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

Edward D. Cavanagh

Available at: https://works.bepress.com/edward_cavanagh/1/
Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler and the Uncertain Future of Private Antitrust Enforcement

Edward D. Cavanagh
Professor of Law
St. John's University
School of Law
Twombly: The Demise of Notice Pleading, the Triumph of Milton Handler and the Uncertain Future of Private Antitrust Enforcement

Edward D. Cavanagh*

In a 7 - 2 decision, the Supreme Court in Bell Atlantic Corp. v. Twombly reversed the Second Circuit and held that a complaint that alleged mere parallel behavior among rival telecommunications companies coupled with stray statements of agreement that amounted to legal conclusions failed as a matter of law to state a claim for an antitrust conspiracy in violation of Section One of the Sherman Act. The Court ruled that in order to withstand a motion to dismiss, an antitrust conspiracy complaint must plead such factual material (taken as true) to suggest that the defendants have entered into an unlawful agreement. Plaintiffs need not set forth detailed factual allegations, but the Court emphasized that "grounds showing entitlement to relief requires more than labels and conclusions, and a formulaic reiteration of elements of a cause of action will not do." Rather, a complaint must contain "plausible grounds from which to infer an agreement" and allege enough facts to raise a reasonable expectation that discovery will reveal evidence of illegality.

I. Background

* Professor of Law, St. John's University School of Law. A.B., University of Notre Dame; J.D., Cornell Law School; LL.M. and J.S.D., Columbia Law School.

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

A decade later, however, the Congress enacted the Telecommunications Act of 1996,\textsuperscript{10} which fundamentally restructured the market for local phone service by ending the regional monopolies held by each of the regional operating companies. In an effort to stimulate competition in local markets, the Telecommunications Act permitted each of the regional companies to compete in each others' markets and required each of the regional companies to share its technology with companies seeking to enter the new competitive local markets for telephone services.\textsuperscript{11} In the years immediately following

\textsuperscript{6} United States v. AT&T Co., Civil Action No. 74-1698 (D.D.C.).


\textsuperscript{8} Id. at 160.

\textsuperscript{9} Id. at 186-89.


\textsuperscript{11} Id. at ___, see Verizon Communications Inc. v. FCC, 535 U.S. 467, 488 (2002).
the enactment of the Telecommunications Act, the regional operating companies, referred to as Incumbent Local Exchanges Carriers ("ILECs") by the Court in Twombly, were slow to comply with the mandates of the Telecommunications Act. Indeed, Bell Atlantic had been fined $10 million by the New York Public Service Commission for its failure to make its facilities available to AT&T.

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

---


13 Id. at 404.

14 Twombly, 127 S. Ct. at 1962.

15 Id. at 1962-63.

16 Id. The complaint alleged:

"In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs alleges upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in
Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. They argued that proof of conscious parallelism, without more, is insufficient as a matter of law, to establish a conspiracy. Defendants further argued plaintiff would have to adduce additional evidence beyond parallel conduct – so-called plus factors – in order to succeed at trial and its failure to allege plus factors in the complaint was fatal to its claim.

A. The Trial Court Decision

The trial court granted the defendants’ motion to dismiss. It reasoned that as a matter of substantive antitrust law, proof of mere conscious parallelism is not itself sufficient to establish the requisite "contract combination or – conspiracy in restraint of commerce” giving rise to a section one violation. Applying a summary judgment standard at the pleading stage, the court concluded that absent allegations of "plus factors" in addition to parallel behavior, plaintiff’s claims were deficient as a matter of law. The court also ruled that the complaint contained no facts suggesting that neither the decision to frustrate the ability of new entrants to compete in the market for local phone services nor the decision by CLEC not to enter into each other's territories

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." Id. ¶ 51, App. 27.

17 Twombly, 127 S. Ct. at 1963.
18 Id.
19 Id.
21 Id. at 179.
22 Id. at 180-82.
was contrary to the individual defendant's self-interest.\textsuperscript{23} Consequently, there was no factual basis upon which to infer that the defendants' actions were the result of a conspiracy.\textsuperscript{24} The court further found that defendants conduct was consistent with self-interest:\textsuperscript{25}

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

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

\begin{itemize}
\item \textsuperscript{23} \textit{Id.} at 182.
\item \textsuperscript{24} \textit{Id.} at 181.
\item \textsuperscript{25} \textit{Id.} at 188.
\item \textsuperscript{26} \textit{Id.} at 180.
\item \textsuperscript{27} Fed. R. Civ. P. 8(a)(2).
\item \textsuperscript{28} 313 F. Supp. 2d at 181.
\end{itemize}
B. The Second Circuit Ruling

The Second Circuit reversed and reinstated the complaint.\textsuperscript{29} It ruled that the trial court erred in applying a summary judgment standard at the pleading stage.\textsuperscript{30} As a threshold matter, the Second Circuit observed that the notice pleading standards embodied in the Federal Rules of Civil Procedure do not require detailed factual pleading and that the Federal Rules do not contemplate use of motions to dismiss at the complaint stage to weed out cases.\textsuperscript{31} While the decisions have not provided any bright-line rules "for identifying the factual allegations required to state an antitrust claim, they suggest that the burden us relatively modest."\textsuperscript{32} The Court then concluded that:\textsuperscript{33}

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

Furthermore, the Second Circuit rejected the trial court's finding that to sustain the complaint, plaintiffs must plead plus factors.\textsuperscript{34} That requirement would be contrary to \textit{Swierkiewicz}\textsuperscript{35} which had held that courts may not by local rule or practice

\textsuperscript{29} 425 F.3d 99 (2d Cir. 2005).
\textsuperscript{30} Id. at 104.
\textsuperscript{31} Id. at 106-07.
\textsuperscript{32} Id. at 106.
\textsuperscript{33} Id. at 113.
\textsuperscript{34} Id. at 113-14.
formulate particularity in pleading requirements beyond those contained in Rule 9(b) of the Federal Rules of Civil Procedure.\textsuperscript{36} As long as conspiracy is in the realm of "plausible" possibilities, the complaint would survive a motion to dismiss.\textsuperscript{37} Pleading parallel conduct by the defendants "can suffice to state a plausible claim for conspiracy."\textsuperscript{38} Thus, plaintiffs may plead plus factors, but they are not required to do so.\textsuperscript{39}

II. The Supreme Court

A. The Rationale

The Supreme Court reversed the Second Circuit holding and held that the complaint in Twombly failed to state a claim upon which relief can be granted and must be dismissed.\textsuperscript{40} In analyzing the issue before it, the Supreme Court steered a middle course between the rulings of the Southern District of New York and the Second Circuit. The Court declined to endorse the trial court's view that summary judgment standards are applicable at the motion to dismiss stage. It also rejected the Second Circuit's view that under Swierkiewicz and Conley v. Gibson, the complaint must be upheld.

Rather, the high court viewed the issue as involving construction of Rule 8(a)(2), which provides that a complaint shall contain "a short plain statement of the

\textsuperscript{36} 425 F.3d at 107-08.
\textsuperscript{37} Id. at 111.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 111-12.
\textsuperscript{40} 127 S. Ct. at 1963.
claim showing that the pleader is entitled to relief."\textsuperscript{41} The Court acknowledged that the Federal Rules eased pleading requirements from those extant under common law or under the Codes but, at the same time, said that it would be a mistake to suggest "that the Federal Rules somehow dispensed with the pleading of facts altogether."\textsuperscript{42} Rather, the Federal Rules merely relieve the plaintiff of the need to "set out in detail the facts upon which he bases his claim."\textsuperscript{43} The Court further reasoned that factual allegations are critical to a plaintiff's claim:\textsuperscript{44}

Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. See 5 Wright \& Miller § 1202, at 94, 95 (Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

To make a "showing" that it is "entitled" to relief, a pleader must do more than assert "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."\textsuperscript{45} Nor are courts "bound to accept as true a legal conclusion couched as a factual allegation."\textsuperscript{46} Allegations of fact "must be enough to

---

\textsuperscript{41} Fed. R. Civ. P. 8(a)(2).

\textsuperscript{42} 127. S. Ct. at 1965, n. 3 ("The dissent greatly oversimplified matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether.") but see 127 S. Ct. at 1979 (Stevens J. dissenting) ("as the Conley Court well knew, the pleading standard the Federal Rules meant to codify does not require, or even invite, the pleading of facts.").

\textsuperscript{43} 127 S. Ct. at 1965, n. 3.

\textsuperscript{44} Id.

\textsuperscript{45} Id. at 1965.

\textsuperscript{46} Id. (citation omitted).
raise a right to relief above the speculative level. A pleading must contain more than facts "that merely creates a suspicion [of] a legally cognizable cause of action." The Court concluded that:

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

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

It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

Thus, to survive a motion to dismiss, a complaint must set forth facts "plausibly suggesting (not merely consistent with) agreement" An allegation of conscious parallelism without more "stays in neutral territory." While that allegation "gets the complaint close to stating a claim, . . . without some further factual

---

47 Id.
48 Id.
49 Id.
50 Id. at 1966.
51 Id.
52 Id.
enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'”

In promulgating the "plausibility" standard, the Court was driven by pragmatic concerns involving (1) the need to stem what it deemed baseless litigation and (2) the high costs of pretrial discovery. First, the Court stated that deficiencies in pleadings should "be exposed at the point of minimum expenditure of time and money by the parties and the court," that is, at the motion to dismiss stage. Otherwise, "a largely groundless claim" would be permitted to "take up the time of a number of otherwise people, with the right to do representing an in terrorem increment of the settlement value.

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

53 Id.
54 Id. at 1966-67.
55 Id. at 1966 (citation omitted).
56 Id. (citation omitted).
57 Id. at 1967.
58 Id.
infirm claims – careful case management, judicial supervision of discovery, summary
judgment and jury instructions – simply do not work.\textsuperscript{59}

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," \textit{post} at 1975, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. See, \textit{e.g.}, Easterbrook, \textit{Discovery as Abuse}, 69 B.U.L. Rev. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves"). And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries," \textit{post} at 1975; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support a § 1 claim. [Citations omitted.]

In addition, plausibility standard enumerated in \textit{Twombly} marks a clear departure from \textit{Conley v. Gibson},\textsuperscript{60} which for half a century was viewed as the standard governing the adequacy of a complaint on a motion to dismiss under Rule 12(b)(6).

\textit{Conley} stated that a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief."\textsuperscript{61}

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} 355 U.S. 41, 45-46 (1957).

\textsuperscript{61} \textit{Id.}
The Court justifies this departure by urging that Conley had been long misconstrued by the lower courts.\(^6^2\) It argued that the "no set of facts" language in Conley must be viewed in light of the detailed factual allegations of racial discrimination therein "which the Court quite reasonably understood as amply stating a claim for relief."\(^6^3\) Accordingly, what Conley was really saying was that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."\(^6^4\) Put another way, "Conley described the breadth of opportunity to prove what an adequate complaint claims, not the minimum statement of adequate pleading to govern a complaint's survival."\(^6^5\) The Court then officially "retired" Conley as the standard for judging the adequacy of the complaint at the motion to dismiss stage.\(^6^6\) In consigning Conley to the boneyard, the Court also observed that the lower courts had questioned the "no set of facts" test, thereby suggesting that support for Conley had long ago eroded.\(^6^7\) Curiously, the majority did not point out, as Justice Stevens in his dissent did, that Conley had been repeatedly cited by the Supreme Court with approval notwithstanding some discontent among lower courts.\(^6^8\)

\(^6^2\) 127 S. Ct. at 1967.
\(^6^3\) Id.
\(^6^4\) Id.
\(^6^5\) Id.
\(^6^6\) Id.
\(^6^7\) Id.
\(^6^8\) Id. at 1978 (Stevens, J. dissenting)

If Conley's "no set of facts" language is to be interred, let it not be without eulogy. That exact language, which the majority says has "puzzle[ed] the profession for 50 years," ibid., has been cited as authority in a dozen opinions of this Court and four separate writings.
B. Plausibility: The New Pleading Standard

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

In not one of those opinions was the language "questioned," "criticized" or "explained away." Indeed, today's opinion is the first by any member of this Court to express any doubt as to the adequacy of the Conley formulation.

69 Id. at 1968.

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

Some of these signals point toward a new and heightened pleading standard. First the Court explicitly disavowed the oft-quoted statement in Conley of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Bell Atlantic, 127 S. Ct. at 1968 (quoting Conley, 355 U.S. at 45-46, 78 S. Ct. 99). Bell Atlantic asserted that this "no set of facts" language "has earned its retirement" and "is best forgotten." Id. at 1969.

Second, the Court, using a variety of phrases, indicated that more than notice of a claim is needed to allege a section 1 violation based on competitors' parallel conduct. For example, the Court required "enough factual matter (taken as true) to suggest that an agreement was made," id. at 1965; "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement," id.; "facts that are suggestive enough to render a § 1 conspiracy plausible," id.; "allegations of parallel conduct . . . placed in a context that raises a suggestion of a preceding agreement," id. at 1966; "allegations plausibly suggesting (not merely consistent with) agreement," id.; a "plain statement" (as specified in Rule 8(a)(2) with "enough heft") to show entitlement to relief, id.; and "enough facts to state a claim to relief that is plausible on its face," id. at 1974, and also stated that the line "between the factually neutral and the factually suggestive . . . must be crossed to enter the realm of plausible liability," id. at 1966 n. 5, and that "the complaint warranted dismissal because it failed in toto to render plaintiffs' entitlement to relief plausible," id. at 1973 n. 14.
Third, the Court discounted the ability of "careful case management," "to weed[] out early in the discovery process" a claim just shy of a plausible entitlement."  Id. at 1967 (quoting id. at 1975 (Stevens, J. dissenting)).

Fourth, the Court encapsulated its various formulations of what is required into what it labeled "the plausibility standard."  Id. at 1968. Indeed, the Court used the word "plausibility" or an adjectival or adverbial form of the word fifteen times (not counting quotations).

On the other hand, some of the Court's linguistic signals pointed away from a heightened pleading standard and suggest that whatever the Court is requiring in Bell Atlantic might be limited to, or at least applied most rigorously in, the context of either all section 1 allegations or perhaps only those section 1 allegations relying on competitors' parallel conduct. First, the Court explicitly disclaimed that it was "require[ing] heightened fact pleading of specifics," id. at 1974, and emphasized the continued viability of Swierkiewicz, see id. at 1973-74, which had rejected a heightened pleading standard.  See also Erickson v. Pardus, ___ U.S. ___, 127 S. Ct. 2197,2200, 167 L. Ed. 2d 1081 (2007) (citing Bell Atlantic's citation of Swierkiewicz).

Second, although the Court faulted the plaintiffs' complaint for alleging "merely legal conclusions" of conspiracy, Bell Atlantic, 172 S. Ct. at 1970, it explicitly noted with approval Form 9 of the Federal Civil Rules, Complaint for Negligence, which, with respect to the ground of liability, alleges only that the defendant "negligently drove a motor vehicle against plaintiff who was then crossing [an identified] highway," Fed. R. Civ. P. App. Form 9.  See Bell Atlantic, 127 S. Ct. at 1970 n. 10.  The Court noted that Form 9 specifies the particular highway the plaintiff was crossing and the date and time of the accident, see id., but took no notice of the total lack of an allegation of the respects in which the defendant is alleged to have been negligent, i.e., driving too fast, crossing the center line, running a traffic light or stop sign, or even generally failing to maintain a proper lookout.  The adequacy of a generalized allegation of negligence in the approved Form 9 seems to weight heavily against reading Bell Atlantic to condemn the insufficiency of all legal conclusions in a pleading, as long as the defendant is given notice of the date, time, and place where the legally vulnerable conduct occurred.

Third, the Court placed heavy emphasis on the "sprawling, costly, and hugely time-consuming" discovery that would ensue in permitting a bare allegation of an antitrust conspiracy to survive a motion to dismiss, see id. at 1967 n. 6, and expressed concern that such discovery "will push cost-conscious defendants to settle even anemic cases," id. at 1967.  These concerns provide some basis for believing that whatever adjustment in pleading standards results from Bell Atlantic is limited to cases where massive discovery is likely to create unacceptable settlement pressures.

Fourth, although the Court expressed doubts about the ability of district courts to "weed[] out" through case management in the discovery process "a claim just shy of a plausible entitlement to relief," id. (emphasis added), the Court did not disclaim its prior statement that
applicable across the board in federal litigation.\textsuperscript{71} It expressly overrules \textit{Conley v. Gibson}, which for 50 years provided the legal standard for determining the sufficiency of a complaint on a matter to dismiss, stating that the "no set of facts" language "has earned its retirement" and "is best forgotten."\textsuperscript{72} The Court states that where the complaint purports to allege conspiracy based on parallel conduct but fails to allege any facts showing agreement, merely putting the defendants on notice that the gist of the plaintiff's complaint is conspiracy is not enough to survive a motion to dismiss.\textsuperscript{73} The Court then articulates a variety of formulations as to what would constitute a valid complaint.\textsuperscript{74} These formulations together are labeled the "plausibility standard."\textsuperscript{75} Finally, the Court underscores the need for lower courts to scrutinize complaints more carefully at the

\begin{quote}
"federal courts and litigants must rely on summary judgment and control over discovery to weed out unmeritorious claims sooner rather than later." Leatherman, 507 U.S. at 168-69, 113 S. Ct. 1160 (emphasis added). Leaving \textit{Leatherman} and \textit{Crawford-El} undisturbed (compared to the explicit disavowal of the "no set of facts" language of \textit{Conley}) further suggests that \textit{Bell Atlantic}, or at least its full force, is limited to the antitrust context.
\end{quote}

Fifth, just two weeks after issuing its opinion in \textit{Bell Atlantic}, the Court cited it for the traditional proposition that "[s]pecific facts are not necessary [for a pleading that satisfies Rule 8(a)(2)]"; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Erickson, 127 S. Ct. at 2200 (quoting \textit{Bell Atlantic}'s quotation from \textit{Conley}) (omission in original).

\textsuperscript{71} \textit{Id.} at 155.
\textsuperscript{72} \textit{Twombly}, 127 S. Ct. at 1969.
\textsuperscript{73} \textit{Id.} at 1965, 1966, 1974.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.} at 1968.
pleading stage because of the perceived inability of trial judges to weed out insubstantial early on in the discovery phase of the case.\textsuperscript{76}

However, the use of the term "plausible" to describe the heightened pleading standard seems like an odd choice. The dictionary definition of "plausible" -- "superficially fair, reasonable or valuable but often specious;" "superficially pleasing or persuasive;" "appearing worthy of belief" – suggests a very forgiving standard, perhaps even lower than that in Conley.\textsuperscript{77} Moreover, litigants are given few clues as to what constitutes a "plausible" claim beyond some descriptive terminology. Twombly says that "possible" or "speculative" claims are deficient but little beyond that.\textsuperscript{78} The Court itself appears to be relying more on labels that the opinion decries.\textsuperscript{79} – in articulating the new pleading standard. Thus, Twombly now allows trial courts to dismiss claims viewed as speculative or implausible without giving a second thought as to whether the claims themselves – as opposed to the way the claims are described in the complaint – have merit and warrant trial.

Similarly, although the Court states that "conclusory" allegations and "formulaic" recitations of claims do not meet the plausibility test,\textsuperscript{80} it nevertheless says nothing about what distinguishes a proper factual allegation from a deficient conclusory claim, and for good reason. The line separating fact from conclusion is not easy to draw

\begin{itemize}
\item \textsuperscript{76} Id. at 1967.
\item \textsuperscript{77} Merriam-Webster's Collegiate Dictionary (11\textsuperscript{th} Ed. 2003).
\item \textsuperscript{78} Twombly, 127 S. Ct. at 1965, 1966.
\item \textsuperscript{79} Id. at 1965 (Rule 8(a)(2) "requires more than labels and conclusions, and the formulaic recitation of the elements of a cause of action will not do.") (citations omitted).
\item \textsuperscript{80} 127 S. Ct. at 1965.
\end{itemize}
and never has been.\textsuperscript{81} Indeed, the Achilles heel of code pleading became apparent when the courts got bogged down on the fact/conclusion distinction and lost sight of the larger goals of litigation.\textsuperscript{82}

The short of it is that the Court has needlessly re-ignited an ancient debate that had been settled long ago with the promulgation of the Federal Rules of Civil Procedure. Once again, trial courts are assigned the task of fathoming the unfathomable – the distinction between allegations that are "factual" and hence valid, and those which are merely "conclusory" and hence deficient.\textsuperscript{83} Trial courts prefer to avoid jumping into the thicket; and, after Twombly, they are likely simply to dismiss claims pleaded in a conclusory manner rather than give plaintiffs a chance to rehabilitate those claims.

On the other hand, some language in Twombly suggests that the opinion has a much narrower focus.\textsuperscript{84} First, the majority eschews any notion of creating a court-made particularity in pleading requirement in antitrust cases and specifically reaffirms its earlier holding in Swierkiewicz that any such requirement must come from the Federal Rules and not from the courts.\textsuperscript{85} Second, although Twombly certainly reinterprets the

\begin{flushright}
\textsuperscript{81} 127 S. Ct. at 1976 (Stevens, J. dissenting) citing Weinstein & Distler, Comments on Procedural Reform: Drafting Pleading Rules, 57 Colum. L. Rev. 518, 520-21 ("it is virtually impossible logically to distinguish among 'ultimate facts,' 'evidence' and 'conclusions.' Essentially, any allegation in a pleading must be an assertion that certain occurrences took place. The pending spectrum, passing from evidence, through ultimate facts to conclusions, is largely a continuum varying only in degree of particularity with which the occurrences are described."

\textsuperscript{82} See e.g., 5 C. Wright and A. Miller, Federal Practice and Procedure § 1216 ("The substitution of 'claim showing that a pleader is entitled to relief for the code formation of 'facts' constituting a 'cause of action' was intended to avoid the distinctions drawn under the codes among 'evidentiary facts,' 'ultimate facts' and 'conclusions' . . . ."

\textsuperscript{83} See, supra, n. 81.

\textsuperscript{84} Iqbal, 490 F.3d at 156.

\textsuperscript{85} Twombly, 127 S. Ct. at 1974.
concept of notice pleading, it does not herald a return to fact pleading. In Erickson v. Pardus, decided two weeks after Twombly, the Court in a per curiam opinion made clear that Twombly did not abnegate notice pleading. Erickson was a pro se civil rights case brought by a prisoner suffering from Hepatitis C, who sued prison officials for injury caused by the prison’s discontinuance of treatment for his disease. The trial court dismissed the complaint for failure to allege harm caused by discontinuance of the treatment for hepatitis, as opposed to harm caused by the hepatitis itself. Reversing the trial court, Erickson held that plaintiff’s allegations that the prison’s discontinuance of treatment caused him injury were not too conclusory under Twombly. In so ruling, the Court in Erickson was mindful that the plaintiff was proceeding pro se and that the federal courts have given considerable leeway to pro se litigants.

Third, Twombly, in a footnote, observed that the barebones allegations in Official Form 9 of the Federal Rules of Civil Procedure would be sufficient to pass it new pleading standards. The Court observed that Form 9 did provide the time and place of

---

87 Id. at 2200 (“Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’ Specific facts are not necessary; the statement need only ‘give the defendant fair notice of what the . . . claim is and grounds upon which it rests.’”) (citations omitted).
88 Id. at 2197.
89 Id. at 2200.
90 Id. at 2198 (The [Court of Appeals] holding departs in so stark a manner from the pleading standard mandated by the Rules of Civil Procedure that we . . . vacate the court’s judgment and remand the case for further consideration.”).
91 Id. at 2200.
92 Twombly, 127 S. Ct. at 1970 n. 10.
the alleged tortious conduct, but elided over the fact that the acts of alleged wrongdoing are encompassed in the term "negligent." The allegations of parallel conduct in \textit{Twombly}, on the other hand, even though they "may be indicative of a conspiracy" are nevertheless deficient because they are also equally consistent with lawful behavior.

Query whether simply allegations of the time and place of alleged negligent behavior are similarly consistent with lawful behavior.

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

\begin{itemize}
  \item \textit{Id.} (Id.)
  \item \textit{Iqbal}, 490 F.3d at 156.
  \item \textit{Twombly}, 127 S. Ct. at 1970, n. 10.
  \item \textit{Id.} at 1967 n. 6.
\end{itemize}
Nevertheless, the Second Circuit in Iqbal ruled that Twombly did not require "a universal standard of heightened fact pleading" in all federal actions. Rather, the court ruled that Twombly enunciated a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those cases where amplification is needed to render a claim plausible." In other words, detailed factual allegations in a complaint are not needed, except where they are needed. Perhaps what the Court in Iqbal was trying to say was that amplification is required in those cases where additional facts are required "to nudge [plaintiff's] claims across the line from conceivable to plausible." Still, the Second Circuit's articulation of the Twombly standard seems hopelessly circular.

III. Impact of Twombly

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

A. Demise of Notice Pleading

The Twombly holding marks a significant retreat from the concept of notice pleading and certainly the end of notice pleading as envisioned by the drafters of

---

98 Id.
99 Id.
100 Id.
the Federal Rules. Procedurally, Twombly represents the culmination of decades of
guerilla warfare on notice pleading.\textsuperscript{101} The defense bar never accepted the concept of
The Federal Rules require that a complaint provide only "a short plain statement of the
claim showing that the pleader is entitled to relief."\textsuperscript{102} To illustrate complaints that would
meet this standard, the drafters included a series of Official Forms which were appended
to the Federal Rules as promulgated. A review of the Official Forms reveals that the
drafters intended a minimalist approach to pleading. Most courts, including antitrust
courts, understood the concept of notice pleading.\textsuperscript{103} A half-century ago, the Supreme
Court ruled that Rule 8(a)(2) obligated the plaintiff to "give the defendant fair notice of
what the … claim is and the grounds upon which it rests."\textsuperscript{104} The Court further held that
under this standard "that a complaint should not be dismissed for failure to state a claim
unless it appears beyond doubt that plaintiff can prove no set of facts in support of his
claim which would entitle him to relief."\textsuperscript{105}

\textsuperscript{101} See 5 Wright & Miller § 1201 at 86-87 describing how Judge Clark's decision in Dioguardi v.
Durning, 139 F.2d 774 (2d Cir. 1944) created a movement among the defense bar to amend Rule 8 and
require the complaint to plead a "cause of action."

\textsuperscript{102} Fed. R. Civ. P. 8(a)(2).

\textsuperscript{103} See Thompson v. Washington, 362 F.3d 969, 970 (7th Cir. 2004) ("The federal rules replaced fact
pleading with notice pleading."); Hames v. AAMCO Transmission, Inc., 33 F.3d 774, 782 (3d Cir. 1994);
(1983) (suggesting that a court may require greater specificity in pleading before allowing an antitrust case
to proceed to potentially expensive discovery); see Syncort, Inc. v. Sequential Software, Inc., 50 F. Supp.
2d 318, 326 (D.N.J. 1999) (complaint dismissed for failure to allege relevant market); George Haug Co. v.
Rolls Royce Motor Cars Inc, 148 F.3d 136, 139 (2d Cir. 1998) (complaint dismissed for failure to allege
antitrust injury).

\textsuperscript{104} Conley v. Gibson, 355 U.S. 41, 47 (1957).

\textsuperscript{105} Id. at 45-46.
**Conley**, however, has not been without its detractors. Critics have railed against its plaintiff-friendly standard, urging that a complaint is defective if it fails to plead "facts" sufficient to state a "cause of action." In other words, the complaint must meet the standards set forth in the state law pleading codes that preceded the Federal Rules. The drafters of the Federal Rules rejected this approach because they believed that it would be unfairly burdensome to require a plaintiff *at the pleading stage* to have its claim prepackaged and its proof ready, especially when the key facts may be in the exclusive control of the defendants.

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

---

106 See, e.g., *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) ("Conley has never been interpreted literally."); *Ascon Properties, Inc. v. Mobil Oil Co.*, 1149, 1155 (9th Cir. 1981); see also Hazard, From Whom No Secrets Are Hid, 76 Tex. L. Rev. 1665, 1668 (1998) ("Conley turned Rule 8 on its head.").

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

108 *Twombly*, 127 S. Ct. at 1977 (Stevens, J. dissenting) ("Under the relaxed standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in.").
Modern critics of notice pleading accept this fact. The problem today, they claim, is that the drafters of the Federal Rules lived in a different time, long before the onset of the big case era, and simply did not anticipate the enormous costs of liberal pretrial discovery on all litigants.\(^{109}\) They argue that a defendant, once a motion to dismiss has been denied, can easily spend millions of dollars on discovery. Thereafter, that defendant may win a motion for summary judgment, but from a financial perspective, still come out a loser.\(^{110}\) The solution, as they see it, is to tighten pleading standards so as to permit the courts to throw out weak cases at the pleading stage.\(^{111}\)

This is precisely the approach adopted by the court in *Twombly*. By "retiring" *Conley v. Gibson*, the Supreme Court abrogated the presumption implicit in the Federal Rules in favor of the complaint and with it 50 years of well-established precedent.\(^{112}\) The Court's decision to give *Conley*'s "no set of facts" language the cruel back of the hand is troublesome, but even more troublesome is its willingness to marginalize the long accepted rule that on a motion to dismiss, the facts pleaded in the complaint must be assumed to be true.\(^{113}\) *Twombly* beats a hasty retreat from that standard by ruling that "a legal conclusion couched as a factual allegation" or "formulaic" recitations of elements of a claim are not "facts" and need not be accepted as true.\(^{114}\)


\(^{110}\) *Id.*

\(^{111}\) *Id.*

\(^{112}\) See *Twombly*, 127 S. Ct. at 1967-69.

\(^{113}\) See *Swierkiewicz*, 534 U.S. at 509, n. 1 (On a "motion to dismiss, we must accept as true all of the factual allegations contained in the complaint.")

\(^{114}\) *Twombly*, 127 S. Ct. at 1965.
That move, however, does not fully explain the Court's conclusion that defendants' acts were fully consistent with independent business judgment. To get there, the Court apparently relies on the "facts" contained in defendants' legal briefs; but these "facts" are not part of the record before the Court. Still, the Court seems to have had little difficulty weaving defendants legal contention into the factual record.115

Query whether the "plausibility" standard adopted in place of Conley v. Gibson will produce a consistent line of case law in the long term. It certainly has not done so in the short term. One thing is certain: that standard will make it much easier for courts to dismiss complaints at the pleading stage and much harder for meritorious, but weakly documented, complaints to get to trial. It also puts plaintiffs who do not have access to proof exclusively in the hands of defendants at a significant disadvantage in pleading and prosecuting their claims. For example, the Twombly Court does not even attempt to explain how the victim of an antitrust conspiracy can escape a motion to dismiss in cases where defendants have concealed information and successfully covered their tracks so as to leave no evidence – beyond parallel conduct – of any agreement among them. The short answer is that such cases will be eliminated on motion to dismiss and the full story will never be known. The Court thus seems more concerned with false positives, that is, entertaining cases that should not have been brought in the first place for lack of merit, than it is with letting meritorious claims slip through the system simply

115 See infra, n. __ and accompanying text.
because the defendants have been able to keep the lid on their scheme.\textsuperscript{116} Here, \textbf{Twombly}’s new pleading rules take on substantive overtones.

\textbf{B. Substantive Effects of the \textbf{Twombly} Holding}

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

In the intervening 35 years, the courts and the Advisory Committee have swung in Handler’s direction. Summary judgment is now routinely granted in antitrust cases.\textsuperscript{119} Courts are more circumspect in certifying class actions.\textsuperscript{120} The Advisory Committee in an effort to make discovery more cost-effective has introduced presumptive limits on the scope,\textsuperscript{121} amount\textsuperscript{122} and length of discovery.\textsuperscript{123} Discovery that

\begin{itemize}
  \item See infra., n. ___ and accompanying text.
  \item See Handler, supra, n. 96.
  \item Id. at 9-12.
  \item Fed. R. Civ. P. 23(c)(1)(A).
  \item Fed. R. Civ. P. 26(b)(1) (attorney-initiated discovery limited to "claims and defenses").
\end{itemize}
is abusive or not proportional to the needs of the case is subject to mandatory sanctions. Nevertheless, the Twombly holding is Handler's crowning achievement. Twombly directs antitrust courts to perform serious triage at the pleading stage and eliminate weak cases before plaintiffs have had an opportunity for discovery. From Handler's perspective, defendants now have a meaningful vehicle to get claims dismissed and thus avoid the perceived "extortionate" tactics of plaintiffs and their lawyers.

Whether Handler was right in his assessment of the antitrust world 35 years ago is an open question. Certainly, at the time of the Twombly decision, given developments in the Courts and under the Federal Rules, Handler's case was vastly overstated. After Twombly, however, it is clear that Handler's views have triumphed and that the balance of power in antitrust litigation has shifted decidedly in favor of defendants.


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

---

123 Fed. R. Civ. P. 32(d)(2) (presumptively limiting the length of depositions to "one day of seven hours.")
management, control of discovery, summary judgment or carefully crafted jury instructions.\textsuperscript{125}

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," \textit{post} at 1975, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. See, \textit{e.g.}, Easterbrook, Discovery as Abuse, 69 B.U.L.Rev. 635, 638 (1989) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves"). And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries," \textit{post} at 1975: the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "reasonably founded hope that the [discovery] process will reveal relevant evidence" to support a § 1 claim. \textit{Dura}, 544 U.S., at 347, 125 S. Ct. 1627. [Citations omitted.]

The \textit{Twombly} approach represents a marked departure from its ruling a decade earlier in \textit{Leatherman},\textsuperscript{126} wherein, Chief Justice Rehnquist, writing for the Court, categorically rejected judicially-created enhanced pleading in favor of summary judgment and judicial control of discovery as vehicles to eliminate infirm claims.\textsuperscript{127}

\textsuperscript{125} \textit{Twombly}, 127 S. Ct. at 1967.

\textsuperscript{126} \textit{Leatherman v. Tarrant Co, Narcotics Intelligence and Coordination Unit}, 507 U.S. 163 (1993).

\textsuperscript{127} \textit{Id}, at 168-69. That the \textit{Twombly} Court was purposeful in departing from \textit{Leatherman} is clear from the fact that its language tracks carefully that used in \textit{Leatherman}. In \textit{Twombly}, the Court reasoned that:

\begin{quote}
It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management" . . . [a]nd it is self-evident that the
\end{quote}
Perhaps if Rule 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.

[Emphasis added.]

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

Nor is it true that the courts have no control of the discovery process. With the 1983 Amendments, the Federal Rules began to encourage active management of discovery by the judge. Rule 26(b)(3) was added to limit discovery to that which is

problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage."

Twombly, 127 S. Ct. at 1967.


proportional to the needs of the case. Where the cost of discovery outweighs its benefits, the party seeking such discovery faces mandatory sanctions. Similarly, a party could be sanctioned for seeking discovery that was redundant or not cost effective.

The judicial role in supervising discovery was broadened significantly by the 1993 Amendments to the Federal Rules. Rule 26(f) was added to provide that prior to the initial pretrial conference, the parties had to meet and confer on an overall discovery plan for the litigation and that discovery could not proceed until such a plan was adopted by the court. The 1993 Amendments also for the first time imposed numerical limitations designed to improve the cost-effectiveness of discovery, including: presumptive limits on the number of interrogatories (25); and presumptive limits on the number of depositions in a given case (10 per side). Subsequently, the length of a deposition was limited presumptively to one seven hour day. Each of these presumptive limits was subject to modification by the court. In 2000, the Federal Rules were amended to narrow the scope of attorney-initiated discovery to claims and

132 Id.
133 Fed. R. Civ. P. 26(g).
134 Id.
136 Id.
defenses in the case. At the same time, the court was given broad discretion in granting additional discovery with respect to the subject matter of the lawsuit. In 1993, Rule 23 was amended to eliminate conditional class certification and to slow down the certification process, lest a class be erroneously certified in haste. It is simply not possible that the Court in Twombly was unaware of these developments under the Federal Rules. Similarly, it is highly unlikely that the Court was unaware of empirical research demonstrating that discovery abuse leading to excessive pretrial costs was not a problem in the vast majority of cases filed in the federal courts. The real question is why the Court chose to ignore these developments.

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

---

142 Id.
conspiracies to go undetected to enable plaintiffs for want of pretrial discovery – the vehicle necessary to present "plausible" complaints.

Simply put, the solution offered by the majority in Twombly makes little sense, unless it had another goal in mind: tort reform, that is, reduction in the number of private civil enforcement suits in the federal courts.\(^{145}\) Tort reform is the unspoken principle at the heart of the Twombly decision. Without citation to authority, the Court seems to assume that all antitrust conspiracy claims are lacking in merit. Rather than recognize the importance of deterring antitrust violation, the Court focuses on the high cost of discovery, which may force defendants to settle for economic reasons rather than litigate on the merits, as well as the burdens that labor-intensive antitrust litigation imposed on the courts.\(^{146}\) The Court pays only lip service to the well-recognized rule that

\(^{145}\) Concern about the ever-increasing litigiousness of American society is not new. Judge Selya described the phenomenon in colorful terms in Securities Industry Ass'n v. Connolly, 883 F.2d 1114, 1115 (1\(^{st}\) Cir. 1989):

Hypertrophy is the pathologic "overgrowth . . . of an organ or part . . . resulting from unusually steady or severe use . . ." Webster's Third New International Dictionary 1114 (1981). Metaphorists seem to find the condition irresistible. Thus, hypertrophy has been used as a partial explanation for the collapse of entire intellectual systems, e.g., Kuhn, The Structure of Scientific Revolutions (2d ed. 1970), and detailed mechanical intellectual artifacts, e.g., Posner, Goodbye to the Bluebook, 54 U. Chi. L. Rev. 1343 (1986). We succumb today to the same temptation, for we find the metaphor especially apt in discussing the rampant growth of the civil docket in the United States.

We need not belabor the point. Increased resort to the courts, and the consequent tumefaction of already-swollen court calendars, have received considerable attention, see, e.g., Heydebrand & Seron, The Rising Demand For Court Services, 11 Just. Sys. J. 303 (1986); Galanter, The Day After the Litigation Explosion, 46 Md. L. Rev. 3 (1986); Lieberman, The Litigation Society (1981), so we merely note the phenomenon and do not comment further upon it.

The approach to this issue by the Court in Twombly is both novel and potentially far-reaching.

\(^{146}\) Twombly 127 S. Ct. at 1966-67.
on a motion to dismiss, all facts alleged in the complaint must be deemed true.\footnote{147} Even though the defendants have not filed answers and must be deemed to have accepted as true the facts in the complaint, the Court works hard to derive a counter story that characterizes defendants conduct as procompetitive or at least competitively neutral.\footnote{148}

IV. The Uncertain Future of Private Antitrust Enforcement

The \textit{Twombly} decision bodes ill for future private antitrust litigation.

A. Echoes of \textit{Trinko}

\textit{Twombly} follows in the footsteps of its first cousin, \textit{Trinko},\footnote{149} in calling for a more tolerant approach to firms' behavior in the marketplace. In \textit{Trinko}, a customer of AT&T brought a monopolization action against Verizon, alleging that Verizon's failure to provide AT&T access to its technology as required under the Telecommunications Act of 1996 had impaired AT&T's ability to provide local phone service in New York City, thereby injuring the customer.\footnote{150} The Court dismissed the complaint, holding that Verizon's refusal to share its infrastructure – mandated by the Telecommunications Act of 1996 – did not give rise to a claim for monopolization under traditional antitrust standards because Verizon's conduct was not anticompetitive.\footnote{151} In

\begin{itemize}
\item \footnote{147} Id. at 1965.
\item \footnote{148} Id. at 1971.
\item \footnote{149} Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).
\item \footnote{150} Id. at 404.
\item \footnote{151} Id. at 407-08. The Court reasoned that firms may acquire monopoly power by creating an infrastructure that "renders them uniquely suited to serve their customers." Id. at 407. Forced sharing of those infrastructures would run counter to basic antitrust principles for several reasons. First, forced sharing could chill innovation and at the same time cast judges in the role of central planners – roles to which they are ill-suited. Id. at 408. Forced sharing would force rivals to negotiate with each other and enhance the risk of collusive behavior, a cardinal sin under the antitrust laws. Id. Mandatory access would undermine the basic right of a seller to choose its customers. Id. Consequently, Verizon's refusal to share its network did not constitute unlawful monopolization. See generally, Edward D. Cavanagh, \textit{Trinko}: A
dismissing the complaint, the Supreme Court struck four distinctly pro business themes. First, the Court suggests that dominant firm conduct is either benign or of no concern to the antitrust laws.\footnote{Kinder, Gentler Approach To Dominant Firms Under The Antitrust Laws, 59 Maine, L. Rev. 112, 116 (2007).} Rather than focusing on the anticompetitive effects flowing from monopolistic conduct, the Court stresses the benefits from a monopolist's behavior.\footnote{Trinko, 540 U.S. at 407.} The Court describes monopoly power as "an important element of the free-market system."\footnote{Id.} The Court further observes that "[t]he opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place."\footnote{Id.}

Second, \textit{Trinko} cautions that the "cost of false positives counsels against an undue expansion of § 2 liability."\footnote{Id.} The Court expressed concern that Verizon's failure to provide services required by the Telecommunications Act may be unrelated to alleged antitrust exclusion:\footnote{Id. at 414.}

One false-positive risk is that an incumbent LEC's failure to provide a service with sufficient alacrity might have nothing to do with exclusion. Allegations of violations of § 251(c)(3) duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations. \textit{Amici} States have filed a brief asserting that competitive

\begin{footnotes}\footnote{Kinder, Gentler Approach To Dominant Firms Under The Antitrust Laws, 59 Maine, L. Rev. 112, 116 (2007).}
\footnote{Trinko, 540 U.S. at 407.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id. at 414.}
\footnote{Id.}
\end{footnotes}
LEC s are threatened with "death by a thousand cuts," Brief for New York et al. as Amici Curiae 10 (internal quotation marks omitted)- the identification of which would surely be a daunting task for a generalist antitrust court. Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to a actively pursued by competitive LECs.

The Court further notes even under the best of circumstances, the application of the antitrust laws "can be difficult" \[158\] and that the mistaken inference of anticompetitive effect "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." \[159\]

Third, Trinko expresses a lack of confidence in the court system to achieve good outcomes in exclusionary conduct cases. The Court points out that Verizon's failure to comply with sharing requirements under the 1996 Telecommunications Act may be difficult for an antitrust court to evaluate "not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex and constantly changing interaction" of the parties. \[160\] Accordingly, identifying exclusionary behavior would prove a "daunting task" for "generalist" antitrust courts. \[161\] Trinko also suggests that antitrust courts are ill-equipped to handle the day-to-day supervision of the implementation of a "highly detailed decree." \[162\] At the very least, antitrust intervention in the telecommunications

\[158\] Id.
\[159\] Id.
\[160\] Id.
\[161\] Id.
\[162\] Id.
field is likely to lead to costly "interminable litigation."¹⁶³ **Trinko** urges judicial self-restraint concluding that the Sherman Act "does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."¹⁶⁴

Fourth, **Trinko** expresses a distinct preference for regulation over antitrust intervention. The Court urges the greater the regulatory overlay, the less appropriate the use of antitrust interaction.¹⁶⁵ **Trinko** reasons that in certain cases "regulation significantly diminishes of antitrust harm."¹⁶⁶ Further, antitrust intervention in highly regulated industries is likely to lead to duplicative enforcement and liability.¹⁶⁷ Regulation rather than generalists courts are best suited to supervise and evaluate complicated decrees.¹⁶⁸

**Twombly** echoes these themes. In particular, **Twombly** re-iterates the need to avoid false positives, refusing to condemn conduct "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."¹⁶⁹ The Court also states that "resisting competition

¹⁶³ Id.
¹⁶⁴ Id. at 415-16.
¹⁶⁵ Id. at 412.
¹⁶⁶ Id.
¹⁶⁷ Id. at 411-13.
¹⁶⁸ Id. at 414-15.
¹⁶⁹ Twombly, 127 S. Ct. at 1964.
is routine market conduct” which, without more, cannot be condemned under Section 1.\(^{170}\)

In addition, Twombly expresses skepticism about the ability of the judiciary to manage complex litigation.\(^{171}\) However, whereas concerns in Trinko were tied to whether courts could achieve reasoned substantive outcomes, Twombly appears more concerned with procedural issues, specifically the perceived inability of courts to rein in discovery and manage complex litigation in a complex manner.\(^{172}\)

**B. Pleading Conspiracy Post-Twombly**

Twombly makes abundantly clear that mere allegations of parallel conduct are deficient in stating a conspiracy claim and to avoid a motion to dismiss, one or more "plus factors" must be alleged.\(^{173}\) The Court, however, is conspicuously silent on how to plead conspiracy claims in those cases where parallel conduct exists, conspiracy is suspected (and even logical) but defendants have been successful in covering their tracks, leaving no tangible evidence of conspiratory behavior. In such a scenario, it appears that Twombly mandates dismissal, thereby denying the plaintiff discovery.

Twombly then creates a disturbing Catch-22 situation. Plaintiff cannot properly allege a conspiracy, and thus be entitled to discovery, unless it alleges conspiratorial acts. On the other hand, plaintiff cannot identify conspiratorial acts and

---

\(^{170}\) Id.

\(^{171}\) Id. at 1967.

\(^{172}\) See, supra, nn. 125-44 and accompanying text.

\(^{173}\) Twombly 127 S. Ct. at 1966.
hence meet the Twombly standard, until it gets discovery. The ineluctable conclusion is that some, perhaps many, antitrust conspiracies will go undetected.

The inevitable result is diminution of the private remedy. Twombly will have little practical effect on government enforcement actions. The government is authorized to obtain pre-complaint discovery through Civil Investigative Demands.\textsuperscript{174} It would thus be inexcusable for a government pleading to fail the Twombly test. Private litigants are not entitled to precomplaint discovery and to some extent are dependent on facts developed in the government enforcement action to develop their claims. In private follow-on actions, it would again be inexcusable for plaintiffs to fail under Twombly.

Accordingly, the real impact of Twombly will be felt in private actions that are independent of government prosecution. Congress intended the private remedy to complement public enforcement.\textsuperscript{175} While Congress made it easy for private parties to benefit from government enforcement, private actions are in no way limited by government actions under the statutory scheme. Twombly, however, creates a de facto dependency which threatens the deterrent function of private antitrust actions.

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

The majority in Twombly barely pays lip service to the long-recognized rule that on a motion to dismiss all allegations in the complaint must be accepted as true.\textsuperscript{176} Rather, it quibbles with whether the complaint contains plausible "factual


\textsuperscript{175} See, 15 U.S.C. § 16(a) (litigated government actions in which a defendant is found to have violated the antitrust laws is given prima facie effect in any subsequent private civil action against that defendant on the same facts).

allegations" rather than "labels and conclusions and formulaic recitations of elements of a cause of action. The decision to dismiss the complaint at the pleading stage "seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency." Even though defendants did not answer the complaint, leaving the factual record before the Court devoid of any response or explanation of the defendant's conduct, the Court nevertheless scoured the motion papers filed by defense counsel and pieced together a "rational" explanation of defendant's conduct.

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

With respect to the claim that the ILECs agreed not to invade each other's territories, the Court found that "a natural explanation for the noncompetition alleged is

177  Twombly 127 S. Ct. at 1965.
178  Id. at 1975 (Stevens, J. dissenting).
179  Id. at 1971.
180  Id.
181  Id.
that the former Government sanctioned monopolists were sitting tight, expecting their
neighbors to do the same thing."\textsuperscript{182} Moreover, relying on a treatise, found that as a matter
of fact "'[f]irms do not expand without limit and none of them enters every market that an
outside observer might regard as profitable, or even a small portion of such markets.'"\textsuperscript{183}
The Court concluded that "Congress may have expected some ILECs to become CLECs
in the legacy territories of other ILECs, but the disappointment does not make conspiracy
plausible."\textsuperscript{184}

The Court took a similar approach in dismissing the complaint in
\textit{Trinko}.\textsuperscript{185} The willingness of the courts to entertain complicated factual arguments by
defendants without the benefit of a factual record makes it even more difficult for an
antitrust plaintiff to get beyond a motion to dismiss. It also significantly devalues the
content of the complaint, contrary to the intent of the Federal Rules.\textsuperscript{186}

\textbf{Conclusion}

\textit{Twombly} is a watershed decision whose impact will reverberate for
decades. Substantively, \textit{Twombly} has engineered at dramatic shift in the balance of
power in antitrust litigation from plaintiffs to defendants. Procedurally, the decision is at
odds with the fundamental tenets of notice pleading. The "plausibility" standard has
created much uncertainty that will take years for the lower courts to resolve. The ball is

\textsuperscript{182} \textit{Id.} at 1972.

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textit{Id.} at 1973.

\textsuperscript{185} \textit{Trinko}, 540 U.S. at 407, 410.

\textsuperscript{186} As Justice Stevens, dissenting in \textit{Twombly} aptly observed: "Under the relaxed pleading standards
of the Federal Rules, the idea was not to keep litigants out of court, but rather to keep them in." \textit{Twombly},
127 S. Ct. at 1976 (Stevens, J. dissenting).
now in the Advisory Committee's court to provide meaningful guidance to litigants and lower courts.