“T’was Three Years After Twombly and All Through the Bar, Not a Plaintiff Was Troubled From Near or From Far.” The Unremarkable Effect of the U.S. Supreme Court’s Re-expressed Pleading Standard in Bell Atlantic Corp. v. Twombly

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“T’was Three Years After Twombly and All Through the Bar, Not a Plaintiff Was Troubled From Near or From Far.” The Unremarkable Effect of the U.S. Supreme Court’s Re-expressed Pleading Standard in Bell Atlantic Corp. v. Twombly

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I. Introduction

War’s over. Wormer dropped the big one.

What? “Over”?

Did you say “over”? 

Nothing’s over until we decide it is!

Was it over when the Germans bombed Pearl Harbor?

Hell, no!

- Germans?
- Forget it, he’s rolling.

And it ain’t over now.

‘Cause when the going gets tough . . .

(Patriotic instrumental music)

. . . the tough get going! Who’s with me?

Let’s go! Come on!1

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1 Animal House (Universal 1978).
Following the U.S. Supreme Court’s *Bell Atlantic Corp. v. Twombly*\(^2\) decision, many commentators predicted a similar fate for antitrust and other civil complainants as suffered by Mr. Blutarski’s famed (or infamous) Delta House. Considerable commentary quickly sprung up alleging and describing the Court’s new and restrictive pleading standard under Federal Rule of Civil Procedure 8—a standard that these commentators insisted meant likely, if not certain, early doom for countless antitrust and other lawsuits.\(^3\)

But *Twombly* actually did nothing to eviscerate, much less affect, Rule 8’s longstanding pleading pronouncement. To the contrary, it reaffirmed it. For this reason, *Twombly* is only remarkable for its unremarkability, which unremarkability some seek to transform into something it is not. Because despite the harsh sheen certain that some assign to *Twombly*, its language—coupled with the Court’s pre-existing pleading principles—simply don’t support such a restrictive and repressive interpretation.

Part II of this Article will describe Rule 8’s origin and will explain its intended application. Part III will chronicle Rule 8’s history of restriction and misapplication and the Supreme Court’s contribution to ensuring Rule 8’s treatment in a manner consistent with its drafters’ intentions. Part IV will then examine *Twombly* and will focus on the Court’s consideration, expression, and application of Rule 8’s pleading standard in more modern circumstances. Finally, Part V will explain how the *Twombly* Court—consistent with the Court’s longstanding goal of preventing Rule 8’s misapplication—reaffirmed the intention of Rule 8’s drafters by re-expressing Rule 8’s liberal pleading requirements.


II. Rule 8 and Its History

Supremely simple Rule 8 requires merely a “short and plain statement of the claim showing that the pleader is entitled to relief.” Described as the “jewel in the crown of the Federal Rules,” Rule 8’s drafters intended it to resolve past pleading abuses at common law and under the codes.

A. Common-Law Pleading and Its Complexity

Common-law pleading was originally oral, but it evolved over the centuries to embrace increasingly detailed written requirements. During this same time, forms of action were developing, which actions’ limitations created pleading difficulties. For example, to prevail at common law a plaintiff had to choose the right form of action. The plaintiff’s lawyer then had to exchange pleadings with the defendant in an exercise designed ultimately to generate a single issue for resolution. By proceeding through

6 Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 444 (1986) (“After extensive debate, the Rules were amended in 1980 and 1983 to promote active case management through pretrial conferences that could ‘formulate issues’ and eliminate ‘frivolous claims and defenses’ and control the conduct and content of discovery.”). See also, Christopher M. Fairman, Heightened Pleading, 81 Tex. L. Rev. 551, 554 (2002) (Federal Rule 8 was “designed to rectify the pleading abuses of the past.”).
7 Marcus, supra n.6 at 437.
8 Id. See also Charles E. Clark, Simplified Pleading, 2 F.R.D. 456, 458 (1943) (“It is well known that the development of the jury system in England led to a substitution of formal written demands and answers in place of the earlier simple oral statements of counsel in response to the questions of the court . . . .”); 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1202 (2d ed. 1990) (describing common law’s belief in objectives and functions of pleadings).
9 Marcus, supra n.6 at 437.
10 Id.
11 Id. See also Ettie Ward, The Future of Pleading in the Federal System: Debating the Impact of Bell Atlantic v. Twombly: The After-Shocks of Twombly: Will We “Notice” Pleading Changes?, 82 St. John’s L. Rev. 893, 896 (2008) (“Common law practice centered on successive rounds of pleadings in the expectation that eventually the dispute would be reduced to a single issue of law or fact that would dispose of the case.”).
numerous pleading stages—denial, avoidance, or demurrer—the parties would reduce the pleadings down to a solitary, dispositive factual or legal issue. In this manner, common-law pleadings were slow, expensive, and unfeasible, and trial became largely an afterthought to the pleading process.

On account of the gamesmanship that common-law pleading engendered, it became necessary to employ highly stylized and technical pleading formulations known as “color,” even when presenting the simplest disputes. Having scant relationship to the underlying facts, color told defendants little about plaintiffs’ claims. But this was of no matter since even with limited, if any, discovery defendants often prevailed after plaintiffs bungled the common law’s hyper-technical pleadings requirements.

As pleading practice prospered, decisions on the merits became more and more infrequent. What had begun as a seemingly workable pleading construct turned into a “wonderfully slow, expensive, and unworkable” plan. Common-law pleading caused protracted disputes “by lawyers anxious to get admissions without committing themselves”; spawned wide-ranging dissatisfaction; and ultimately led to pleading reform.

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13 Fairman, supra n.6 at 554-55. See also Comment, Civil Procedure: Medical Malpractice Gets Eerie: The Erie Implications of a Heightened Pleading Burden in Oklahoma, 57 Okla. L. Rev. 977, 998 (2004) (“Common law pleadings were notoriously ‘slow, expensive, and unworkable’ because litigants were forced through various stages of pleadings that courts ultimately relied upon to determine the outcome of the suit.”).
14 Marcus, supra n.6 at 437
15 Id.
16 Id.
17 Id.
18 Id. See also F. James & G. Hazard, Civil Procedure § 3.2, at 132 (3d ed. 1985).
20 Fairman, supra n.6 at 555. See also Clark, supra n.8 at 458.
21 Fairman, supra n.6 at 555.
B. The Field Code – Not Such a Dream

In 1848—and at the same time as similar reforms were occurring in England—David Dudley Field was spearheading pleading reforms in New York. By drafting the New York Code—or “Field Code” as it became known—Field endeavored to eliminate decisions based on technicalities. Instead of stylized language, the Field Code required that complaints contain “[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.”

But while reformers hailed Field’s effort, his Code’s high hopes went unfulfilled. Instead, lawyers encountered a “quagmire of unresolvable disputes as to whether allegations were ultimate fact, evidence, or conclusions—a categorization critical to whether the allegation was proper under the Code.”

According to the Code, “[o]nly ultimate facts satisfied [its] pleading standard; evidentiary facts and conclusions within a pleading could not state a claim.” It was oftentimes extremely difficult to distinguish between facts and conclusions since so many legal concepts—like agreement, ownership, and exception—blend historical fact and legal conclusion. As a result, disputes arose over whether allegations were evidence, facts, or legal conclusions, and the Field Code rapidly devolved into a pleading system that rivaled the waste.
inefficiency, and confusion of the common-law pleading system that it was designed to correct.  

C. Finally, the 1938 Federal Rules

The origin of the 1938 Federal Rules dates back to the American Bar Association’s 29th Annual Meeting in St. Paul, Minnesota on August 29, 1906. Roscoe Pound, the University of Nebraska Law School’s progressive, young dean, initiated matters with his blistering speech, *The Causes of Popular Dissatisfaction with the Administration of Justice*. The purpose of Pound’s remarks was to recount the “real and serious dissatisfaction with courts and lack of respect for law which exist[ed] in the United States . . . .” He described procedural and organizational problems as “the most efficient causes of dissatisfaction with the present administration of justice in America” and branded the American court system as “archaic,” with procedure causing “uncertainty, delay, and expense.”

Pound described multiple bases for his dissatisfaction with the American legal system, but he emphasized his displeasure with “our American judicial organization and

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31 Fairman, supra n.6 at 555-56. See also Marcus, supra n.6 at 438 (“Pleading decisions caused increasing difficulty for even the most common claims. For example, the detail needed to allege negligence was regularly recalibrated. Such fencing among lawyers led to stagnation that interfered with resolution of disputes on their merits.” (footnote omitted)); C. Clark, Handbook of the Law of Code Pleading § 47, at 300-03 (2d ed. 1947) (observing that the requirements for pleading negligence under the Field Code were more demanding than under common law).
33 Walker, supra n.32 at 93. See also Roscoe Pound, Transactions of the Twenty-Ninth Annual Meeting of the American Bar Association, 29 A.B.A. Rep. 395 (1906).
34 Pound, supra n.33 at 399.
35 Id. at 408.
36 Id.
procedure."\(^{37}\) Although Pound’s comments marked the origin of the 1938 Rules,\(^{38}\) his recommended enhancements were slow in coming.\(^{39}\) Only after countless committees, protracted debates, and largely ineffective administrative efforts\(^{40}\) did Congress finally approve the 1934 Rules Enabling Act.\(^{41}\) The Act, which was all but identical to an earlier ABA proposal\(^{42}\) provided Congress the authority necessary for passing the 1938 Rules.\(^{43}\)

After a year of accomplishing very little, in 1935 the Supreme Court appointed an advisory committee to assist in developing a uniform federal procedure.\(^{44}\) The Committee’s reporter was Yale Law School dean, Charles Clark.\(^{45}\) In addition to Clark and Committee Chairman, former Hoover-administration attorney general and Coolidge-administration solicitor general William Mitchell, the Committee included eight practicing business attorneys and four senior academics from prominent law schools.\(^{46}\)

Following two years of meetings, the Committee submitted its final report to the Supreme Court on April 30, 1937.\(^{47}\) The Court adopted the report with only minor changes\(^{48}\) and forwarded it to Attorney General Homer Cummings.\(^{49}\) Cummings then

\(^{37}\) Id. at 397.

\(^{38}\) Walker, supra n.32 at 93.

\(^{39}\) Id. at 95.

\(^{40}\) Id.


\(^{42}\) Walker, supra n.32 at 96. \textit{See also} Burbank, supra n.41 at 1099.


\(^{45}\) Walker, supra n.32 at 96.

\(^{46}\) Id. at 97.

\(^{47}\) Id.

\(^{48}\) 302 U.S. 783 (1938).

\(^{49}\) Walker, supra n.32 at 97.
sent it to Congress,\textsuperscript{50} which approved the report by inaction\textsuperscript{51} thus creating the Federal  
Rules of Civil Procedure. Clark described the Rules as “a significant reform, involving 
the due subordination of civil procedure to the ends of substantive justice.”\textsuperscript{52}

Clark intended the Rules to serve four key functions: (1) Provide notice of a 
claim of defense; (2) state facts; (3) narrow issues for litigation; and (4) allow for the 
quick disposition of sham claims and defenses.\textsuperscript{53} Unconvinced that pleadings could 
perform these functions, Clark initially advocated eliminating pleadings altogether.\textsuperscript{54} But 
while Clark’s view did not prevail, the Committee carefully drafted Rule 8 to avoid the 
highly charged phrases “fact,” “conclusion,” and “cause of action.”\textsuperscript{55} Instead, a party 
needed only plead a “short and plain statement of a claim” entitling the pleader to relief.\textsuperscript{56}

To emphasize Rule 8’s simplicity, the Committee included a series of form 
complaints that by definition satisfied this standard.\textsuperscript{57} Form 9, for example, reversed 
decades of pleading-related litigation by declaring appropriate the allegation that 
“defendant negligently drove a motor vehicle against plaintiff.”\textsuperscript{58} Clark’s subtext for this 
simplicity was his aversion to the use of a “mere formal motion”\textsuperscript{59} to challenge the 
sufficiency of a plaintiff’s pleadings because it “really decides nothing of substance.”\textsuperscript{60}

\textsuperscript{51} Walker, supra n.32 at 97.
\textsuperscript{52} Charles E. Clark, The Handmaid of Justice, 23 Wash. Univ. L.Q. 297, 297 (1938).
\textsuperscript{53} Wright & Miller, supra n.8 at § 1202 (describing the Rules’ four key functions). See also Fairman, supra 
n.6 at 556.
\textsuperscript{54} Fairman, supra n.6 at 556; Marcus, supra n.6 at 439.
\textsuperscript{55} Fairman, supra n.6 at 556; Marcus, supra n.6 at 439.
\textsuperscript{56} Fed. R. Civ. P. 8(a)(2).
\textsuperscript{57} Id. at 84 (“The forms contained in the Appendix of Forms are sufficient under the rules and are intended 
to indicate the simplicity and brevity of statement which the rules contemplate.”).
\textsuperscript{58} Form 9, Appendix of Forms, Fed. R. Civ. P.; Marcus, supra n.6 at 439.
\textsuperscript{59} Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (“[H]e has stated enough to withstand a mere 
formal motion, directed only to the face of the complaint, and that here is another instance of judicial haste 
which in the long run makes waste.”); Marcus, supra n.6 at 439.
\textsuperscript{60} Proceedings of the Institute at Washington, D.C. and of the Symposium at New York City 54 (1938).
Indeed, Clark’s protégé, Professor Moore, later explained in his treatise that pleadings need “do little more than indicate generally the type of litigation that is involved.”

Clark and his fellow drafters’ generous pleading standard stemmed from their belief that litigants should have their day in court. This belief served as the basis for why they designed the Rules to encourage determination on the merits, not on the pleadings:

The notice in mind is rather that of the general nature of the case and the circumstances or events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or transaction to be litigated—but not of details which he should ascertain for himself in preparing his defense—and to tell the court of the broad outlines of the case.

As the Rules were intended primarily to provide notice, they included alternative methods for fulfilling non-notice functions. The Rules’ expanded discovery methods allowed litigants to get to the merits of the case, such as by developing facts through discovery; narrowing issues through discovery or partial summary judgment; and eliminating meritless claims through summary judgment. When considered alongside

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64 Clark, supra n.8 at 460-61.

65 Fairman, supra n.6 at 556. See also Wright & Miller, supra n.8 at § 1202.

66 Marcus, supra n.6 at 440.


the other Rules, it becomes evident that Rule 8 “operates as a keystone to an entire procedural system”70 where the Rule’s sole intended purpose is to provide notice.71

III. Rule 8’s Misapplication and the Return to Sensibility

A. Reaffirming Rule 8’s Liberal Application

Rule 8 was hardly universally accepted, and its forgiving underpinnings failed to avoid harsh criticism.72 This focus of this disparagement concerned whether Rule 8’s requirement that a pleader must allege his or her entitlement to relief also meant he or she must allege a prima facie case.73 Believing so, the Ninth Circuit Judicial Conference adopted a resolution supporting an amendment to Rule 8(a)(2) that required a pleader’s short, plain statement also to “contain the facts constituting a cause of action.”74 The primary decision fueling this effort was now-Judge Clark’s own ruling in Dioguardi v. Dunning.75

*Dioguardi* involved a payment dispute that resulted in the Collector of Customs’ delay in releasing John Dioguardi’s medicinal tonics.76 After holding Dioguardi’s tonics for a year, the Collector finally sold them at auction.77 Dioguardi filed a *pro se*

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70 Fairman, supra n.6 at 556-57. *See also* Wright & Miller, supra n.8 at § 1202 (“Rule 8 is the keystone of the system of pleading embodied in the Federal rules of Civil Procedure.”).
71 Fairman, supra n.6 at 557. *See also* Wright & Miller, supra n.8 at § 1202 (“[T]he only function left exclusively to the pleadings by the federal rules is that of giving notice . . . .”).
72 See Fairman, supra n.6 at 558; Wright, supra n.12 at 473 (posing that lawyers skilled in old pleading style may have fueled Rule 8’s criticism).
73 See Wright & Miller, supra n.8 at § 1202 (discussing difficulty in establishing what constituted a claim showing an entitlement to relief).
74 Fairman, supra n.6 at 558. *See also* Claim or Cause of Action—A discussion on the need for amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure, 13 F.R.D. 253, 254 (1953) (committee’s report that there “[s]hould be a pleading requirement in civil actions in the Federal Courts that a complaint must allege facts sufficient to constitute a cause of action”). Some commentators have even described the Ninth Circuit’s effort as a “guerilla attack” on the Federal Rules. Richard H. Field, et al., Civil Procedure 524 (7th ed. 1997).
75 139 F.2d 774 (2d Cir. 1944).
76 *Id.* at 775.
77 *Id.*
complaint alleging that the Collector had “sold [his] merchandise to another bidder with my [Dioguardi’s] price of $110, and not of his [the Collector’s] price of $120,” and that “three weeks before the sale, two cases, of 19 bottles each case, disappeared.”

The U.S. moved to dismiss Dioguardi’s complaint for failure to allege facts sufficient to state a cause of action. Following the district court’s order granting Dioguardi leave to amend, he filed an amended complaint conveying “obviously heightened conviction,” but the district court again dismissed it. On appeal, Judge Clark writing for the Second Circuit, reversed explaining, “[h]owever inartistically they may be stated, the plaintiff has disclosed his claims that the collector has converted or otherwise done away with two of his cases of medicinal tonics and has sold the rest in a manner incompatible with the public auction . . . .” Judge Clark added that “[u]nder the new rules of civil procedure, there is no pleading requirement of stating ‘facts sufficient to constitute a cause of action,’ but only that there be ‘a short and plain statement of the claim showing the pleader is entitled to relief . . . .’”

Given Rule 8’s purpose, the Second Circuit’s decision stood to reason. Had the court affirmed the district court’s dismissal order, Dioguardi would have never had the chance to demonstrate his claim’s merits, which may well have proven true. Because the U.S. moved to dismiss rather than moved for summary judgment, the

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78 Id. at 774.
79 Id.
80 Id.
81 Id. at 775.
82 Id.
83 Id.
84 Id. (quoting Fed. R. Civ. P. 8(a)(2)).
85 See Wright, supra n.12 at 474.
86 See Fairman, supra n.6 at 559.
district court’s decision short-circuited any possibility of honest factual resolution. 87

But the Second Circuit’s reversal eventually generated tremendous controversy as on
remand Dioguardi failed to prove his claim, and the district court entered judgment for
the U.S. 88  Given the Second Circuit’s affirmance, 89 Dioguardi became a flashpoint for
critics who supported strict pleading rules as a way to conserve judicial resources. 90

Nevertheless, following Dioguardi the Advisory Committee rejected the Ninth
Circuit’s proposal amendment and instead drafted an extensive note rejecting Rule 8’s
criticism. 91  The Committee’s note explains that, contrary to any criticism, Rule 8 does
not contemplate a statement of facts and circumstances supporting a plaintiff’s claim. 92
The Committee further rejected the idea that Dioguardi had approved filing a complaint
alleging insufficient information to disclose a basis for relief. 93  Rather, the Committee
expressed its belief that Dioguardi’s amended complaint stated sufficient facts, which the
court properly construed as sufficient to sustain his complaint. 94  As a result—and
contrary to critics’ insistence—the Committee expressed that Rule 8 required no
amendment:

The rule adequately sets forth the characteristics of good pleading; does
away with the confusion resulting from the use of “facts” and “causes of
action” and requires the pleader to disclose adequate information as the
basis of his claim for relief as distinguished from a bare averment that he
wants relief and is entitled to it. 95

87 See id.
88 Dioguardi v. Durning, 151 F.2d 501, 501-02 (2d Cir. 1945).
89 Id. at 502.
90 See Fairman, supra n.6 at 559.
91 See Wright & Miller, supra n.8 at § 1201; Fairman, supra n.6 at 560.
92 See 12A Charles Alan Wright et al., Federal Practice and Procedure, Appendix F at 777 (2002); Fairman,
supra n.6 at 560.
93 See Wright, supra n.8 at § 1201; Fairman, supra n.6 at 560.
94 Fairman, supra n.6 at 560.
95 Id.
In this manner, the drafters reaffirmed their goal of Rule 8’s liberal application and articulated the level of detail (or not) necessary for pleading a sustainable complaint.

B. Reaffirmation at the Highest Level

Although the Supreme Court never adopted the Committee’s proposed final report,\(^{96}\) in 1957 the Court quelled any uncertainty regarding Rule 8’s liberal application when it decided *Conley v. Gibson*.\(^ {97}\)

*Conley* involved a class-action lawsuit brought by African American railway-union members against its union because the union had allegedly breached its duty to fairly represent its members.\(^ {98}\) According to plaintiffs’ complaint, the railroad claimed to abolish 45 African American union members’ jobs only to refill them with white workers.\(^ {99}\) Despite plaintiffs’ insistence, the union had failed to protect plaintiffs against the railroad’s discrimination or to provide them comparable protection to the union’s white members.\(^ {100}\) Among other responses to plaintiffs’ complaint, the union moved to dismiss it for failure to state a claim upon which relief could be granted since it didn’t describe specific facts detailing the union’s alleged discrimination.\(^ {101}\) The district court granted the union’s motion and the Fifth Circuit affirmed.\(^ {102}\)

But the Supreme Court unanimously reversed, explaining that plaintiffs’ complaint complied with Rule 8 liberal pleading standard.\(^ {103}\) The Court first declared that a court cannot dismiss a complaint for failure to state a claim unless “it appears

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\(^ {96}\) Wright & Miller, supra n.8 at § 1201; Fairman, supra n.6 at 560. *See* supra n.47.

\(^ {97}\) 355 U.S. 41 (1957).

\(^ {98}\) *Id.* at 42.

\(^ {99}\) *Id.* at 43.

\(^ {100}\) *Id.*

\(^ {101}\) *Id.* at 47.

\(^ {102}\) *Id.* at 41.

\(^ {103}\) *Id.* at 48.
beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

And because the allegations in plaintiffs’ complaint, if true, would have constituted a breach of the union’s duty of fair representation owed its members, the Court ruled that the district court should not have dismissed plaintiffs’ complaint.

The Court next reaffirmed the factual detail necessary to properly plead a cause of action under Rule 8:

The Federal Rules do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is “a short and plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.

To this end, the Court reminded that the Rules’ illustrative forms easily demonstrate this liberal standard, and that “simplified ‘notice’ pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules.”

The Court further rejected the notion that the Rules considered pleading as a skillful game where the slightest mistake could doom a plaintiff’s complaint and instead embraced Rule 8’s approach to facilitate decisions on the merits. With the Court’s holding, the common law and Field Code’s rigorous symmetry and fact-intensive requirements became a thing of the past . . . or so it seemed.

104 Id. at 45-46.
105 Id. at 46.
106 Id. at 47.
107 Id. at 47-48.
108 Id. at 48.
109 Fairman, supra n.6 at 562. See also Wright, supra n.12 at 469.
C. Lower Courts’ Expansion of Rule 9’s Particularity Requirement and the Supreme Court’s Accompanying Need to Reaffirm Rule 8’s Forgiving Standard

Rule 8 does not contemplate situations requiring enhanced pleading particularity because that’s Rule 9’s job. According to Rule 9, “the circumstances constituting fraud or mistake shall be stated with particularity.”\(^\text{110}\) This heightened pleading requirement is based in the belief that since allegations of fraud and moral turpitude can cause inordinate damage to a defendant’s reputation, plaintiffs should not be permitted to generally plead such allegations but rather must describe specific facts constituting defendant’s alleged fraud.\(^\text{111}\)

Despite Conley’s apparent clarity, lower courts began raising the pleadings bar by imposing Rule 9’s heightened standard on cases involving securities fraud, conspiracy, and civil rights.\(^\text{112}\) For instance, in Elliot v. Perez,\(^\text{113}\) the Fifth Circuit adopted a heightened pleading standard for cases involving government actors serving in their individual capacity, reasoning that immunity from liability also provided protection against burdensome discovery and litigation.\(^\text{114}\) To ensure this protection, the Fifth Circuit required a plaintiff’s complaint to “state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity.”\(^\text{115}\) The Fifth Circuit extended this

\(^{110}\) Fed. R. Civ. P. 9(b). Despite Rule 9’s application to situations involving “mistake,” scant cases exist invoking this basis.

\(^{111}\) See Jack H. Friedenthal, Mary Kay Kane, & Arthur R. Miller, Civil Procedure 5.8, at 288 (3d ed. 1999) (explaining that common law disfavored fraud claims because they involved allegations of immorality); Ross v. A.H. Robbins, Co., 607 F.2d 545, 557 (2d Cir. 1979) (noting that Rule 9(b) evolves from interest in protecting defendants from harm to reputation or goodwill when charged with serious misconduct).

\(^{112}\) Marcus, supra n.6 at 447.

\(^{113}\) 751 F.2d 1472 (5th Cir. 1985).

\(^{114}\) Id. at 1479.

\(^{115}\) Id. at 1473.
holding in *Palmer v. City of San Antonio*,\(^{116}\) where it explained that its heightened pleading standard applied not only to cases involving immunity to public officials but to all § 1983 cases.\(^{117}\)

The Supreme Court seemed to have the Fifth Circuit and others’ retrenchment in mind when it accepted *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*.\(^{118}\) *Leatherman* involved two separate incidences of police misconduct related to executing search warrants by local law-enforcement officers.\(^{119}\) The first incident concerned Charlene Leatherman, her son Travis, and her two dogs, Shakespeare and Ninja.\(^{120}\) While driving in Forth Worth, police abruptly stopped and surrounded the Leatherman’s car, shouting instructions and threatening to shoot them.\(^{121}\) The officers informed Leatherman that other law enforcement officers were in the process of searching her residence and that the search team had shot and killed her two dogs.\(^{122}\) Leatherman and Travis returned home to find Shakespeare lying dead from gunshots to the leg, stomach, and head.\(^{123}\) Ninja was lying in a pool of blood on the bed in the master bedroom, shot in the head at close range with brain matter splattered across the bed, against the wall, and on the floor.\(^{124}\) Although the officers found nothing in the home relevant to their investigation, rather than departing they lounged on the

\(^{116}\) 810 F.2d 514 (5th Cir. 1987).
\(^{117}\) Id. at 516-17.
\(^{118}\) 507 U.S. 163 (1993).
\(^{119}\) Id. at 164-65.
\(^{120}\) Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 954 F.2d 1054, 1055 (5th Cir. 1992).
\(^{121}\) Id.
\(^{122}\) Id.
\(^{123}\) Id.
\(^{124}\) Id. at 1055-56.
Leatherman’s front lawn “for over an hour, drinking, smoking, talking, and laughing, apparently celebrating their seemingly unbridled power.”

The second incident concerned a police raid of Gerald Andert’s home pursuant to a search warrant. Police obtained the warrant on the basis that they had smelled odors associated with the manufacture of amphetamines emanating from Andert’s home. At the time of the raid, Andert was a 64-year old grandfather at home with his family and was mourning his wife’s death of his wife following her three-year battle with cancer. Without knocking or identifying themselves, the officers burst into Andert’s home and, without provocation, began beating him. After an officer first knocked Andert backwards, Andert received two swift blows to the head from a club. During this time, other officers, shouted obscenities at Andert’s family members, who remained unaware of the intruders’ identities. At gunpoint, the officers forced the family to lie face down on the floor, continuing to insult them and threatening them harm. After searching the residence for one and one-half hours and finding nothing related to narcotics activity, the officers left.

Plaintiffs sued several municipalities alleging failure to properly train officers in executing search warrants and confronting dogs. The district court believed the complaint lacked the required particularization, describing it as “blunderbuss in character and describe[ing] only isolated incidents ‘decked out with general claims of inadequate

125 Id. at 1056.
126 Id.
127 Id.
128 Id.
129 Id.
130 Id.
131 Id.
132 Id.
133 Id.
134 Id.
Three defendants argued that plaintiffs’ complaint failed to adequately plead facts under the Fifth Circuit’s heightened pleading standard as expressed in *Elliot* and *Palmer*, and the district court dismissed plaintiffs’ claims against all defendants.\(^\text{136}\)

On appeal to the Fifth Circuit, plaintiffs did not argue that their complaints met the Fifth Circuit’s heightened standard; rather, they encouraged the court to abolish it.\(^\text{137}\) But constrained by *Elliot* and *Palmer* and considering that even plaintiffs admitted their complaint fell short of this standard, the Fifth Circuit declined:

> [W]e, as a panel of this court, must politely decline [plaintiffs’] invitation to reexamine the wisdom of this circuit’s heightened pleading requirement. Until such a time as the en banc court sees fit to reconsider *Elliott* or, more specifically, *Palmer*, and in the absence of an intervening Supreme Court decision undermining our settled precedent, I find myself constrained to obey the command of the heightened pleading requirement.\(^\text{138}\)

The Supreme Court accepted the Fifth Circuit’s invitation to consider its heightened pleading standard. In a mere five-page opinion, the court unanimously struck down the Fifth Circuit’s restrictive interpretation, explaining that “it is impossible to square the ‘heightened pleading standard’ applied by the Fifth Circuit in this case with the liberal system of ‘notice pleading’ set up by the Federal Rules.”\(^\text{139}\) The Court added that the Rules required more particularized pleading in two discrete instances—fraud and mistake under Rule 9—and that Rule 8(a)(2) required merely that a complaint include “a

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\(^{135}\) *Id.*

\(^{136}\) Leatherman, 954 F.2d at 1057.

\(^{137}\) *Id.* at 1058.

\(^{138}\) *Id.* at 1061 (Goldberg, J., specially concurring).

\(^{139}\) Leatherman, 507 U.S. at 168.
short and plain statement of the claim showing that the pleader is entitled to relief.”140

The Court concluded by repeating what it expressed in Conley:

The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is “a short and plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.141

Accordingly, the Court reversed the order dismissing plaintiffs’ complaint, with Justice Rehnquist adding this final admonition:

[I]f Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.142

The Court’s clear reaffirmation would have seemed to suggest an end to lower courts’ heightened-pleading efforts, but more challenges lay ahead.

D. Déjà Vu All Over Again

Since history tends to repeat itself, perhaps it should come as no surprise that lower courts continued applying heightened pleading standards even after Leatherman.143

140 Id.
141 Id. (quoting Conley, 355 U.S. at 47. (footnote omitted)).
142 Id. at 168-69.
143 See, e.g., Rippy v. Hattaway, 270 F.3d 416, 424-25 (6th Cir. 2001) (heightened pleading standard applied in qualified-immunity case); Dill v. City of Edmond, 155 F.3d 1193, 1204 (10th Cir. 1998) (heightened pleading standard applied in immunity case); Schultea v. Wood, 47 F.3d 1427, 1433 (5th Cir. 1995) (en banc) (“When a public official pleads the affirmative defense of qualified immunity in his answer, the district court may, on the official’s motion or on its own, require the plaintiff to reply to that defense in detail.”); Edgington v. Missouri Dep’t of Corrections, 52 F.3d 777, 779 n.3 (8th Cir. 1995) (heightened pleading standard applied in case against government officials for money damages); Dunbar Corp. v. Lindsey, 905 F.3d 754, 764 (4th Cir. 1990) (heightened pleading standard applied in case against government officials for money damages).
This intransigence caused the Supreme Court—again—to reaffirm unanimously Rule 8’s liberal application in *Swierkiewicz v. Sorema, N.A.*

*Swierkiewicz* was an employment case involving Akos Swierkiewicz, a 53-year-old Hungarian native. Swierkiewicz was a senior vice president and chief underwriting officer for a French-owned reinsurance company. After the company demoted then fired him, Swierkiewicz sued, alleging national origin and age discrimination.

The district court dismissed Swierkiewicz’s complaint, believing he “had not adequately alleged a prima facie case, in that he had not adequately alleged circumstances that support[ed] an inference of discrimination.” In a four-page, unpublished opinion, the Second Circuit affirmed the dismissal, insisting that “[i]t is well settled in this Circuit that a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6).” The Supreme Court accept Swierkiewicz’s request to elucidate Rule 8’s requirements.

Consistent with *Conley* and *Leatherman*, the Court reversed the Circuit Court’s dismissal, holding that employment discrimination complaints need not contain specific facts establishing a prima facie claim; rather, they must merely comply with Rule

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145 *Id.* at 508.
146 *Id.*
147 *Id.* at 509.
148 *Id.*
149 *Swierkiewicz v. Sorema, N.A.*, 5 Fed. Appx. 63, 64 (2d Cir. 2001) (quoting Martin v. New York State Dep’t of Mental Hygiene, 588 F.2d 371, 372 (2d Cir. 1978)).
151 *Id.* at 515.
8’s standard to allege a “short and plain statement of the claim.” The Court added that while its own McDonnell Douglas Corp. v. Green decision required a private, non-class plaintiff to prove his or her discrimination case by a preponderance of the evidence, this evidentiary burden did not create a pleading standard. Having earlier “rejected the argument that a Title VII complaint requires greater ‘particularity,’ because this would ‘too narrowly constrict the role of the pleadings,’” the Court expressed that “the ordinary rules for assessing the sufficiency of a complaint apply.”

The Court went further to add that “under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the McDonnell Douglas framework does not apply in every employment discrimination case.” For instance, the Court explained, “if a plaintiff is able to produce direct evidence of discrimination, he [or she] may prevail without proving all the elements of a prima facie case.” Under the Second Circuit’s heightened pleading standard, though, a plaintiff lacking direct evidence of discrimination when filing his or her complaint would nevertheless have to plead a prima facie case of discrimination, even though discovery might uncover direct evidence. “It thus seem[ed] incongruous,” the Court believed, “to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he

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152 Id. at 508 (quoting Fed. R. Civ. P. 8(a)(2)).
154 Id. at 802.
155 Swierkiewicz, 534 U.S. at 511.
156 Id. (quoting McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283, n. 11 (1976)).
157 Swierkiewicz, 534 U.S. at 511.
158 Id.
159 Id. (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (“The McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination.”)).
160 Id.
[or she] may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.”161

But the Court’s ruling was not grounded so much in substantive employment-law doctrine as it was in the Federal Rules. The Court reemphasized that Rule 8’s exceptions appear in Rule 9(b) by revisiting Leatherman, where the Court explained that “[t]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983.” 162

Just as Rule 9(b) makes no mention of municipal liability, neither does it refer to employment discrimination. As such, employment complaints, like most others, “must satisfy only the simple requirements of Rule 8(a).” 163 And if a defendant believes a complaint fails to provide sufficient notice, the defendant can move for a more definite statement under Rule 12(e),164 while the court can deal with meritless claims through Rule 56’s summary judgment mechanism.165 In this manner, and continually mindful that greater specificity for pleading particular claims must come through amending the Federal Rules not judicial intervention,166 “[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.”167

Considering Conley, Leatherman, and Swierkiewicz together adduces the following observations: First, the complaint serves a notice function and merely informs

161 Id. at 511-12.
162 Leatherman, 507 U.S. at 168.
163 Swierkiewicz, 534 U.S. at 513.
164 Id. at 514.
165 Id.
166 Id. at 515 (quoting Leatherman, 507 U.S. at 168).
167 Id.
the defendant of the claim and its basis.\textsuperscript{168} As a result, factual detail is not necessary at the pleading stage,\textsuperscript{169} as the Rules provide later opportunities to develop it.\textsuperscript{170} Next, only a claim’s eventual assured absence warrants dismissal; when it remains possible for a plaintiff to adduce facts supporting his or her claim, dismissal is inappropriate.\textsuperscript{171}

Finally, the pretrial process—including broad discovery,\textsuperscript{172} not the pleadings—is the appropriate mechanism for weeding out improper or unmeritorious claims.\textsuperscript{173}

Then, along came \textit{Twombly}.

\textsuperscript{168}A. Benjamin Spencer, Plausibility Pleading, 49 B.C. L. Rev. 431, 438 (2008). \textit{See also} Mayle v. Felix, 545 U.S. 644, 655 (2005) (“Under Rule 8(a), applicable to ordinary civil proceedings, a complaint need only provide ‘fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’” (quoting Conley, 355 U.S. at 47)).

\textit{See Conley, 355 U.S. at 47 (“[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”); Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 568 n.15 (1987) (“Under the Federal Rules of Civil Procedure, respondent had no duty to set out all of the relevant facts in his complaint.”); See also Spencer, 49 B.C. L. Rev. at 438 (“factual detail was unnecessary at the pleading stage”).

\textsuperscript{170}Conley, 355 U.S. at 47-48 (“[S]implified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”). \textit{See also} Spencer, 49 B.C. L. Rev. at 438 (“subsequent phases of the litigation would elicit such details and frame the case”).

\textsuperscript{171}Conley, 355 U.S. at 45-46 (“[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.”). \textit{See also} Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (“A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”); Spencer, 49 B.C. L. Rev. at 438-39 (“[O]nly certainty of the absence of a claim warranted dismissal; when one could say that it remained possible for the plaintiff to adduce facts that could prove liability, dismissal was inappropriate.”).

\textsuperscript{172}Hickman v. Taylor, 329 U.S. 495, 507 (1947) (“We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.”) (\textit{superseded, in part}, by Fed. R. Civ. P. 26(b)(3)). \textit{See also}, Spencer, 49 B.C. L. Rev. at 439 (“[T]he pleadings were not the proper vehicle for screening out unmeritorious claims. Rather, other pretrial procedures—namely broad discovery.”).

\textsuperscript{173}Swierkiewicz, 534 U.S. at 514 (“[C]laims lacking merit may be dealt with through summary judgment under Rule 56.”); Leatherman, 507 U.S. at 168-69 (“[F]ederal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.”). \textit{See also} Spencer, 49 B.C. L. Rev. at 439 (“[P]retrial procedures . . . and summary judgment . . . were the proper vehicles for ferreting out claims lacking merit.”).
IV. Understanding Twombly

As of March 15, 2008, lower courts had cited *Twombly* more than 9,400 times,\(^{174}\) many concluding that *Twombly* had established a new pleading standard under Rule 8.\(^{175}\) But examining *Twombly* actually indicates nothing of the sort.

The Telecommunications Act of 1996 was designed to replace the heavy regulation in the local telephone markets with competition.\(^{176}\) Specifically, the Act requires incumbent local exchange carriers (ILECs), like the *Twombly* defendants, to facilitate the entry of competitors (known as competing local exchange carriers or CLECs) into their local telephone markets in return for the opportunity to compete in the

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\(^{174}\) Ward, 82 St. John’s L. Rev. at 893.


Because building their own telecommunications infrastructure would be prohibitively expensive for most CLECs, the Act provides them with a shortcut into the market by obliging ILECs to sell access to parts of the ILECs’ networks at wholesale rates.\(^\text{178}\)

\textit{Twombly} involved a group of purchasers of local telephone or high-speed internet services who filed a class-action antitrust lawsuit against four ILECs who together control over 90\% of the market for local telephone and high-speed internet services in the continental U.S.\(^\text{179}\) Plaintiffs alleged that despite the Act’s requirement that the ILECs provide access to their telecommunications infrastructure on “just, reasonable and non-discriminatory terms,”\(^\text{180}\) the ILECs made it nearly impossible for the CLECs to enter the ILECs’ local service markets by (1) conspiring to collectively keep CLECs from successfully entering [the ILECs’] markets, and (2) refraining from attempting to enter each other’s markets as CLECs.\(^\text{181}\) Plaintiffs added that defendants’ refusal to compete as CLECs in each others’ territories constituted parallel conduct and that competition would have occurred had defendants not conspired to avoid it.\(^\text{182}\)

The district court read plaintiffs’ complaint to allege merely conscious parallelism:

[W]hile plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement, courts must be cognizant of the fact that, while circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy[,] conscious parallelism has not yet read conspiracy out of the Sherman Act entirely. . . . [P]arallel action is a common and often

\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 176.
\textsuperscript{180} Id. at 177 (quoting plaintiffs’ Amended Complaint).
\textsuperscript{181} Id. at 182.
\textsuperscript{182} Id. at 178.
legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions.\textsuperscript{183}

Based on plaintiffs’ allegations of conscious parallelism, the district court dismissed their complaint for failure to state a claim under section 1 of the Sherman Act, explaining that “Plaintiffs ha[d] not alleged facts that suggest[ed] that refraining from competing in other territories as CLECs was contrary to defendants’ apparent economic interests, and consequently ha[d] not raised an inference that their actions were the result of a conspiracy.”\textsuperscript{184}

But the Second Circuit Court of Appeals reversed the district court’s dismissal, concluding that the district court had applied an unfairly restrictive pleading standard.\textsuperscript{185} Rightly observing that no heightened pleading standard applies in antitrust cases,\textsuperscript{186} the Second Circuit believed that plaintiffs’ allegations of solely conscious parallelism did not present “a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts [that required] dismissal.”\textsuperscript{187}

Rather, the court expressed that to survive a motion to dismiss an antitrust claimant “must allege only the existence of a conspiracy and a sufficient supporting

\textsuperscript{183} Id. at 179 (internal quotations omitted).
\textsuperscript{184} Id. at 188.
\textsuperscript{186} Id. at 108. See also George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 553-54 (2d Cir. 1977) (rejecting argument that “antitrust claims, because of their complexity, must be pleaded with greater specificity than other claims”); Nagler v. Admiral Corp., 248 F.2d 319, 322-23 (2d Cir. 1957) (“[M]any defense lawyers have strongly advocated more particularized pleading in this area of litigation, [but] it is quite clear that the federal rules contain no special exceptions for antitrust cases”). Some courts have even explained that antitrust cases are less suitable candidates for dismissal at the pleading stage than other kinds of litigation because evidence of the claimed illegality frequently rests in defendants’ exclusive control. See Hospital Bldg. Co. v. Treasurers. of Rex Hosp., 425 U.S. 738, 746 (1976) (“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.” (quoting Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962))).
\textsuperscript{187} Twombly, 425 F.3d at 109.
factual predicate on which that allegation is based,”

adding that “pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy.”

Believing it reasonable to infer collusion from plaintiffs’ conscious parallelism allegations, the court invoked Conley as its basis for concluding that plaintiffs’ “allegations [were] sufficient to give the defendant fair notice of what the . . . claim [was] and the grounds upon which it rest[ed] . . . .”

Not dissimilar from its impetus for considering the lower courts’ rulings in Conley, Leatherman, and Swierkiewicz, the Supreme Court granted certiorari in Twombly “to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.” After first explaining that conscious parallelism without more “falls short of conclusively establish[ing] an agreement or . . . itself constitut[ing] a Sherman Act offense,” because such conduct is no less consistent “with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market,” the Court, in an opinion authored by Justice Souter, dove directly into considering plaintiffs’ complaint against Conley’s pleading standard.

The Court began its analysis by repeating Conley’s instruction that not only does Rule 8(a)(2) requires a “short and plain statement of the claim showing that the pleader is entitled to relief,” but this statement must also “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” These “grounds,” explained the

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188 Id. at 114 (emphasis added).
189 Id. (emphasis added).
190 Id. at 118-19 (internal quotations omitted).
191 Twombly, 550 U.S. at 553.
192 Id. at 553-54 (internal quotations omitted).
193 Id. at 555 (quoting Conley, 355 U.S. at 47).
Court, require more than “mere labels and conclusions”; they “must be enough to raise a right to relief above the speculative level.”

Applying these standards to plaintiffs’ antitrust complaint, the Court held that properly pleading such a complaint requires including enough factual allegations to suggest that defendants even made an illegal agreement, adding that this plausibility (or believability) requirement at the pleadings “does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasoned expectation that discovery will reveal evidence of an illegal agreement . . . even if it strikes a savvy judge that actual proof of those facts is improbable” Accordingly, the Court directed that plaintiffs’ mere allegations of conscious parallelism coupled with a bare allegation of conspiracy as the grounds upon which plaintiffs’ antitrust complaint rested were insufficient to suggest conspiracy with any believability, and instead plaintiffs’ complaint needed facts raising even “a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.”

After so ruling, the Court took great pains to explain that it in no way intended to upset its historical interpretation and application of Rule 8. “The need at the pleading stage,” the Court instructed, “for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’” And allegations merely of conscious parallelism without “further circumstances pointing

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194 Id.
195 Id.
196 Id. at 556.
197 Id.
198 Id. at 556-57.
199 Id. at 557.
200 Id.
toward a meeting of the minds”201 (i.e., the grounds upon which such an allegation rested202) failed to comply with Rule 8’s standard.

Turning next to Conley’s “no set of facts” language, the Court noted that a literal reading of this language would allow a court to sustain a complaint based on “wholly conclusory statement[s].”203 Believing this literal reading and extension was inconsistent with Rule 8’s historical application, the Court—while not upending Rule 8’s fact-pleading requirement—retired Conley’s “no set of facts” phrase, describing it as an “incomplete, negative gloss on an accepted pleading standard: once a claim has been adequately stated, it may be supported by showing any set of facts consistent with the allegations in the complaint.”204 The Court instead explained Conley as “describ[ing] the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s survival.”205

Because the Court believed that nothing contained in plaintiffs’ complaint plausibly, realistically, or believably, suggested a conspiracy,206 it reversed the Second Circuit’s order sustaining plaintiffs’ complaint.207 But immediately before so ruling, the Court again emphasized that it did not intend to raise Rule 8’s historical notice-pleading standard: “[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have

201 Id.
202 See Conley, 355 U.S. at 47.
203 Twombly, 550 U.S. at 561.
204 Id. at 563.
205 Id.
206 Id. 566.
207 Id. at 570.
not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”

The Court further emphasized that any such changes rested solely in the Congressional domain and that until Congress initiates a change, Rule 9’s heightened pleading requirements apply in extremely narrow circumstances:

In reaching this conclusion, we do not apply any “heightened” pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished “by the process of amending the Federal Rules, and not by judicial interpretation.” Swierkiewicz v. Sorema N. A., 534 U.S. 506, 515, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (quoting Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)). On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. Fed. Rules Civ. Proc. 9(b)-(c). Here, our concern is not that the allegations in the complaint were insufficiently “particularized,” ibid.; rather, the complaint warranted dismissal because it failed in toto to render plaintiffs’ entitlement to relief plausible.

The reason for the Court’s extensive pacifying language was its critical evaluation of Conley’s interpretation and application of Rule 8. In this context, it was the Court’s mere use of the adjective “plausible” (simply meaning “having an appearance of truth or reason”210) when describing the grounds upon which a complaint’s factual allegations must rest that some judges and commentators have invoked as their basis for concluding that Twombly spawned a new and more restrictive pleading standard. But the rumors of the death of Rule 8’s age-old pleading standard have been greatly exaggerated.211

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208 Id.
209 Id. at 569 n.14.
211 See Mark Twain, letter to unknown recipient (May 1897) (“The report of my death was an exaggeration.”)
V.  *Twombly* did Nothing to Change Rule 8’s Historical Pleading Standard

The *Twombly* Court’s instruction that “we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face,”\(^\text{212}\) should have surprised no one, as it mirrored the Court’s longstanding precedent refusing to impose heightened pleading requirements extending beyond simple notice pleading. This directive stands to reason since insisting on anything further at the pleading stage requires a plaintiff to prove his or her case to a summary-judgment standard absent discovery—nearly always an impossible task—which of course is why such proof is not required.

Instead, the Court instructed that a complaint’s factual allegations must make some practical sense. This believability requirement has always been implicit in and an integral part of Rule 8, and the *Twombly* Court merely further articulated what has always been the case. Indeed, even the Second Circuit when sustaining plaintiffs’ complaint instructed that the complaint must “include conspiracy among the realm of plausible possibilities,”\(^\text{213}\) believing like the Court that this plausibility consideration did not raise plaintiffs’ pleading requirement. That the Court’s opinion as to whether the allegations in plaintiffs’ complaint *constituted* the requisite short and plain statement differed from the Second Circuit’s opinion should not be taken to suggest that the Court invoked any sort of elevated pleading standard.\(^\text{214}\)

Indeed, to suppress any confusion, less than two weeks after *Twombly* the Court repeated that Rule 8(a)(2)’s simple “short and plain statement” requirement provides

\(^{212}\) *Twombly*, 550 U.S. at 570.
\(^{213}\) *Twombly*, 425 F.3d at 111-12.
\(^{214}\) *See* supra n.209.
central guidance for federal courts. In *Erickson v. Pardus*, a prisoner filed a pro se § 1983 action alleging that prison medical officials had diagnosed him as requiring treatment for hepatitis C but had discontinued his treatment because they suspected he had taken illicit drugs. The prisoner claimed he was suffering liver damage because of his disease’s non-treatment, and that its progression could cause irreversible liver damage and possibly death. The prisoner’s complaint added that he was in imminent danger as hepatitis C had already killed other inmates. Although the prisoner’s complaint alleged that defendants’ conduct had violated his Eighth Amendment rights, the Tenth Circuit affirmed the district court’s order dismissing his complaint, explaining he had made “only conclusory allegations to the effect that he had suffered a cognizable independent harm . . .”

This dismissal visibly troubled the Court. “The holding,” the Court explained, “departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure that we grant review.” The Court ruled that the lower courts had erred by concluding that the prisoner’s allegations of a cognizable independent harm were “too conclusory,” and in doing so invoked *Twombly* and its reiteration of Rule 8(a)(2)’s core-pleading requirement:

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215 551 U.S. 89 (2007). After *Erickson*, the Court decided *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), where the Court dismissed a complaint alleging that high-level government officials had “adopted an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin.” *Id.* at 1942. But while the *Iqbal* Court drew heavily on *Twombly* as its basis for dismissal, *Iqbal* is meaningful insofar as it confirms, like *Erickson*, that *Twombly*’s Rule 8 affirmation concerns all types of litigation not just antitrust claims, which restriction would have made little sense as the Federal Rules (including Rule 8, of course) necessarily apply to all civil litigation.

216 *Erickson*, 551 U.S. at 91.

217 *Id.* at 92.

218 *Id.* at 93 (internal quotations omitted).

219 *Id.* at 90.

220 *Id.* at 93.
Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Specific facts are not necessary; the statement need only “‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” (citing Twombly quoting Conley). In addition, when ruling on a defendant’s motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. (citing Twombly) 222

The Court even highlighted Rule 8(f)’s mandate that “[a]ll pleadings shall be construed as to do substantial justice” and concluded that “[t]he case cannot . . . be dismissed on the ground that petitioner’s allegations of harm are too conclusory to put these matters in issue.” 223

Thus, within only two weeks after Twombly the Court reaffirmed Twombly’s simple message and revalidated what federal courts have held for decades: Our civil-pleading system, as encompassed in Rule 8(a)(2), has always required and still requires simply a short and plain statement of the claim showing that the pleader is entitled to relief. To this end, multiple lower courts have cited Twombly as a basis for sustaining complaints pleaded consistent with this venerable standard. 224 And concomitantly, where

222 Id. at 93-94.
223 Id. at 94 (internal quotations omitted).
224 See, e.g., Phillips v. County of Allegheny, 515 F.3d 224, 231(3rd Cir. 2008) (Twombly does not require “detailed factual allegations” or pleading with particularity”; rather, it “requires only a short and plain statement that the pleader is entitled to relief in order to give the defendant fair notice of what the . . . claim is the grounds upon which it rests.”); Airborne Beeper & Video, Inc. v. AT&T Mobility, LLC, 499 F.3d 663, 667 (7th Cir. 2008) (“[T]aking Erickson and Twombly together, we understand the Court to be saying only at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim that the defendant is entitled to under Rule 8.”); In re Pressure Sensitive Labelstock Antitrust Litig, 566 F. Supp. 2d 363, 370 (2008) (“[T]he claims presented need not be alleged with particularity, but there must be sufficient factual averments that place the defendants on notice of the bases for the claims; and plaintiff’s entitlement to relief is on the bases for the claim presented against a particular defendant must be plausible.”); Hiltabidel v. Herald Standard Newspaper, No. 2:08-cv-409, 2008 U.S. Dist. LEXIS 49668, at *4 (W.D. Pa. June 26, 2008) (denying defendant’s motion to dismiss because complaint’s allegations rendered plaintiff’s claims plausible); Behrend v. Comcast Corp., 532 F. Supp. 2d 735, 741 (E.D. Pa. 2007) (citing Twombly as basis for denying defendants’ motion to dismiss because federal courts should evaluate such motions based on reasonable, pre-discovery inferences drawn from the facts alleged and in the proper context, such as where antitrust plaintiffs can only necessarily know so much before committing to take full discovery, including depositions); Walker v. S.W.I.F.T., SCRL, 491 F. Supp. 2d 781, 788 (N.D. Ill. 2007) (noting Twombly’s confirmation that a complaint “does not need detailed factual allegations” and finding the complaint sufficient under Rule 8(a)(2) to put defendant on
complaints lack minimal facts, courts have continued granting motions to dismiss after invoking *Twombly*.\(^{225}\) For as Justice Souter even more recently explained in *Ashcroft v. Iqbal*,\(^{226}\) where the very believability of a complaint’s allegations are suspect, such as where plaintiff alleges “claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel,”\(^{227}\) the complaint continues—as always—to fall short of satisfying Rule 8’s liberal standard.

But if *Twombly* didn’t affect Rule 8’s pleading standard, why did the Court see fit to accept review, this time *dismissing* plaintiffs’ complaint rather than sustaining it as had occurred in *Conley, Leatherman, and Swierkiewicz*? Was it merely “to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct”?\(^{228}\) Or might a more looming issue have also concerned the court, one that dovetailed nicely into its articulated issue?

Recall the atmosphere that preceded *Conley, Leatherman, and Swierkiewicz*. Despite contrary Congressional and Supreme Court mandates, lower courts had continued to elevate Rule 8’s pleading standard. Each time these unauthorized efforts reached a critical stage and the Court was presented with an opportunity to correct matters, it did so by entered the fray and sounding what it hoped would be an enduring call to lower courts to refrain from improperly changing the law.


\(^{227}\) Id. at 1959 (Souter, J., dissenting).

\(^{228}\) *Twombly*, 550 U.S. at 553.
Not unlike the atmosphere that preceded Conley, Leatherman, and Swierkiewicz (and in keeping with the reality that history has a way of re-re-repeating itself), the Twombly Court seemed mindful that “federal courts [were] continu[ing] to require heightened pleading in a variety of contexts,” despite the Court’s constant contrary admonitions:

Despite strong words from the Supreme Court expressing its continued commitment to this rubric, heightened pleading thrives post-Leatherman. Courts cling to it in civil rights cases. Congress imposes it with the PSLRA and the Y2K Act. Both ignore the drafters’ vision, with predictable consequences. The simple notice pleading standard is replaced with an uncertain one. Uniform application of pleading practice is eroded by splits in the courts of appeals applying heightened pleading. Transsubstantivity gives way to different pleading standards for different substantive claims. In essence, the result is common-law pleading revisited. The consequences are not surprising. Whole categories of cases are deemed frivolous. Plaintiffs suffer prediscovery dismissal, often for failure to plead facts relating to the defendant’s state of mind. The Court has not once, but twice, tried to establish limits to heightened pleading in civil rights cases. In this context, two rights don’t make a wrong. However, given the post-Leatherman experience, it is unlikely that those courts that embrace heightened pleading will abandon it on the strength of Swierkiewicz.

Comment, A Phoenix from the Ashes? Heightened Pleading Requirements in Disparate Impact Cases, 36 Seton Hall L. Rev. 1043 (2006). See also, Christopher M. Fairman, The Myth of Notice Pleading, 45 Ariz. L. Rev. 987, 1064 (“A uniform pleading standard with notice as the touchstone remains illusory. Yet the intentions of the drafters are clear. . . . [T]he Supreme Court reinforces notice pleading as the only choice.”).

Given this defiant environment, it should have come as no surprise that the Court saw fit to reinsert itself into the pleading-standard discussion. But the reason this time that the Court saw fit to dismiss rather than sustain plaintiffs’ complaint concerned not Rule 8 and its accompanying standard but rather the allegations in plaintiffs’ complaint. After reaffirming Rule 8’s pleading standard so as to ensure—as best it could—that all who invoke this standard understand its continuing relevance and viability, the Court described its belief that the Twombly plaintiffs had failed to plead facts sufficient to satisfy this enduring standard. As the Court expressed repeatedly (and reiterated in Erickson), it never intended to raise Rule 8’s longstanding requirements. And while the Court’s similar reaffirmations in Conley, Leatherman, and Swierkiewicz resulted—on the facts of those cases—in orders sustaining the plaintiffs’ complaints because those complaints were properly pleaded according to the prevailing and still-current standard, Twombly’s complaint, when considered according to this same standard—which standard, by the way, was at all times available to plaintiffs—simply didn’t.

Considering the Twombly complaint against the example described in Form 9 only amplifies the Court’s declaration that it did not intend to adjust Rule 8’s pleading standard. Form 9 has always provided plaintiffs guidance because it describes a controversy that can just as easily be attributed to negligence as not. As such, based on those facts the discovery process may properly commence, so the parties can reach a just resolution. But the Twombly complaint struck the Court as entirely conjectural (if not fabricated) in that no facts demonstrating an illegal agreement appeared to exist. Sure, plaintiffs alleged an illegal agreement that caused them damage, but they pleaded no facts makes clear that heightened pleading requirements apply in civil rights cases asserted against defendants who may avail themselves of the defense of qualified immunity.”
(i.e., who, what, where, when, why) to support this conclusion as demonstrated in Form 9 (i.e., who - defendant; what - drove into plaintiff; where - Boylston Street; when – June 1, 1936; why - because defendant was negligent). Contrasting the Twombly plaintiffs “factual” allegations with Form 9’s factual allegations only corroborates the Court’s objective to confirm and remain true to Rule 8’s longstanding ideals.

So the Court got it right when it said, “the complaint warranted dismissal because it failed in toto to render plaintiffs’ entitlement to relief plausible.” The majority believed, based on the notice plaintiffs provided, that proceeding to discovery or beyond would have been both futile and unfair, which circumstances even Justice Stevens’ dissent admitted justify dismissal. In this manner, and on account of the Court’s reasoned interpretation of the complaint’s factual allegations, Twombly didn’t change the pleading standard on account of merely invoking the adjective “plausible” when describing plaintiff’s entitlement to relief. Instead, it reaffirmed this standard in the face of lower courts’ continuing and unjustified restriction of it and did so while explaining, this time, that the complaint’s factual allegations failed to comply with the Court’s long-embraced standard.

As demonstrated then, Twombly really marks no departure from Rule 8’s pleading standard. Rather, Twombly embraces this standard, simply re-expressing that a complaint containing implausible (if not far-fetched or even fabricated) allegations supported by no facts—like solely parallel conduct to plead antitrust conspiracy allegations as opposed to conspiratorial facts subject to naturally differing inferences, which will always be the

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231 Twombly, 550 U.S. at 569 n.14. See also infra n.209.
232 See Twombly, 550 U.S. at 577 (“Consistent with the design of the Federal Rules, Conley’s ‘no set of facts’ formulation permits outright dismissal only when proceeding to discovery or beyond would be futile.”).
case pre-discovery, if not forever—requires dismissal. In this manner, *Twombly*’s holding was all that significant, after all.

VI. Conclusion

Things are no different today than they were before *Twombly* as *Twombly* merely reaffirmed Rule 8’s liberal pleading standard. Since the Court took such expected steps to act consistent with its multiple earlier efforts educating the bench and bar on proper pleading practice, *Twombly* cannot fairly be understood to have enhanced Rule 8’s pleading standard. An honest reading of *Twombly* commands otherwise.

On account of *Twombly*, plaintiffs who plead—not prove—reasoned and believable fact-based complaints as Rule 8 has always required can reasonably expect courts to sustain them. *Twombly* merely describes the Court’s latest foray into preventing lower courts from wrongly adjusting Rule 8’s pleading standard in the manner that many commentators, ironically, accuse the Court of itself doing. As such, *Twombly* is hardly the “big one” that these commentators insist.

Rather, life and litigation march on after *Twombly*, hopefully in the manner that Judge Clark and the rest of Rule 8’s drafters intended. With *Twombly*, the Supreme Court did its job to ensure Rule 8’s proper application. Hopefully, the Court’s third time will prove a charm, and lower courts will finally regard the Court’s instruction and apply Rule 8 to plaintiffs’ complaints in the manner that its drafters originally, always, and eternally envisioned.