facts. The Court “retired” Conley’s “no set of facts” language—a move consistent with the Court’s stated desire to require enough factual detail to indicate recovery was plausible, not merely possible—but one sentence later wrote that the “accepted pleading standard” is that “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” Similarly, the court disclaimed any intention to require “heightened fact pleading of specifics;” however, there is a range of factual material that might be required within a notice pleading paradigm, and rejecting fact pleading thus does not necessarily foreclose a

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83 See, e.g., Iqbal v. Hasty, 490 F.3d 143, 155-58 (2d Cir. 2007) (describing conflicting signals in Bell Atlantic as to the requisite factual detail for complaints to survive motions to dismiss for failure to state a claim). The discussion in this and the following paragraph partially mirrors the discussion in Iqbal.

84 The lone certainty appears to be that allegations of parallel conduct in antitrust suits, without more, are insufficient to state a claim. See Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1966 (2007).

85 See Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1969 (2007); see also supra note 12 and accompanying discussion.

stricter notice pleading standard.\textsuperscript{87} Moreover, in dissent Justice Stevens “viewed Bell Atlantic as dramatically changing the playing field” in which plaintiffs—at least in antitrust cases—were to plead complaints.\textsuperscript{88}

Considerable confusion also exists as to whether Bell Atlantic applies only to antitrust cases and cases with similarly high discovery costs, or whether the decision applies to all civil complaints.\textsuperscript{89} On one hand, there are ample grounds to conclude that Bell Atlantic’s plausibility standard applies only to antitrust cases and cases with similarly high discovery costs.\textsuperscript{90} First, the Court explicitly approved of Form 9 of the Federal Rules of Civil Procedure, Complaint for Negligence, which merely alleges that the defendant ‘negligently drove a motor vehicle against plaintiff who was then crossing [an identified] highway.’\textsuperscript{91} Second, the Bell Atlantic Court noted in dicta the high costs associated with anti-trust litigation and disapproved of allowing those claims to proceed through an expensive discovery process without meeting a heightened plausibility standard, thereby leaving in question the applicability of Bell Atlantic to cases without those high discovery costs.\textsuperscript{92} Third, a mere two weeks after Bell Atlantic, the Court cited Bell Atlantic in a case with simpler facts and without the potential for the high discovery

\textsuperscript{87} See supra Table 1 and accompanying discussion; see also Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007) (“[W]e . . . require . . . enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”).

\textsuperscript{88} See Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1984-85 (2007) (Stevens, J., dissenting); Dodson, supra note 56, at 126.

\textsuperscript{89} See, e.g., Iqbal v. Hasty, 490 F.3d 143, 155-58 (2d Cir. 2007).

\textsuperscript{90} Id. at 155-58.

\textsuperscript{91} See Bell Atlantic, 127 S. Ct. at 1970 n.10; Fed. R. CIV. P. APP. Form 9.

\textsuperscript{92} See Bell Atlantic, 127 S. Ct. at 1967 & n.6.
costs of an antitrust lawsuit, stating that “[s]pecific facts are not necessary [for a pleading that satisfies Rule 8(a)(2)]; the statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”

On the other hand, there are grounds to conclude that Bell Atlantic applies beyond antitrust cases and cases with high discovery costs. First, nowhere in Bell Atlantic did the Court delineate external parameters limiting its holding. Second, the Court’s subsequent decision in Erickson arguably means very little given the relative simplicity of the facts of that case (compared to Bell Atlantic) and that the plaintiff proceeded pro se, which typically requires a more liberal pleading standard.

This confusion has compelled a broad range of statements as to what level of factual detail Bell Atlantic requires in civil complaints. The responses in the Circuit

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93 See Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007)) (quoting Conley, 355 U.S. at 47) (denying defendant’s 12(b)(6) motion). The complaint in Erickson alleged that a prison doctor improperly discontinued a prisoner’s Hepatitis C medication after finding in a trash can a syringe modified in a manner suggesting illegal drug use; the complaint also alleged the plaintiff’s medical injury. Id. at 2198-99. Of course, the fact that Erickson cited Conley reveals little because the “fair notice” requirement that a complaint plead a claim plus grounds is question-begging, as evidenced by the broad possible range of requisite factual material required within the notice pleading paradigm. See supra Table 1 and accompanying discussion.

94 See Dodson, supra note 56, at 126.

95 See, e.g., id. at 126 (“Rule 8 now requires notice-plus pleading for all cases (though especially for cases with costly discovery). It invites defendants to file motions to dismiss . . . where the complaint does not allege supporting facts, and it suggests that . . . some of those motions should be granted with more regularity.”); Andrée Sophia Blumstein, A Higher Standard: ‘Twombly' Requires More for Notice Pleading, TENN. B.J., Aug. 2007, at 12, 12:

Twombly sends a fairly alarming message to plaintiffs. They should no longer count on bare-bones, conclusory pleadings to get them past a motion to dismiss and into the discovery process with the hope of developing facts to support their claims. Twombly signifies a migration from what has been a fairly liberal standard governing pleadings in civil litigation for the past 50 years. Impelled by a sense that discovery, particularly complex litigation discovery, has been allowed to run amok, the court crafted a stricter standard of review for motions to dismiss, so that the legal viability of claims can be evaluated with greater scrutiny before discovery costs engulf the parties and the courts.
Courts of Appeal have been particularly varied.\textsuperscript{96} \textit{E.E.O.C. v. Concentra Health Services} is the only case after \textit{Bell Atlantic} in which a Circuit Court of Appeals explicitly asserted it would have disposed of the case differently under the pre-\textit{Bell Atlantic} standard than the post-\textit{Bell Atlantic} standard.\textsuperscript{97} Dissimilarly, the Third Circuit held that dismissal of a complaint was premature because competing inferences could be drawn from the facts alleged, and the presence of competing inferences raised a right to relief above a speculative level.\textsuperscript{98} Accordingly, given the breadth of opinion as to \textit{Bell Atlantic}'s

\textsuperscript{96}See, e.g., In re Elevator Antitrust Litigation, No. 06-3128-cv, 2007 WL 2471805, at *6 n.3 (2d Cir. Sept. 4, 2007) (“A narrow view of \textit{Twombly} would have limited its holding to the antitrust context, or perhaps only to Section 1 claims; but we have concluded that \textit{Twombly} affects pleading standards somewhat more broadly” (citation omitted).); \textit{Iqbal v. Hasty}, 490 F.3d 143, 157-58 (2d Cir. 2007) (“[W]e believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim \textit{plausible}.’’); \textit{St. John’s United Church of Christ v. City of Chicago}, No. 05-4418, 2007 WL 2669403, at *7 (7th Cir. Sept. 13, 2007) (“[A] district court should dismiss a complaint if ‘the factual detail . . . [is] so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8’ (citation omitted).”).

\textsuperscript{97}496 F.3d 773 (7th Cir. 2007). In that case, the E.E.O.C. sued on behalf of a man terminated from his place of employment. The plaintiff alleged retaliation in violation of Title VII for reporting a sexual affair between the plaintiff’s supervisor and another employee. Favoring a subordinate with whom one is sexually involved, however, does not alone violate Title VII. \textit{See id. at 775.} The Court noted,

\begin{quote}
Perhaps . . . the reported affair was not consensual but rather the result of quid-pro-quo sexual harassment. Some of our cases suggest that such a possibility is enough to avoid dismissal (citation omitted). . . . Those cases, however, are no longer valid in light of the Supreme Court’s recent rejection of the famous remark in \textit{Conley v. Gibson} from which they derive, that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief” (citation omitted). As the \textit{Bell Atlantic} Court explained, it is not enough for a complaint to \textit{avoid foreclosing} possible bases for relief; it must actually \textit{suggest} that the plaintiff has a right to relief (citation omitted) by providing allegations that “raise a right to relief above the speculative level,” (citation omitted). Horn’s report of a sexual affair is logically consistent with the possibility that the affair was caused by quid-pro-quo sexual harassment, but it does not \textit{suggest} that possibility any more than money changing hands suggests robbery. Dismissal was probably correct.
\end{quote}

\textit{Id. at 777.} \textit{See also Ocwen Loan Servicing, LLC Mortgage Servicing Litig.}, 491 F.3d 638, 649 (7th Cir. 2007) (noting the \textit{Bell Atlantic} Court’s concern over excessive discovery costs in antitrust cases and that while “[t]he present case is not an antitrust case . . . the district court will want to determine whether the complaint contains ‘enough factual matter (taken as true)’ to provide the minimum notice of the plaintiffs’ claim that the Court believes a defendant entitled to.’’).

\textsuperscript{98}See \textit{Stevenson v. Carroll}, 495 F.3d 62, 66 (3d Cir. 2007). In \textit{Stevenson}, inmates sent to a more restrictive prison setting without a hearing alleged substantive and procedural due process violations. The complaint alleged that plaintiffs were given no rationale for the punitive move and described lengthy stays in isolation
meaning in subsequent lower court decisions and academic and practitioners’ 
commentaries, Bell Atlantic’s import seems more susceptible to gradual development by 
common law processes than to instant identification of a universally-applicable pleading 
standard.\textsuperscript{99}

VII. ARGUMENT

A. The Proposal captures almost all of the accuracy advantages of both the pre- 
and post-Bell Atlantic worlds and avoids almost all of the accuracy 
disadvantages of both worlds

This Paper’s proposal helps solve from both angles the accuracy problems 

described in section V.A supra. The proposal captures almost all of the accuracy 
advantages of the pre- and post-Bell Atlantic worlds and avoids almost all of the accuracy 
disadvantages of both worlds. This conclusion rests on the assumption that there exists a 
complete information asymmetry between the plaintiff and the defendant: the defendant

with prisoners with behavioral problems. Id. at 65-66. One prisoner was involved in a violent riot at 
another facility, while two others had been sentenced to death. Id. at 66. The court held that these facts 
supported an inference that the prisoners were impermissibly punished, but that they also supported 
inferences that the first prisoner was transferred for his participation in the riot and that the second two 
two were transferred because they were charged with violent offenses. Id. The court concluded, “the fact that 
such [competing] inferences may be drawn is proof that the dismissal was premature. The appellants have 
met their obligation to provide grounds for their entitlement to relief by presenting factual allegations 
sufficient to raise their right to relief above a speculative level. Id. (citing Bell Atlantic).

Given that Bell Atlantic rejected a complaint alleging parallel conduct even though an inference of 
unlawful activity could be drawn, it remains questionable whether the Bell Atlantic Court would have 
upheld the complaint in Stevenson alleging, without more, a move to a more restrictive facility. The 
inference of an unlawful punitive motive seems no more likely—and, indeed, seems less likely—than the 
inferences of lawful conduct on the part of the warden. One explanation for this seeming incongruity is 
that the court in Stevenson, while not explicitly making this argument, saw a difference between the 
complex facts and high discovery costs of Bell Atlantic and the relatively simple facts and presumably-
lower discovery costs in Stevenson.

\textsuperscript{99} See Owen C. Pell & Kumari A. Nelson, Supreme Court Raises Bar for Pleading Securities Fraud 
Claims, BANKING & FIN. SERVS. POL’Y REP., Aug. 2007, at 12, 13 (“No doubt, these two decisions will 
require a great deal of consideration and interpretation by the lower courts, a process that will take years as 
the courts wrestle with these new pleading and motion to dismiss standards.”).
knows whether or not it behaved unlawfully; the plaintiff does not know whether observed parallel conduct reflects lawful or unlawful defendant behavior.

Under the Proposal, there exists a simple model of plaintiff and defendant settlement behavior where there exist complete information asymmetries and the defendant is the knowledgeable party. There also exists a complication to that model. This Section presents the simple model, explicates the complications to the model, and addresses the complications. The model is depicted in Figure 1.
The simple model of plaintiff and defendant settlement behavior under the Proposal where there exist complete information asymmetries and the defendant is the knowledgeable party rests on the following assumption: if a plaintiff proceeds to discovery in a case in which the defendant behaved unlawfully, the plaintiff will uncover evidence of the defendants’ unlawful behavior that will support the plaintiff’s claim for recovery.\footnote{An objection to this model is addressed \textit{infra} section VII.B.}

The model proceeds as follows: First, under the Proposal, deserving plaintiffs will be compensated for unlawful defendant behavior. If the defendant behaves unlawfully,
the defendant knows that the plaintiff will proceed to discovery based merely on the plaintiff’s allegation of parallel conduct and that the plaintiff will thereby ascertain that the defendant behaved unlawfully. Since it would be irrational for the defendant to proceed to discovery when the defendant knows the plaintiff will uncover evidence of the defendant’s wrongdoing, the defendant will settle prior to discovery.\textsuperscript{101} The Proposal thus achieves the accurate outcome of the pre-\textit{Bell Atlantic} world that, due to the lenient pleading standard allowing deserving plaintiffs to proceed to discovery based on allegations of parallel conduct alone, blameworthy defendants compensate wronged plaintiffs any time the defendant behaves unlawfully. The Proposal accordingly avoids the inaccurate outcome of the post-\textit{Bell Atlantic} world that, due to the stricter pleading standard prohibiting deserving plaintiffs from proceeding to discovery when they allege parallel conduct alone, allows blameworthy defendants to escape unpunished.

Second, the Proposal eliminates plaintiffs’ \textit{in terrorem} settlement advantage over defendants. Blameless defendants will not settle meritless claims when they may proceed to discovery and have their costs reimbursed. This captures the accuracy advantage of the post-\textit{Bell Atlantic} world (undeserving plaintiffs cannot hold up blameless defendants with an allegation of parallel conduct alone because defendants know those claims will not proceed to discovery) and accordingly avoids the corresponding accuracy disadvantage of the pre-\textit{Bell Atlantic} world (due to the lenient pleading standard, undeserving plaintiffs did hold up blameless defendants).

Third, the Proposal mitigates the economic costs problems of both the pre- and post-\textit{Bell Atlantic} worlds. Unlike the pre-\textit{Bell Atlantic} world, meritless claims will not force the defendant to either settle early or incur substantial discovery costs. Unlike the

\textsuperscript{101} An objection to this assumption is addressed \textit{infra} section VII.B.
post-*Bell Atlantic* world, the threat of discovery uncovering the defendant’s unlawful behavior will deter defendants from engaging in unlawful behavior in the first instance.

B. **Complications to the simple model**

Several complications afflict the simple model depicted in Figure 1.

i. **Complication 1: Guilty defendants plus guaranteed discovery might not result in a deserving plaintiff’s victory**

The Paper makes an assumption that, once the plaintiff proceeds to discovery in a suit where the defendant behaved unlawfully, the plaintiff will uncover evidence of the defendant’s unlawful behavior that will support the plaintiff’s claim for recovery. This, of course, might not be true. There might not exist evidence of wrongdoing in the defendant’s discoverable records, and the defendant might know that. Even if evidence of wrongdoing does exist in the defendant’s discoverable records, and even if the defendant knows of the evidence’s existence, the plaintiff might not survive summary judgment for a host of other reasons, and the defendant might accurately predict that. This might diminish the degree to which defendants will settle meritorious claims and to which plaintiffs, in the event that blameworthy defendants thereby decline to settle meritorious claims, will succeed upon proceeding to discovery.
ii. Complication 2: The model’s prediction of settlement dynamics will sometimes be faulty

The second complication is that this Paper’s explication of settlement dynamics might be too simple. The assumption is, under a lenient pleading standard under which an allegation of parallel conduct is sufficient to proceed to discovery, defendants will settle early when liable, and they will not settle when they are not liable. But this might not be true. Even when defendants are liable, defendants might “bluff” and refuse to settle. Plaintiffs incur discovery costs too. Knowing this, defendants—counter to the model’s expectations—will refuse to settle even when they are liable. Blameworthy defendants will thus bluff by not settling in order to compel plaintiffs to drop their lawsuits in cases where the defendant is liable, knowing that the plaintiff might be afraid of proceeding erroneously in a case in which the defendant is not liable and incurring discovery costs. (Remember, the defendant knows whether it is liable; the plaintiff knows nothing.) The critical question, then, is whether plaintiffs will in fact be sufficiently afraid of incurring discovery costs in meritless suits to deter plaintiffs from bringing claims in meritorious suits where the defendant surreptitiously refuses to settle.

iii. An answer to Complications 1 & 2: The proposal likely achieves a comparative accuracy advantage over both the pre- and post-\textit{Bell Atlantic} worlds, irrespective of the absolute accuracy gain.

The Proposal in this Paper does not purport to achieve some absolute level of accuracy. Rather, this Paper argues that the Proposal is likely to entail a substantial comparative accuracy advantage over the pre- and post-\textit{Bell Atlantic} worlds, capturing almost all the accuracy advantages of both worlds and avoiding almost all the accuracy
disadvantages of both worlds. Recall that two complications attend the Paper’s accuracy claims: (1) that, even upon proceeding to discovery, deserving plaintiffs in meritorious cases might not recover; and (2) plaintiffs, knowing that defendants might bluff and refuse to settle meritorious cases—and afraid of incurring their own discovery costs should the case ultimately be meritless—might drop meritorious claims in the face of such fears.

While it is interesting to question how plaintiffs will react in the face of these uncertainties and, similarly, how defendants will exploit the resulting plaintiff behavior, the answers are irrelevant for this Paper’s argument that the Proposal is comparatively advantageous from an accuracy standpoint over both the pre- and post-\textit{Bell Atlantic} worlds. The leniency of the pleading standard has nothing to do with a plaintiff’s anxiety of incurring discovery costs in meritless claims, and it accordingly has nothing to do with defendants’ decisions to exploit that anxiety. How the perceived difficulty of proceeding to discovery impacts a plaintiff’s decision to attempt to proceed to discovery in the first instance is an entirely separate question from whether and how much a plaintiff will be afraid of losing and incurring discovery costs once the plaintiff proceeds to discovery.

Plaintiffs are admittedly likely to sue more under a more lenient standard, but that is because plaintiffs know it is easier to proceed to discovery under the lenient pleading standard, not because they are any less afraid of incurring discovery costs in meritless claims. Thus, whatever the level of deterrence against plaintiffs suing due to plaintiff fears of defendant bluffs and thus of plaintiffs incurring discovery costs in meritless claims, that deterrence—that accuracy disadvantage—exists in identical form under the
Proposal, the pre-*Bell Atlantic* world, and the post-*Bell Atlantic* world. Accordingly, the Proposal achieves a comparative accuracy advantage over the two pleading alternatives.

The Model should accordingly be modified as follows: under the Proposal, an identical percentage of plaintiffs will pursue meritorious claims as did plaintiffs pre-*Bell Atlantic*. This, of course, is subject to its own limitation. The assumption is that plaintiff behavior will be identical under the Proposal to plaintiff behavior pre-*Bell Atlantic* because both standards allowed plaintiffs to proceed to discovery based on allegations of parallel conduct alone. The implication is that the Proposal captured the entirety of the pre-*Bell Atlantic* accuracy advantage: deserving plaintiffs proceeded to discovery and were compensated by blameworthy defendants.

This assumption, however, as well as its derivative implication, appears questionable: pre-*Bell Atlantic*, the Supreme Court promulgated a “concededly rigorous” standard in antitrust cases in which complaints were rarely to be dismissed at the pleading stage. In cases alleging parallel conduct alone, therefore, most courts allowed plaintiffs to proceed to discovery. Only two courts required plaintiffs to plead in

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102 Plaintiff behavior was aggressive, even in the face of incurring their own discovery costs and having no idea whether observed parallel conduct in fact was indicative of unlawful activity, which was why defendants were so up in arms and the *Bell Atlantic* Court felt obligated to toughen the pleading standard.

103 *See* Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746-47 (1976) (holding that the complaint adequately alleged a restraint of trade substantially affecting interstate commerce when the plaintiff alleged that the defendant hospital and others conspired to exclude the plaintiff’s hospital from the defendant’s geographical area):

> We have held that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” . . . And in antitrust cases, where “the proof is largely in the hands of the alleged conspirators” . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly (citations omitted).

104 *See, e.g.*, Twombly v. Bell Atl. Corp., 425 F.3d 99, 114 & n.9 (2d Cir. 2005); In re Tableware Antitrust Litig., 363 F. Supp. 2d 1203, 1206 (N.D. Cal. 2005) (noting that “[i]n considering whether a complaint provides insufficient factual support for a legally viable theory of relief, a useful thought experiment is to ask ‘what [the] plaintiff [could] plead in an amended complaint to repair the defect,’ ” and rejecting the
addition to parallel conduct further factual allegations suggesting unlawful anticompetitive behavior.\textsuperscript{105} Thus, plaintiffs under the Proposal will not behave exactly like plaintiffs pre-\textit{Bell Atlantic} because pre-\textit{Bell Atlantic} not all plaintiffs could proceed to discovery based on allegations of parallel conduct alone.

If anything, however, plaintiffs will be slightly more likely to proceed to discovery under the Proposal because the Proposal universalizes the more lenient pleading standard embraced by most—but not all—courts pre-\textit{Bell Atlantic}.

Accordingly, it is possible that the Proposal enjoys not just an \textit{equivalent} accuracy advantage (compensating deserving plaintiffs) to the pre-\textit{Bell Atlantic} pleading standard, but a \textbf{greater} one. Either way, the Proposal likely enjoys a comparative accuracy advantage over the status quo, capturing almost all of the accuracy advantages of the pre- and post-\textit{Bell Atlantic} worlds and avoiding almost all of the accuracy disadvantages of

\textsuperscript{105} The only two courts that made this argument were the District of Massachusetts and the Southern District of New York. \textit{See, e.g., In re Carbon Black Antitrust Litig.}, No. Civ.A.03-10191-DPW, 2005 WL 102966, at *6 (D. Mass. Jan. 18, 2005) (“Simply claiming a conspiracy by pointing to parallel conduct, is not sufficient to plead a Section 1 case. Parallel conduct is a common and often legitimate phenomenon.” (citation omitted)); \textit{Twombly v. Bell Atlantic Corp.}, 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003) (noting that possible “plus factors include evidence that the parallel behavior would have been against individual defendants’ economic interests absent an agreement, or that defendants possessed a strong common motive to conspire”); Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 256 (S.D.N.Y. 1995) (dismissing the plaintiff’s complaint because “the defendants’ allegedly conspiratorial actions could equally have been prompted by lawful, independent goals which do not constitute a conspiracy”); Yellow Page Solutions, Inc. v. Bell Atl. Yellow Pages Co., No. 00 CIV. 5663, 2001 WL 1468168, at *14 (S.D.N.Y. Nov. 19, 2001) (dismissing a Sherman Act complaint for failure to state a claim because “uniformity does not permit an inference of a conspiracy where the conduct is in each party's individual self-interest”).
both worlds. For the reasons expressed in section V.B supra, this comparative accuracy gain is normatively desirable so long as the Proposal does not entail prohibitive costs.\footnote{Note that the Proposal’s incentive for defendants to never settle meritless claims remains unchanged. Since defendants know they will have their discovery costs reimbursed, they should never settle. Settling meritless claims would presumably not be part of any defendant bluffing strategy, as the bluff only works when defendants do not settle, leaving plaintiffs unsure if proceeding to discovery will force them to incur discovery costs in an ultimately-meritless case.}

C. The extent of the Proposal’s economic cost mitigation

There are compelling reasons to believe that the costs the Proposal eliminates from the status quo directly offset the costs of the Proposal or, alternatively, that even if the costs the Proposal eliminates from the status quo do not directly offset the costs of the Proposal, the cost is unlikely to be so substantial as to make the Proposal’s accuracy gains unworthy of the Proposal’s expense.

The economic costs of the pre-\emph{Bell Atlantic} world were (a) that defendants paid discovery costs in meritless cases where plaintiffs alleged nothing more than parallel conduct yet survived the pleading stage,\footnote{See discussion supra section V.A.} and (b) that some if not all of these costs were passed on to consumers in the form of higher prices.\footnote{See discussion supra section V.A.}

The economic costs of the post-\emph{Bell Atlantic} world are the cost of whatever increased anticompetitive behavior is encouraged by the tougher pleading standard.

The economic costs of the Proposal are (a) the cost of the tax credit and (b) the potential additional cost of defendants’ attorneys running up both their fees and discovery costs.
i. The Proposal eliminates the pre-*Bell Atlantic* costs incurred by defendants who incurred discovery costs in meritless cases.

On the level of aggregate social costs, both the post-*Bell Atlantic* standard and the Proposal eliminate the pre-*Bell Atlantic* costs whereby defendants paid discovery costs in meritless cases in which plaintiffs alleged nothing more than parallel conduct yet survived defendants’ motions to dismiss. Presumably, defendants passed some if not all of those costs on to consumers in the form of higher prices.

The purest form of this assertion is that every dollar defendants incurred paying discovery costs in meritless cases was passed on to consumers in the form of higher prices. Assume, however, that defendants internalize some of the costs of settling or proceeding to discovery in meritless cases and that those defendants pass on the remainder of those costs to consumers in the form of higher prices.

Both the post-*Bell Atlantic* world and the Proposal eliminate in its entirety the aggregate social cost of the pre-*Bell Atlantic* world. In the post-*Bell Atlantic* world, defendants will never pay discovery costs in meritless claims where plaintiffs alleged parallel conduct alone because the pleading standard prevents plaintiffs from proceeding to discovery in those cases. This Paper presumes that defendants are aware of the post-*Bell Atlantic* pleading standard, so defendants in that world will not settle meritless claims either. Similarly, under the Proposal, defendants will not pay discovery costs in meritless cases because the Proposal reimburses defendants’ discovery costs in those cases.

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109 Assuming every business in an industry is subjected to meritless antitrust claims, a price increase by one company would not be discouraged by a refusal to do so by other companies, which would be the case if only one company in a competitive market were subjected to meritless antitrust claims.
Accordingly, regardless of what percentage of settlement/discovery costs incurred in meritless claims is internalized by defendants and what percentage is passed on to consumers in the form of higher prices, both costs, on an aggregate social level, are eliminated by both the post-*Bell Atlantic* world and the Proposal. This is so because both standards eliminate the source of the cost internalization and the price increase: namely, the settlement and discovery costs incurred in meritless cases.

ii. The Proposal avoids the economic cost of the post-*Bell Atlantic* world of increased anti-competitive behavior

Both the pre-*Bell Atlantic* world and the Proposal avoid the economic cost of the post-*Bell Atlantic* world: the additional anticompetitive behavior encouraged by the more lenient post-*Bell Atlantic* pleading standard.\(^{110}\)

iii. The Proposal’s cost to taxpayers of subsidizing defendants’ discovery costs in meritless cases is not likely to be substantial.

The cost to taxpayers of reimbursing defendants’ discovery costs in meritless cases is reduced in two ways. First, on the level of aggregate social costs, every dollar spent by the Proposal is a dollar (a) not spent by defendants when they internalize settlement and discovery costs in meritless claims or (b) not spent by consumers\(^{111}\) when defendants pass on part of those costs in the form of higher prices.

Second, disregarding aggregate social costs, there are four possibilities of who might benefit from the proposal and how much they might benefit:

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\(^{110}\) *See* discussion *supra* note 60.

\(^{111}\) By “consumers” I mean the customers of a company alleged to have engaged in anticompetitive behavior.
(A) Assume that all settlement and discovery costs are passed on to consumers and that consumers represent all taxpayers. If this is the case, the cost of the Proposal (for which all consumers/taxpayers pay) would be directly offset by the elimination of the cost to consumers/taxpayers of defendants’ settlement and discovery costs in the post-
Bell Atlantic world.

(B) Assume that some costs are internalized by defendants and some are passed on to consumers, but again that consumers represent all taxpayers. If this is the case, all consumers/taxpayers will receive some benefit from the elimination of the cost to consumers/taxpayers of defendants’ settlement and discovery costs in the post-Bell Atlantic world, but that benefit will not directly offset the cost of the proposal.

(C) Assume that all settlement and discovery costs are passed on to consumers but that the base of affected consumers is smaller than the base of total taxpayers. If this is the case, two things are true:

1. Consumers will be better off under the proposal because the cost of the Proposal is equal to the higher prices in the post-Bell Atlantic world, but taxpayers who are not consumers and who thus do not suffer the higher prices will share in the cost of the proposal, thereby lessening the burden of the remedy on consumers;

   and (2) taxpayers who are not consumers will be worse off because they do not suffer from higher prices—and thus do not benefit from the Proposal—but they are forced to pay for the proposal.

(D) Assume that some settlement/discovery costs are internalized by defendants and some are passed on to consumers, but that the base of affected consumers is smaller than the base of total taxpayers. If this is the case, two things are true:
(1) It is unclear whether consumers will be better off under the Proposal because, even though taxpayers who are not consumers will share in the cost of the proposal, it is not clear whether the cost of the Proposal to consumers will be greater or less than the discovery/settlement costs passed on to consumers by defendants (which, under this assumption, is only a percentage of the total discovery costs);

and (2) taxpayers who are not consumers will be worse off because they do not suffer from higher prices—and thus do not benefit from the Proposal—but they are forced to pay for the proposal.

Remember, however, that the Proposal deters any anticompetitive behavior that exists in the post-\textit{Bell Atlantic} world but not in the pre-\textit{Bell Atlantic} world. That anticompetitive behavior entails some social cost.\footnote{See \textit{Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters}, 459 U.S. 519, 528 (1983) (citing \textit{Klors, Inc. v. Broadway-Hale Stores, Inc.}, 359 U.S. 207, 210-214 (1959) ("Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect."). For example, there is a social cost for taxpayers who are not consumers in the antitrust context because anticompetitive behavior deters taxpayers who might wish to become consumers from doing so.} Think of these as anticompetitive behavior costs, or ABCs.

If assumption (A) above is true, the cost of the Proposal is directly offset by the elimination of the status quo post-\textit{Bell Atlantic} costs of defendants passing on those costs to taxpayers/consumers in the form of higher prices, and taxpayers/consumers end up better off because of the deterred ABCs.

If assumption (B) is true, even though the cost of the Proposal is not directly offset by the elimination of whatever costs defendants pass on to taxpayers/consumers, the additional amount would either be partially, completely, or more than completely made up for by deterred ABCs.
If assumption (C) is true,

then (1) consumers end up better off (a) because the cost of the proposal is directly offset by the elimination of defendants’ settlement/discovery costs that are all passed on to consumers and (b) because of the deterred ABCs;

and (2) taxpayers who are not consumers who are paying to remedy a problem that does not effect them will have some of that cost disadvantage mitigated by the social benefits of deterred ABCs.

If assumption (D) is true,

then (1) even though it is not clear whether the cost of the Proposal to consumers will be greater or less than the discovery/settlement costs passed on to consumers by defendants, if consumers are placed at a cost disadvantage by the Proposal, the deterred ABCs should partially, completely, or more than completely make up the difference to consumers;

and (2) taxpayers who are not consumers who are paying to remedy a problem that does not effect them will have some of that cost disadvantage mitigated by the social benefits of deterred ABCs.

Assumption (D) probably best represents the real world, which is the worst case scenario in terms of the economic costs of the Proposal for both consumers and taxpayers who are not consumers. For reasons described in section V.B supra, accuracy gains are normatively desirable and are something for which even taxpayers who are not consumers should consider paying. There is no more reason, moreover, to believe the costs of the Proposal will be prohibitive than to believe these costs will not be
prohibitive. Under conditions of uncertainty, we should strive for greater accuracy. If society deems the costs prohibitive, then it may deem the Proposal a failed experiment. But given the possibility of non-prohibitive costs, we should opt for guaranteed accuracy gains until those costs may be determined.

iv. Institutional and other checks should deter defendants’ attorneys from running up fees associated with discovery costs in meritless cases

An additional potential cost of the Proposal is that in meritless cases defendants’ attorneys might run up their fees associated with discovery costs. Knowing that they will have their discovery costs reimbursed in meritless cases, defendant companies will proceed through discovery. But a defendant company’s attorneys, now not having to exercise financial restraint in billing hours and complying with discovery, will run up the costs to obtain a higher bill. This could cause the cost of the Proposal to skyrocket and make the whole plan cost-prohibitive.

There are several reasons to believe, however, that with respect to this potential for abuse, the potential fiscal impact on the Proposal is minimal. First, institutional constraints already exist in relation to statutes under which winning plaintiffs are awarded attorney fees.¹¹³ Cases applying these statutes demonstrate that it is possible to place limits on attorneys’ abilities to unnecessarily run up costs.¹¹⁴ Similarly, many European

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¹¹⁴ See, e.g., Johnson v. Lafayette Fire Fighters Ass’n, 51 F.3d 726, 731-32 (7th Cir. 1995) (awarding fees to plaintiffs in a section 1983 action at the prevailing market rate—which is the opportunity cost of the attorney’s time—even though the plaintiffs were represented by a labor group that provided legal representation free of charge). *Johnson* noted that “the best place to look to determine a reasonable fee [for
countries compel losing parties to pay their adversaries’ costs.\footnote{115} In both cases, there exists some measure of court review of attorney billing practices; for example, the Proposal might require submission of detailed records of hours worked and discovery produced.\footnote{116}

Second, the legislature might declare that if the cost controls on attorneys did not work, and the plan accordingly became cost-prohibitive, then the Proposal would be abandoned as a failed experiment. This might have two effects:

(a) Every defendant will know its attorneys’ billable hours records will be examined by the court. If those hours do not survive court review, defendant companies know they will be denied reimbursement. This provides a similar if not identical incentive for a defendant company to exert pressure on its attorneys to exercise fiscal restraint (compared to a world in which defendants’ discovery costs are not compensated in meritless cases).

\footnote{115} See, e.g., Werner Pfennigstorf, \textit{The European Experience with Attorney Fee Shifting}, 47 L. & CONTEMP. PROBS. 37, 51 (1984) (noting that “limiting application of the fee shifting rule to \underline{necessary costs} has made the cost decision a preferred tool for the promotion of procedural economy . . . .”) (emphasis added).

\footnote{116} Of course, it would be important not to make the review too stringent, or else defendants might predict they will not have their discovery costs reimbursed due to the stringent standard of review and alter their behavior accordingly. The Proposal would in that case lose some of its accuracy-enhancing advantages.
(b) The very fact that the legislature expressed a willingness to abandon the program should it become cost-prohibitive might compel individual defendant companies to exert pressure on their attorneys to control costs because defendant companies know that if costs spiral out of control, defendants will never be reimbursed for their discovery costs in meritless cases.

Third, by hypothesis, the more defense attorneys work, the more time they and their clients spend producing discoverable material. Businesses might not appreciate spending unnecessary time producing windfalls for their lawyers, especially when the cost is the productivity of its own employees.

In any event, there is no more reason to believe these costs would be prohibitively high than to believe they would not be prohibitively high. Under conditions of uncertainty, the Proposal should be enacted to achieve the guaranteed accuracy gain.

VIII. ANSWERS TO SEVERAL OBJECTIONS TO THE PROPOSAL

One objection to the Proposal might limit its accuracy-enhancing effects. It is unclear what percentage of pre-*Bell Atlantic* plaintiff suits were brought in the first instance due to the presence of plaintiffs’ *in terrorem* settlement advantage over defendants in meritless cases. Plaintiff behavior under the proposal will thus differ from plaintiff behavior pre-*Bell Atlantic* to the extent that plaintiffs sued pre-*Bell Atlantic* only in the hopes of eliciting an early settlement from the defendants. This group of plaintiffs may be broken down into two categories: (a) plaintiffs who sued, attempted to elicit a pre-discovery settlement, and dropped the suit upon failure to do so; and (b) plaintiffs
who sued, attempted to elicit a pre-discovery settlement, yet even after failing to elicit a pre-discovery settlement proceeded to discovery anyway. It is only the plaintiffs in (a) that present the accuracy problem for the proposal because it is only those plaintiffs who were deterred from proceeding to discovery by the threat of high discovery costs. Presumably, those plaintiffs in (a) would not bring suit in the first instance under the proposal because the proposal eliminates the *in terrorem* settlement advantage, which was the only incentive for the plaintiffs in (a) to sue. This serves as a limit on this Paper’s analysis because it carves out a subset of plaintiffs who will not behave identically under the Proposal as they did pre-*Bell Atlantic* under an identical pleading standard.

A second objection is that the Proposal’s lenient pleading standard creates incentives for defendants to hide information that might be subject to discovery in a manner that differs from defendant behavior had there existed a more stringent pleading standard. While theoretically attractive, it is unclear what information companies make conducive to discovery post-*Bell Atlantic* that they did not pre-*Bell Atlantic*. (It is not as if companies routinely volunteer internal emails.) More importantly, regardless of the degree to which companies conceal information under a lenient pleading standard, they would do so to the same degree pre-*Bell Atlantic* as under the Proposal. Pre-*Bell Atlantic*, companies did not want information discovered because discovery could lead to high discovery and trial costs. Under the Proposal, companies do not want information discovered because discovery could lead to high discovery costs (unreimbursed, just like pre-*Bell Atlantic*) and trial costs. Given the other advantages of the Proposal over the
pre-*Bell Atlantic* world, the Proposal is likely to enjoy a comparative advantage over that world.

IX. CONCLUSION

Both the pre- and post-*Bell Atlantic* worlds treat promoting the interests of deserving plaintiffs and blameless defendants as mutually exclusive goals. This Proposal attempts to reconcile those differences, but the full extent of the accuracy-economic costs tradeoff must be empirically tested. Under conditions of uncertainty, Congress should enact the Proposal to achieve most of the accuracy gains of both the pre- and post-*Bell Atlantic* worlds at a cost that there is reason to believe will not be substantial. Should the costs become prohibitive, Congress may deem the proposal a failed experiment. However, the opportunity to reconcile the interests of two groups whose wellbeing, until now, seemed diametrically at odds warrants the Proposal’s enactment.