Making Sense of Twombly

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I. Introduction

In May 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*¹ and sent shockwaves throughout the federal civil justice system. Reversing the Second Circuit, the Court held that an antitrust complaint that alleged mere parallel behavior among rival telecommunications companies, coupled with stray averments of agreement that amounted merely to legal conclusions, failed as a matter of law to state a claim for conspiracy in violation of Section 1 of the Sherman Act² and had been properly dismissed by the trial court.³ The Court then proceeded to: (1) redefine the concept of notice pleading by “retiring” the half-century old “no set of facts” standard⁴ that it had announced in *Conley v. Gibson*⁵ (2) articulate a new “plausibility” standard against which to measure complaints, thereby raising the bar for pleadings in federal courts;⁶ and (3) remind district courts that they are gatekeepers, tasked with

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³ *Id.* at 548.
⁴ *Id.* at 562-63.
⁵ 355 U.S. 41, 45-46 (1957) (“a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”) (emphasis added).
⁶ *Twombly*, 550 U.S. at 562 (“Conley’s ‘no set of facts’ language…and earned its retirement… [and] [t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”).
the responsibility of screening complaints at the motion to dismiss stage in order to assure that speculative or insubstantial claims that are expensive for the parties to litigate and costly for the courts to administer are not allowed to “immerse the parties in the discovery swamp — ‘that Serbonian bog … where armies whole have sunk.’” The upshot of Twombly is that defendants should be spared the rigors of discovery “unless the complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to burden of responding to at least a limited discovery demand.”

**Twombly** has triggered an avalanche of motions to dismiss, which, in turn, have generated thousands of judicial opinions, some of them knee-jerk reactions, others, more thoughtful. It also has generated a plethora of academic commentary, much of it negative.

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7 Id. at 559 (“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.


9 Id.


Legislation has been introduced to overturn *Twombly* and restore the *Conley v. Gibson* standard.\(^\text{13}\) *Twombly* was also a major agenda item at the 2010 Conference on Civil Rules held at Duke University on May 10-11, 2010.\(^\text{14}\) Unquestionably, the *Twombly* decision is flawed on many levels:

1. It redefines federal pleading standards generally in order to address perceived problems specific to antitrust and similar complex litigation, including costly and time consuming pretrial discovery.\(^\text{15}\)

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\(^{13}\) See S. 1504, The Notice Pleading Restoration Act of 2010; H.R. 4115, The Open Access to Courts Act of 2009. Both of these bills would overrule *Twombly* and restore the status quo ante. *But see* John Thorne, *Congress Overturning Twombly and Iqbal Would Be the Real Revolution in Pleading*, The Metropolitan Corporate Lawyer (Aug. 10, 2010) (“in the struggle to devise better language than the Supreme Court has used in explaining pleading standards of the Federal Rules, the drafters of these bills have ended up proposing—perhaps unintentionally—new and fairly incomprehensible standards that would lead to chaos in the courts and frivolous cases crowding out meritorious ones”).


\(^{15}\) *Twombly*, 550 U.S. at 558. This approach is curiously at odds with the Court’s consistent rulings that court-made pleading rules should not be used to address substantive policy concerns. Only weeks before *Twombly* was decided, the Court reiterated these views in *Jones v. Bock*, 549 U.S. 199, 212-13 (2007):

> In a series of recent cases, we have explained that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns. Thus, in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), we unanimously reversed the Court of Appeals for imposing a heightened pleading standard in § 1983 suits against municipalities. We explained that “[p]erhaps if [the] Rules … were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirements … But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.” *Id.*, at 168, 113 S.Ct. 1160.

In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), we unanimously reversed the Court of Appeals for requiring employment discrimination plaintiffs to specifically allege the elements of a prima facie case of discrimination. We explained the “the Federal Rules do not contain a heightened pleading standard for employment discrimination suits,” and a “requirement of greater specificity for particular claims” must be obtained by amending the Federal Rules. *Id.*, at 515, 122 S.Ct. 992 (citing *Leatherman*). And just last Term, in *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006), we unanimously
2. In place of the Conley’s “no set of facts standard” - - a measuring stick that the Supreme Court had consistently adhered to for half a century in passing on complaints at the motion to dismiss stage - - the Court substituted a “foggy”\textsuperscript{16} plausibility test\textsuperscript{17}, which is ever murkier in the wake of its subsequent attempts at clarification.\textsuperscript{18}

3. The decision shifts the focus of the court in ruling on a motion to dismiss from whether a claim exists to whether a claim is properly alleged in the complaint, thereby re-introducing into federal practice the very technical pleading requirements that the Federal Rules of Civil Procedure sought to eliminate\textsuperscript{19}

4. As a result, Twombly appears to be at odds with the basic thrust of the Federal Rules to encourage trials on the merits over pretrial dispositions and seems to embrace the common law philosophy that trials are to be avoided.\textsuperscript{20}

\textsuperscript{16} See Clermont & Yeazell, \textit{supra}, n. 12 at 823.
\textsuperscript{17} \textit{Twombly}, 550 U.S. at 556.
\textsuperscript{19} See Charles Alan Wright and Mary Kay Kane, The Law of Federal Courts \S 368 at 470-80 (6th Ed. 2004) (hereafter “Wright & Kane”). Dissenting in \textit{Twombly}, Justice Steven observed:

Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. See \textit{Swierkiewicz}, 534 U.S., at 514, 122 S.Ct. 992 (“The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim”). Charles E. Clark, the “principal draftsman” of the Federal Rules put it thus:

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

Twombly, 550 U.S. at 575 (Stevens, J. dissenting)
\textsuperscript{20} Wright & Kane, \textit{supra}, n. 19, \S 368 at 470-80; \textit{Twombly}, 550 U.S. at 515 (Stevens, J. dissenting).
5. The Court pointedly ignores the many management tools available to the courts under the Federal Rules of Civil Procedure short of dismissal of claims.\textsuperscript{21}

6. The opinion suggests that federal trial judges are not effective pretrial managers.\textsuperscript{22}

7. Yet, these very same judges are encouraged to dismiss claims on the merits perhaps without the benefit of pretrial discovery.\textsuperscript{23}

8. The Court offers no suggestions on how a plaintiff is expected to meet the plausibility test when information crucial to its case, such as the time and place of conspiratorial meetings and the nature and extent of any agreements, is in the exclusive control of the defendant.\textsuperscript{24}

On the other hand, \textit{Twombly} is not without its supporters.\textsuperscript{25} They view \textit{Twombly} as “unremarkable” in requiring plaintiffs to plead sufficient facts to make a claim plausible.\textsuperscript{26} They also maintain that \textit{Twombly} does “little more than restate and apply the federal pleading standard that lower courts had long been implementing.”\textsuperscript{27} The fact is that lower courts, with the possible exception of \textit{pro se} cases,\textsuperscript{28} have never applied \textit{Conley} literally;\textsuperscript{29} and frequency with which

\begin{footnotesize}
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  \item \textsuperscript{22} \textit{Twombly} 550 U.S. at  558.
  \item \textsuperscript{23} \textit{Id}. at 559.
  \item \textsuperscript{24} See Cavanagh, supra, n. 21 at 892.
  \item \textsuperscript{25} See, Thorne, supra, n. 13.
  \item \textsuperscript{26} \textit{Id. Twombly} and \textit{Iqbal} “are unremarkable in requiring that before a lawsuit can proceed to expensive discovery, the plaintiff must plead a valid cause of action based on facts (not conclusions) that make the claim plausible in the circumstances”).
  \item \textsuperscript{27} \textit{Id}.
  \item \textsuperscript{28} See, e.g., Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).
  \item \textsuperscript{29} \textit{Twombly}, 550 U.S. at 562; Huertas-Gonzalez v. University of Puerto Rico, 520 F. Supp. 2d 304, 311 (D.P.R. 2007)
\end{itemize}
\end{footnotesize}
courts grant motions to dismiss is testament to this fact. Rather, as noted in *Iqbal*, the courts have always decided motions to dismiss or the basis of “judicial experience and common sense.”

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

34 *See* Mem. Of Andrea Kuperman to the Civil Rules Committee at 2 (July 26, 2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_072610.pdf (“The case law to date does not appear to indicate” any significant changes in pleading standards by the courts).
35 *In re*: Text Messaging Antitrust Litigation, __F.3d__, __(7th Cir. 2010).
36 *Twombly*, 550 U.S. at 555.
II. Prologue: The Adoption of the Federal Rules of Civil Procedure and the Advent of Notice Pleading

As Arthur Miller has observed, “[h]istory matters;” and because history matters, any analysis of *Twombly* must begin with a discussion of the origins of the Federal Rules of Civil Procedure and the changes in practice and procedure that the Federal Rules effectuated. In 1934, Congress enacted the Rules Enabling Act authorizing the United States Supreme Court to fashion uniform rules of practice and procedure in the federal courts. The Federal Rules of Civil Procedure were thereafter promulgated by the Supreme Court on December 20, 1937 and became effective on September 16, 1938 pursuant to the Rules Enabling Act after Congress adjourned without enacting an adverse legislation. The new Federal Rules introduced a number of dramatic changes in federal practice and procedure: the merger of law and equity; the elimination of the common law forms of action; the limitation of the number of pleadings to three; liberal procedures for joinder of claims and parties; and the introduction of pretrial discovery. Perhaps the most significant change, however, was the introduction of simplified

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40 See Wright & Kane, *supra*, n 19 §62.
42 *Id.*
43 Fed. R. Civ. 7(a) (complaint, answer and reply, if ordered by the court).
pleading standards to facilitate trial of meritorious claims. The drafters thus rejected the common law model with its highly technical pleading rules and endless exchanges of paper designed to avoid trial. The drafters also rejected the code pleading models and their heavy emphasis on pleading facts sufficient to make out a cause of action. The drafters felt that both models tended focus the court’s attention on how a claim had been pleaded instead of the nature of the claim itself and to reward the party whose attorney possessed superior technical skills rather than the party having the meritorious claim or defense.

Instead, the simplified pleading system chosen by the drafters de-emphasized the role of the complaint and answer in the action. Rule 8(a)(2) requires only that the complaint contain “short and plain statement of the claim showing that the pleader is entitled to relief.” The goal of this simplified pleading was to insure that meritorious claims would have their day in court and that claims would not be dismissed simply because they were inartfully drafted or because the plaintiff did not allege in the complaint each and every element of the cause of action to be proved at trial.

49 Id. Miller, supra, n. 37 at 1; Campbell, supra, n. 48 at 1198-1202; See Ward, supra, n. 12 at 896-97 (criticizing common law pleading and code pleading).
50 See Miller, supra, n 36 at 1: Wright & Kane, supra, n.19 at § 62; See Charles Clark, History, Systems and Functions of Pleading, 11 Va. L. Rev. 517, 518 (1925):

[T]he purpose especially emphasized has varied from time to time. Thus in common law pleading especial emphasis was placed upon the issue-formulating function of pleading; under the earlier code pleading like emphasis was placed upon stating the material, ultimate facts in the pleadings: while at the present time the emphasis seems to have shifted to the notice function of pleading.

51 Miller, supra, n. 36 at 1. See also Victor E. Schwartz and Christopher E. Appel, Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal, 33 Har v. J. Law & Pub. Pol. 1107, 1118 (“A guiding policy behind simplified pleading was it would be more efficient, in terms of both cost and expediency, to resolve disputes using discovery rather than successive technical pleadings.”).
53 See Miller, supra, n. 37 at 1 (“the Federal Rules created a system that relied on plain language and minimized procedural traps with trial by jury as the gold standard for determining a case’s merits”); Wright & Kane, supra, n. 19 at § 368.
The function of the complaint, with one notable exception involving the pleading of fraud claims, was to provide the adversary with notice of the claim or defense and the grounds upon which it depends. This simplified pleading regimen became popularly known as notice pleading, although the drafters themselves declined to embrace that terminology. Claims could be described generally; it was unnecessary to plead every element of the cause of action to be proven at trial. The drafters eschewed the phrase “cause of action” in favor of “claim for relief.” The details of the claims or defenses could be fleshed out through pretrial discovery. To illustrate this barebones pleading regimen, the drafters included several sample complaints in the Appendix of Forms. Presumably, complaints modeled on these forms would survive a motion to dismiss. Consistent with the approach of the drafters, the Supreme Court in Conley v. Gibson held that a complaint must contain notice of the claim as well as the grounds upon which it depends and that a complaint challenged for insufficiency pursuant to Rule 12(b)(6) should not be dismissed at the pleading stage “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Moreover, the courts have been especially solicitous of pro se plaintiffs and have demonstrated a marked reluctance to dismiss pro se complaints at the pleadings stage.

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54 Fed. R. Civ. P 9(b) (Fraud and mistake must be pleaded “with particularity”).
55 Wright & Kane, supra, n.19 at § 68.
56 See Conley v. Gibson, 355 U.S. at 47.
57 Id.
59 See Miller, supra, n. 36 at 1.
60 See e.g. Federal Rules of Civil Procedure, Appendix of Official Forms, Form 4.
61 Twombly, 550 U.S. at 565, n. 10; see Hamilton v. Palin, 621 F.3d 816, 818 (8th Cir. 2010), quoting Fed. R. Civ. P. 84 (“The forms in the Appendix [to the Rules] suffice under these rules”).
63 Id. at 45-46.
64 Erickson v. Pardus 551 U.S. 89, 94 (2007) (a pro se complaint is “to be liberally construed” and “however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.”) (citations omitted).
While the notice pleading concept was not without its detractors, it is fair to say that the transition from fact pleading to notice pleading went smoothly, at least initially. Concern about notice pleading began to mount as litigation grew more complex and more costly in ways that the original drafters could not have foreseen. Critics argued that the Federal Rules had shifted the litigation playing field decidedly in favor of plaintiffs. A threadbare complaint could force a defendant to spend millions of dollars on discovery, irrespective of the merits of the underlying claim. Faced with such costs, a defendant would have little choice from an economical prospective other than to settle the matter, even if the underlying claims were of little or no merit.

The Advisory Committee resisted calls to change pleading standards. It did, however, take other steps to reduce litigation costs. A package of amendments was introduced in 1983 to curb baseless claims and to police more effectively the discovery process. First, that package contained a revitalized Rule 11 in 1983 to provide for mandatory sanction where a claim or

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66 See Schwartz & Appel, supra, n. 50 at 1118-19 (the drafters’ judgment that simplified pleading combined with discovery was more efficient than technical pleading rules “was justifiable”).
69 Id.
70 Id. at 11-12.
defense is adjudged to have been baseless. Second, it amended Rule 16 to make clear that a court’s managerial powers extended to the discovery phase, as well as to the trial phase, of a case and that failure to participate meaningfully in pretrial conferences. Third, it amended Rule 26 to provide that discovery must be proportional to the needs of the case and to sanction discovery that is redundant, not cost effective or disproportional to the needs of the case. Subsequently, in 1993 it amended the discovery rules to impose presumptive numerical limits on interrogatories and depositions. Fourth, the 2000 Amendments to the Federal Rules limit the scope of attorney-initiated discovery. Fifth, the 2006 Amendments to the Federal Rules provide a framework for reining in potentially costly electronic discovery.

Nevertheless, concerns about notice pleading persisted and found sympathetic ears in some appellate courts. For example, the Second Circuit in *Ostrer v. Aronwald* imposed a specificity in pleading requirement, akin to Rule 9(b), in civil rights cases. That approach, however, was short-lived. The Supreme Court in *Leatherman* and subsequently in *Swierkiewicz* ruled that courts may not fashion their own rules of particularity in pleading for

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77 Fed. R. Civ. P. 26(b)(1) (attorney-initiated discovery limited in scope to a “claim or defense”).
79 Ostrer v. Aronwald, 567 F.2d 551 (2d Cir. 1977).
80 Id. at 553.

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

specific types of cases. Any change would have to come through the Federal Rules of Civil Procedure. As noted above, the Advisory Committee was disinclined to act on pleadings, and criticism of Conley persisted in the lower courts. The Supreme Court chose to re-enter the fray by accepting certiorari in Twombly.

III. The Twombly Trilogy: Exactly What Did Twombly Do?

A. Twombly

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

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83 Id. at 515.
84 See, supra, n. ____ and accompanying text.
85 See, e.g. Car Carriers Inc. v. Ford Motor Co., 745 F. 2d 1101, 1106 (7th Cir. 1984); Ascon Properties, Inc. v. Mobil Oil Co., 866 F. 2d 543, 546 n.3 (1st Cir. 1976); see also Geoffrey C. Hazard, From Whom No Secrets Are Hid, 76 Tex. 2 Rev. 1665, 1685 (1998) (“Conley turned Rule 8 on its head”).
86 Twombly, 550 U.S. at 548-49.
87 Id.
88 Id. at 550, n.1.
90 Twombly, 550 U.S. at 550 n. 1; see Verizon Directories Corp. v. Yellow Book USA, Inc. 338 F. Supp. 2d 422, 425 (E.D.N.Y. 2004).
That state of affairs was short-lived. In 1996, Congress enacted the Telecommunications Act of 1996,\textsuperscript{91} which, among other things, deregulated markets for local telephone services. In order to stimulate competition in local markets, Congress authorized the erstwhile monopolistic regional operating companies, referred to in \textit{Twombly} as incumbent local exchange carriers (“ILECs”) to compete in each other’s territories.\textsuperscript{92} In addition, the Act required ILECs referred to by \textit{Twombly} as competitive local exchange carrier (“CLEC”) to share their technology with companies, seeking to enter the newly created competitive markets for local telephone services.\textsuperscript{93} Notwithstanding the Act, little changed in the local exchange markets. The ILECs did not seem interested in competing with each other, and they were slow to make technology available to CLECs.\textsuperscript{94}

\textit{Twombly}, a lawyer and a consumer of local phone and high speed internet services, commenced under section one of the Sherman Act a putative class action, alleging that the ILECs (1) had conspired not to compete in each other’s territories; and (2) had agreed to limit the growth opportunities of CLECs by, \textit{inter alia}, limiting access to their networks, overbilling and undermining relations between CLECs and their customers.\textsuperscript{95} The complaint contained no specific factual allegations of any agreements among the ILECs. Rather, it averred that the ILECs pursued a parallel course of conduct and then characterized that conduct as conspiratorial.\textsuperscript{96} Defendants moved to dismiss the complaint, arguing that it was defective as a matter of substantive antitrust law because proof of mere conscious parallelism, without more, is

\begin{itemize}
  \item \textsuperscript{91} Pub. L. No. 104, 110 Stat. 56.
  \item \textsuperscript{92} \textit{Twombly}, 550 U.S. at 549.
  \item \textsuperscript{93} \textit{Id.} at 549-50.
  \item \textsuperscript{94} \textit{Id.} at 550.
  \item \textsuperscript{95} \textit{Id.}
  \item \textsuperscript{96} \textit{Id.} at 551.
\end{itemize}
insufficient to establish an unlawful conspiracy. Defendants further argued that in order to succeed at trial, plaintiffs would have to adduce evidence of agreement beyond parallel conduct--so-called plus factors--and its failure to allege plus factors was fatal to its claim.

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

The Supreme Court reversed and ordered dismissal of the complaint. In so doing, it steered a middle course between the decisions below. The high court declined to endorse the trial court’s view that summary judgment standards apply at the motion to dismiss stage. It also rejected the Second Circuit’s view that under Swierkiewicz and Conley, the claims must be upheld and could proceed to discovery. Rather, the Court based its decision on the construction of Rule 8(a)(2) and found that it failed to provide “a short and plain statement of the claim showing that the pleader is entitled to relief.”

In so holding, the Court acknowledged that the Federal Rules had significantly liberalized pleading standards and further, reaffirmed the holding in Swierkiewicz, that courts are not free to

\[97 \text{Id. at 552.} \]
\[98 \text{Id. at 553.} \]
\[99 \text{Twombly v. Bell Atlantic Corp., 331 F. Supp. 2d. 174, 183 (S.D.N.Y. 2003).} \]
\[100 \text{Twombly v. Bell Atlantic Corp., 425 F. 3d. 99, 114 (2d. Cir. 2005).} \]
\[101 \text{Id. at 107.} \]
\[102 \text{Twombly, 550 U.S. at 548.} \]
\[103 \text{Id. at 570.} \]
\[104 \text{Id. at 555.} \]
adopt ad hoc heightened pleading standards. The Court then proceeded to redefine notice pleading on the language of Rule 8(a)(2) of the Federal Rules of Civil Procedure. The Court also acknowledged that the Federal Rules had eased pleading requirements that had been in effect at common law and under the Codes; but at the same time stated that it would be a mistake to suggest “that the Federal Rules somehow dispensed with the pleading of facts altogether.”

Rather, the Federal Rules merely relieve a plaintiff of the need to “set out in detail the facts upon which he bases his claim.” The Court further opined that factual allegations in the complaint are critical to a plaintiff’s claim.

To satisfy Rule 8(a)(2) a complaint must provide notice of the plaintiff’s claim and the grounds upon which the claim rests. To establish “grounds” sufficient to make a “showing” that it is “entitled” to relief, a pleader must aver “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Nor are courts “bound to accept as true a legal conclusion couched as a factual allegation.” The facts alleged “must be enough to raise a right to relief above the speculative level.” It is not enough to allege facts “that merely create [ ] a suspicion [of] a legally cognizable right to action.” The complaint must assert plausible grounds

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105 Id. at 570.
106 Id. at 555 n. 3.
107 Id.
108 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. (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”). Id.
109 Id. at 555.
110 Id.
111 Id.
112 Id. at 545.
113 Id. at 555.
to infer wrongdoing. The Court emphasized that simply requiring plausible grounds from which to infer wrongdoing “does not impose a probability requirement at the pleading stage.” Rather, “it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [wrongdoing].”

Applying the plausibility standard to the complaint before it, the Court in *Twombly* held that the claim of conspiracy consisting of “an allegation of parallel conduct a bare allegation of conspiracy will not suffice” because parallel conduct itself is not unlawful and “could just as well be independent action.” In so ruling, the Court pointedly departed from its 50 year old ruling in *Conley v. Gibson*. The Court concluded that *Conley* had long been misconstrued by lower courts and that the “no set of facts” language “described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s survival.” Pointing to criticism leveled at *Conley* by the lower courts, the Court also suggested that judicial support for *Conley* had long ago eroded.

Nevertheless, the contours of the plausibility standard enunciated by the Court are vague, and the Court in *Twombly* provides little guidance. It is clear that the Court

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114 *Id.*
115 *Id.* at 545.
116 *Id.*
117 *Id.* at 556, 557.
118 *Id.* at 561.
119 *Id.* at 562.
120 As Judge Posner pointed out: *Twombly* is a recent decision and its scope unsettled (especially in light of its successor *Iqbal*-from which the author of the Justices who participated in those cases have since retired.)
intended to raise the bar for pleadings in federal courts. How much higher the bar has been raised and how broadly the *Twombly* holding should be applied remains unclear.\footnote{In *re*: Text Messaging Antitrust Litigation, ___F.3d___, ___ (7th Cir. 2010); see also, Mark Anderson & Max Huffman, *Iqbal*, *Twombly*, and the Expected Cost of False Positive Error, 20 Cornell J.L. & Pub. Poly, 1 (2010) ("How the Plausibility Standard from *Iqbal* and *Twombly* Should operate in the real world is poorly understood.")}

A fundamental problem with the *Twombly* standard is that the Court “defines plausibility in terms of what it is not.”\footnote{In *re*: Blood Reagents Antitrust Litigation, ___F.Supp.2d___, ___ (7th Cir. 2010), the Seventh Circuit underscored the difficulty of reconciling the Supreme Court’s reaffirmation of notice pleading, while at the same time adopting the plausibility standard: It is by now well established that a plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, might suggest that something has happened to her that might be redressed by the law. The question with which courts are still struggling is how much higher the Supreme Court meant to set the bar, when it decided not only *Twombly*, but [Erickson and *Iqbal*]. This is not an easy question to answer, as the thoughtful dissent from this opinion demonstrates. On the one hand, the Supreme Court has adopted a “plausibility” standard, but on the other hand, it has insisted that is not requiring fact pleading, nor is it adopting a single pleading standard to replace Rule 8, Rule 9, and specialized regimes like the one in the Private Securities Litigation Reform Act ("PSLRA").} It is not a particularity requirement but rather “simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”\footnote{*Twombly*, 550 U.S. at 556.} On the other hand, “it asks for more than a sheer possibility that a defendant has acted unlawfully.”\footnote{*Iqbal*, 129 S.Ct. at 1949.} Nor does it require “heightened fact pleading of specifics [·].”\footnote{*Twombly*, 550 U.S. at 555, 570.} We are left with a sort of Goldilocks approach: probability (too much); possibility (too little); plausible (just right).

Moreover, the Court’s choice of terminology is unfortunate. As Judge Posner points out “plausibility, probability and possibility overlap.”\footnote{In *re*: Text Messaging Antitrust Litigation, ___F.3d___, ___ (7th Cir. 2010) Judge Posner goes on to say: Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as “preponderance of the evidence” connote.} True, on a spectrum with possible on one end and probable on the other end, plausible fits somewhere in between.

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

B. *Erickson*

*Erickson v. Pardus* was decided two weeks after *Twombly* but with a very different outcome and a very different rationale. *Erickson* was a pro se civil rights action by a prisoner against prison officials in which the prisoner claimed that officials had unlawfully denied him treatment of his Hepatitis C condition. The plaintiff claimed that the prison which had been treating his disease, ceased treatment after wrongfully concluding that he had used contraband drugs. On the authority of *Twombly*, defendants moved to dismiss the complaint; and the trial court granted the motion, ruling that the complaint failed to allege harm caused by discontinuance of the treatment, as

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127 *Id.*
128 *Id.* at 558.
129 *Id.* at 559; see, infra, nn. ___ and accompanying text.
131 *Id.* at 89-90, 94.
132 *Id.* at 89-90.
opposed to harm caused by the progression of the disease.\textsuperscript{133} In other words, defendants challenged not the claim itself but rather how the claim had been pleaded.

The Supreme Court reversed and upheld the complaint.\textsuperscript{134} Citing\textit{ Conley}, the Court held that a complaint need only provide notice of the claim and its grounds; the detail demanded by the trial court was unnecessary under the Federal Rules.\textsuperscript{135} The Court also criticized the Court of Appeals’ “departure from the liberal pleading standards set forth by Rule 8(a)(2)” in\textsuperscript{pro se} cases.\textsuperscript{136}\textbf{Erickson} sheds some light on the holding in\textit{ Twombly}. First, it makes clear that the Court in\textit{ Twombly} accepted notice pleading and did not intend to adopt a fact pleading regimen in the federal courts generally.\textsuperscript{137} The thrust of the trial court’s dismissal of the complaint was that the claim was improperly pleaded, not that a claim did not exist, and the Supreme Coast rejected that reasoning. Second,\textbf{Erickson} in reaffirming the traditionally generous treatment of\textit{ pro se} complaints demonstrates vividly that\textit{ Twombly} did not intend to undo some seventy years of case law in its entirety.\textsuperscript{138} Simply put,\textbf{Erickson} suggests that\textit{ Twombly} is plausibility standard has flexibility and is not to be construed in a wooden manner.

\textbf{C.} \textit{Iqbal}

\textsuperscript{133} Id. at 93.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 93-94.
\textsuperscript{136} Id. at 94.
\textsuperscript{137} Id.
\textsuperscript{138} Id. This is not to suggest that\textit{ pro se} complaints automatically survive motions to dismiss. Where claims in\textit{ pro se} complaints are implausible, they may be dismissed under\textit{ Twombly}.\textit{ See Vargas v. Wughalter, 380 Fed. Appx. 110 (2d Cir. 2010); Blakely v. Wells, 380 Fed. Appx. 6 (2d Cir. 2010).}
In May 2009, the Supreme Court revisited pleading standards in *Ashcroft v. Iqbal*. Plaintiff Iqbal, a Muslim from Pakistan who had been arrested in the United States in the wake of the 2001 attack on the World Trade Center and who had subsequently pleaded guilty to defrauding the United States, brought a civil rights action against federal officials including the Attorney General of the United States and the Director of the FBI, alleging that they knowingly condoned a discriminatory policy which had led to “harsh conditions of confinement on account of his race, religion or national origin.” The lower courts had upheld the complaint.

Reversing, the Supreme Court in a 5-4 decision held that the complaint was deficient as a matter of law under *Twombly*. The Iqbal decision reaffirms *Twombly* and attempts to add flesh to the skeletal *Twombly* analyses. As a threshold matter, the Court rejected arguments that *Twombly* should be limited to antitrust cases or complex litigation generally, and held that *Twombly* applied to all federal complaints. The Court then underscored “[t]wo working principles [that] underlie or decision in *Twombly*.” First, on a motion to dismiss only well-pleaded factual allegations must be accepted as true; conclusory allegations are not entitled to a presumption of truth. Second, to survive a motion to dismiss, a complaint must state “a plausible claim for relief.” Determining plausibility is “a context-specific task that require the reviewing

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140 *Id.* at 1942.
141 *Id.*
142 *Id.* at 1943.
143 *Id.* at 1953 (“Our decision, *Twombly* expounded the pleading standard ‘for all civil actions’ … and it applies to antitrust and discrimination suits alike.’”).
144 *Id.* at 1949-50.
145 *Id.*
146 *Id.* at 1950.
court to draw on its judicial experience and common sense.”  

The pleader need not at the motion to dismiss stage establish the probability of wrongdoing; but at the same time, allegations that raise only the mere possibility of misconduct are insufficient as a matter of law to establish “that the pleader is entitled to relief.”

Applying these working principles, the Court first weeded out conclusory allegations that it deemed to be nothing more than “formulaic recitation of the elements” of plaintiff’s constitutionally based claim. The Court, after reviewing the well-pleaded facts, ruled that the complaint failed Twombly’s plausibility standard. Here, the Court found that the complaint raised no more than the possibility of wrongdoing. While acknowledging that certain allegations were consistent with plaintiff’s claims of unlawful conduct, the Court pointed out that in the wake of the 9/11 events, the Attorney General had ample reason to detain Arab Muslims illegally present within the United States who might be potentially linked to terrorists. Given the “obvious alternative explanation” for plaintiff’s detention, the Court found that claims of discrimination and the purposeful discrimination he asks the Court to infer were not plausible. Even if it did, the complaint is still deficient because it fails to allege facts showing the defendants purposefully adopted a discriminatory detention policy.

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147 Id.
148 Id.
149 Id. at 1951.
150 Id. at 1952.
151 Id.
152 Id. at 1951.
153 Id. at 1951-52.
154 Id. at 1952.
In so ruling, the Court not only rejected the argument that *Twombly* should be limited to antitrust complaints, but also rejected the argument that *Twombly* should be tempered in light of the Second Circuit’s directive to cabin discovery so as to preserve the defense of qualified immunity. The Court observed that permitting this case to proceed to discovery would exact a heavy toll on government officials forced simultaneously to defend their case and carry out their official duties. In particular, litigation “exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.”

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

**III. Themes of *Twombly* Trilogy**

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155 *Id.* at 1953.
156 *Id.*
157 *Id.*
158 *Id.*
From the *Twombly* Trilogy, several important themes emerge which shed light on the standards for reviewing a complaint at the motion to dismiss stage (1) trial judge as gatekeeper (2) pleadings matter; (3) cost matters; (4) context matters; and (5) greater leeway for courts in evaluating complaints.

A. Gatekeeper Role

In holding that dismissal was the preferred vehicle for handling complaints that failed the plausibility test, *Twombly* and *Iqbal* directed trial courts to act as gatekeepers and to take a hard look at the pleadings before opening the doors to expensive pretrial discovery. The assignment of yet another gatekeeper role to the trial judge is consistent with the trend that began nearly a quarter of a century ago aimed at screening out cases unworthy of trial. In its 1986 *Matsushita* decision, the Supreme Court, in an effort to revitalize summary judgment, directed the trial courts to carefully examine the pleadings and the pretrial record to determine if there is a genuine issue of material fact necessitating a trial and to grant summary judgment if there is not. *Matsushita* demythologized the notion that somehow summary judgment was inappropriate in antitrust cases. Seven years later, in *Daubert*, the high court tasked trial judges to screen out junk science in the courtroom by making sure prior to trial that expert testimony was both relevant and reliable. By pushing the process for vetting experts and their opinion back into the pretrial phase, *Daubert* would save time at trial

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159 *See*, *supra*, n. 126 and accompanying text.
161 *Id.* at 585-88. In so holding, the Court rejected the view that its earlier holding in *Poller v. CBS, Inc.*, 368 U.S. 464 (1962) was meant to limit the use of summary judgment in antitrust cases generally.
163 *Id.* at 589.
and eliminate ancillary disputes. More importantly, exclusion of expert testimony could be outcome determinative and thus eliminate the need for trial altogether.

In 2003, the Supreme Court promulgated amendments to Rule 23 of the Federal Rules of Civil Procedure involving class actions, which brought about subtle, but nevertheless significant changes, in class certification procedures. Recognizing that the granting or denying of class certification had significant consequences and effectively could be outcome determinative, the amended rules encouraged courts to consider the issues thoughtfully and not rush the certification decision. The interpretive cases have held that in ruling on certification issues, the trial court must engage in “rigorous analysis.” A court must make findings that the pre-requisites for certification have been met; it is not enough that a party has made a “threshold showing” of compliance or that it intends to meet the requirements of Rule 23. In making its findings, the court may have to resolve factual issues and may not avoid that exercise merely because of a

164 See Fed. R. Civ. P. 23(c)(1)(A) (“When a person sues or issued as a representative of a class, the court must – at an early practicable time – determine by order whether to certify the action as a class action.”).

165 Fed. R. Civ. P. 23 adv. comm. note. The amended Rule provides that the certification decision be made “at an early practicable time” instead of “as soon as practicable after commencement of an action.” in the prior rule. The drafters recognized that it may take time to gather information necessary to making the certification ruling, to determine which issues can be tried on a class-wide basis and to designate class counsel. Id.

166 General Telephone Co. v. Falcon, 457 U.S. 147, 160 (1982); Dukes v. Wal-Mart Stores, Inc., 603 F. 3d 571, 581-82 (9th Cir 2010), cert. granted, 131 S.Ct. 795 (2010); In re IPO Securities Litigation, 471 F. 3d 24, 33-34 (2d Cir. 2006); Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services, Inc., 601 F. 3d “59, 2280 (11th Cir. 2010); In re Hydrogen Peroxide Antitrust Litigation 552 F. 3d 305, 316 (3d Cir. 2008); In re New Motor Vehicles Canadian Export Antitrust Litigation, 522 F. 3d 6, 17 (1st Cir. 2008).

167 In re Hydrogen Peroxide Antitrust Litigation 552 F. 3d 305, 307 (3d Cir. 2008).
concern that certification issues overlap with merits issues. Moreover, where a Rule 23 requirement relies on a novel or complex theory as to injury, the trial judge must engage in a “searching inquiry” as to the viability of that theory and the existence of facts necessary for the theory to succeed. In short, resolution of class certification issues may require significant fact-finding well in advance of trial.

Viewed against this backdrop of developments in summary judgment, expert testimony and class certification, Twombly might be seen simply as the next logical step in a progression through which dispositive decisions are rendered earlier on the litigation time-line in order to reduce overall costs and to filter out insubstantial claims from trial dockets. That Twombly and Iqbal are part of a discernable trend does not necessarily mean that these decisions are wise. Indeed, both the logic the Twombly decision and the direction in which it points the federal courts are troubling. Twombly is illogical because the Court proposes that complex cases be choked off at the motion to dismiss stage, the very point at which the courts know least about their cases.

168 Dukes v. Wal-Mart Stores, Inc., 603 F. 3d 571, 581-82 (9th Cir. 2010); cert. granted, 131 S.Ct. 795 (2010): Falcon thus provides relatively straightforward guidance. When considering class certification under Rule 23, district courts are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of Rule 23(a) have been satisfied. See id. at 160-61, 102 S. Ct. 2364. It does not mean that a district court must conduct a full-blown trial on the merits prior to certification. A district court’s analysis will often, though not always, require looking behind the pleadings, even to issues overlapping with the merits of the underlying claims. See id. As we describe in more detail below, every circuit to have considered this issue, including our own previous decisions, as reached essentially the same conclusion: Falcon’s central command requires district courts to ensure that Rule 23 requirements are actually met, not simply presumed from the pleadings.

169 In re Hydrogen Peroxide Antitrust Litigation, 552 F. 3d 305, 319 (3d Cir. 2008) (certification decision requires a “searching inquiry,” citing Moore’s Federal Practice § 23.80 [2]); In re New Motor Vehicles Canadian Export Antitrust Litigation, 522 F. 3d 6, 26 (1st Cir. 2008) (“We do not need to resolve now whether ‘findings’ regarding the class certification criteria are ever necessary, but we do hold that when a Rule 23 requirement relies on a novel or complex theory as to injury, as the predominance inquiry does in this case, the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed.”)

170 Dukes, 603 F. 3d at 581-82.
Equally troubling is that the Court - at a time when district courts are starving for trial activity in civil cases - appears to be re-embracing the long discredited common law philosophy of avoiding trial on the merits.\textsuperscript{171} Scholars\textsuperscript{172} and judges\textsuperscript{173} have bemoaned the “vanishing” civil trial – the sharp decline in federal civil trials over the last 50 years. In his 2004 study, Professor Marc Galantner concluded that the “portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002.”\textsuperscript{174} He also concludes that at least part of this decline in overall civil trials is due to increased, summary judgment activity.\textsuperscript{175} Similar empirical data on the effect of Daubert, class certification decisions and Twombly on the number of civil trials are difficult to come by; but Twombly presents yet another hurdle that has to be negotiated on the road to trial. As one class action lawyer confided in me, a class action plaintiff has to win its case four times before it even gets to trial.\textsuperscript{176} An important, but little discussed spill-over effect of the vanishing trial is that bench and bar become less skilled at trying cases and those cases that do get tried are not litigated as well as they might have been. It also further contributes to the declining number of trials.\textsuperscript{177}

A second spillover effect of the vanishing civil trial is the increasing disconnect between discovery and proof at trial. The nature and scope of pretrial discovery was once

\textsuperscript{171} See Miller, supra n. 36 at 1.
\textsuperscript{173} Patrick E. Higginbotham, Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law, So Why Do We Call Them Trial Courts?, 55 SMU L. Rev. 1405 (2002).
\textsuperscript{174} Galantner, supra, n 172 at 1; Elizabeth M. Schneider, The Changing Shape of Federal Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases, 158 U. Pa. L. Rev. 517, 518 (2010); but see Higginbotham, supra, n. 170 at 1418-19 (suggesting no discernible rate of change in summary judgment grants between 1981 and 1997.
\textsuperscript{175} Id. at 483-84.
\textsuperscript{176} A successful class action plaintiff must win (1) a motion to dismiss; (2) a class certification motion; (3) a Daubert motion; and (4) a summary judgment motion just to get to trial.
shaped by the issues to be tried. With the vanishing civil trial, that overarching 
structure has disappeared. Pretrial discovery has become an end in itself. Discovery, 
after all, is time-consuming and therefore lucrative for attorneys billing by the hour. 
Under these circumstances, the tendency is to seek more, not less, discovery; and the 
more pretrial discovery sought, the higher the cost of litigation. Equally important, 
lawyers who lack trial experience and, perhaps, the vision to see the interconnection 
between discovery and proof at trial, are likely to exercise less discipline in the conduct 
of discovery. The focus of inexperienced trial lawyers tends to be what they can get 
on discovery, instead of what they need. Inevitably, this need-insensitive approach 
also leads to higher discovery costs.

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

Twombly and Iqbal represent a retrenchment from the liberal pleading practices 
envisioned by the drafters of the Federal Rules as originally promulgated. As 
discussed above, the overarching goal of the Federal Rules was that meritorious 
claimants should have their day in court. The drafters were of the view that 
hypertechnical pleading rules at common law or under the codes had effectively derailed 
meritorious claims prior to trial. Their solution was to demote the role of the pleadings 
in federal litigation by de-emphasizing their factual content and underscoring their notice

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\text{Id. at 750.} \\
\text{Id.} \\
\text{Id. at 1418 (“the virtual disconnect between pre-trial has become institutionalized”).} \\
\text{Id.} \\
\text{Id.} \\
\text{Id.} \\
\text{See Miller supra, n.37 at 1.} \\
\text{See, supra, n. ____ and accompanying text.} \\
\text{Wright & Kane, supra, n. 19 at § 68 at 470-80.}
\]
function. Technical proficiency was not required. A complaint could pass muster even if it did not recite all the elements of the cause of action, as long as it described the events and occurrences giving rise to the claim. The facts could be developed on discovery.

Under *Twombly* however, facts do matter. The Court stated that “without some factual allegations in the complaint, it is hard to see how a claimant, could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also grounds on which the claim rests.” To withstand a motion to dismiss, a complaint must contain “enough factual matter” to make out a claim that is “plausible.”

Plausibility has both qualitative and quantitative dimensions. Qualitatively, “conclusory” allegations, “naked assertions” and “formulaic recitations” do not count and can be ignored on a motion to dismiss. Despite the fact that history has shown attempts to distinguish “facts” from “conclusions” to be an unproductive exercise, the lower courts have readily embraced this task after *Twombly* and *Iqbal*.

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187 *Id.*
188 *Id.*
189 *Id.*
190 *Twombly*, 550 U.S. at 555.
191 *Id.* at 556.
192 *Id.* at 555.
193 *See*, infra, nn. ___ - ___ and accompanying text.
194 *See*, e.g., Jacobs v. Tempur-Pedic Int’l, Inc. 626 F.3d 1327, 1337 (11th Cir. 2010) (finding “deficient” and “conclusory” allegations that “visco-elastic foam mattresses comprise a relevant product market or submarket, separate and distinct from the market for mattresses generally, under the antitrust laws”); *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 326 (3d Cir. 2010) (rejecting “conclusory averments”); Howard Hess Dental Labs, Inc. v. Dentisply Int’l, Inc., 602 F.3d 237, 254-55 (3d Cir. 2010) (assertions of conspiracy allegations in a “conclusory manner deficient); Jacobs v. Tempur-Pedic & Inter, Inc. 626 F.3d 1327, 1338 (11th Cir. 2010) (“conclusional statement begs the question of what exactly makes foam mattresses comprise this submarket” and “bold statement” that consumers lost hundreds of millions of dollars does not establish competitive harm); Starr v. SONY BMG Music Entertainment, 592 F.3d 314, 319 (2d Cir. 2010) (conclusion “are not entitled to the assumption of truth”); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 258 (4th Cir. 2009) (“bare allegation proves nothing”); summer v. Cunningham, 2011 WL 52554 at *2 (E.D. Tenn. January 4, 2011) (“an unadorned, the-defendant-unlawfully-harmed me accusation… will not do.”).
The next step is for the court to determine whether the remaining well-pleaded facts make out a plausible claim, *i.e.*, whether the factual allegations are “enough to raise a right to relief above the speculative level on the assumption that all of the complaint’s [well-pleaded] allegations are true.”\(^{195}\) In the wake of *Twombly* and *Iqbal*, the lower courts have struggled to determine the meaning of “plausible.”\(^{196}\) On the one hand, by retiring *Conley*, the Supreme Court clearly intended to raise the bar for pleadings in federal court. On the other hand, it is not clear how much the bar has been raised.\(^{197}\) *Twombly* made clear that the court was not abandoning notice pleading for fact pleading,\(^{198}\) and by reaffirming *Swierkiewicz*, the Court eschewed any particularity in pleading requirement under Rule 8.\(^{199}\) *Twombly* also made clear that on a motion to dismiss, the court must accept a true all well-pleaded facts, in the complaint, even if the “savvy judge” might disbelieve them.\(^{200}\) Nor did the Supreme court purport to alter the legal axion that allegations in a complaint are to be read as a whole and not in

\(^{195}\) *Twombly*, 550 U.S. at 545.

\(^{196}\) *Swanson v. Citibank*, N.A., 614 F.3d 400,403 (7th Cir. 2010) (courts are “still struggling” with the question of how much higher *Twombly* set the bar for pleadings). *Robbins v. Okla. Exrel. Dept. of Human Services*, 519 F.3d 1242, 1246 (10th Cir. 2008) ("We are not the first to acknowledge that the new formulation is less than pellucid"). *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) ("The issues raised by *Twombly* are not easily resolved and likely will be a source of controversy for years to come"); *Moss v. Secret Service*, 577 F.3d 962, 968 (9th Cir. 2009) ("Much confusion accompanied the lower court’s initial engagement with *Twombly*); compare *Kendall v. Visa U.S.A.*, Inc., 518 F.3d 1042, 1047 n. 5 (9th Cir. 2008) (*Twombly* abrogated notice-pleading in antitrust cases) and *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 3646, 58 (1st Cir. 2008) (after *Twombly*, Rule 12(b)(6) has “more heft”) *with Aktieselskabet AF 21, November 2001 v. Fame Jeans*, 525 F.3d 8, 15 and n. 3 (D.C. Cir. 2008) (*Twombly* “leaves the longstanding fundamentals of noticed pleading intact”).

\(^{197}\) *Swanson v. Citibank*, N.A., 614 F.3d at 403.

\(^{198}\) *Twombly*, 550 U.S. at 570.

\(^{199}\) *Id. But see* *Ward*, supra n. 12 at 900 ("Courts ‘talk’ notice pleading but often require much more--whether authorized to do so by the Federal Rules or a statute or not.").

\(^{200}\) *Twombly*, 550 U.S. at 556. The exception, of course, is that courts can disregard “that are sufficiently fantastic so as to defy reality as we know it: claims about little green men or the plaintiff’s recent trip to Pluto, or experience in time travel. *Iqbal*, 129 S.Ct. at 1937 (Souter, J. dissenting); *See* *Rosenman Family, LLC v. Picard*, 2010 WL 3911370 at *1 (2d Cir. Oct. 7, 2010) (same).
isolation.\textsuperscript{201} In light of these facts, one can surely argue that not much has changed after \textit{Twombly}.

Twombly’s conflicting cross-currents are “not easily resolved.”\textsuperscript{202} The lower courts have articulated the plausibility requirement in various ways: “some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation;”\textsuperscript{203} “a right to relief that goes beyond a speculative level;”\textsuperscript{204} “plaintiff plausibility, not just speculatively, has a claim for relief;”\textsuperscript{205} “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”\textsuperscript{206} Oddly, in purporting to construe \textit{Twombly}, the courts have engaged in the very type of labeling that \textit{Twombly} decried.

C. Context Matters

Plausibility also involves a quantitative component. How much factual detail is required to cross the plausibility threshold? \textit{Iqbal} held that to determine whether a complaint states a plausible claim for relief, a court must engage in a context-specific analysis and “draw on judicial experience and common sense.”\textsuperscript{207} While a complaint need not contain “detailed factual allegations,” it requires more than an unadorned, the

\textsuperscript{201} Ostrofe v. HS Crocker Co., 670 F.2d 1378, 1381, (9th Cir. 1982) (“allegations of a complaint must be read as a whole”).
\textsuperscript{202} Phillips, 515 F.3d at 234-35; See Tamayo v. Blagojevich, 526 F.3d 1074, 1084 (7th Cir. 2008) (plausibility suggests that plaintiff has a right to relief that goes beyond a “speculative level”); Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008), (a complaint will withstand a motion to dismiss if plaintiff “plausibly, not just speculatively” has a claim for relief); Matson v. Board of Educ. Of City School Dist. Of New York, ___ F.3d ___, 2011 WL 70572 at *1 (2d Cir. January 11, 2011) (“While a complaint need not contain “detailed factual allegations”, it requires “more than an unadorned, the defendant-unlawfully-harmed-me accusation”).
\textsuperscript{203} Id.
\textsuperscript{204} Tamayo v. Blagojevich, 526 F.3d 1074, 1084 (7th Cir. 2008).
\textsuperscript{205} Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008).
\textsuperscript{207} \textit{Iqbal}, 129 S.Ct. at 1949.
defendant-unlawfully-harmed-me accusation.’” Simply put, where there is an alternative, a lawful explanation of defendant’s conduct that is as probable as plaintiff’s claim of illegality, the claim is implausible and may be dismissed. In *Twombly*, the Court held that allegations that defendants’ refusal to compete constituted an unlawful conspiracy were implausible in light of (1) lack of any direct proof of agreement; (2) refusal to compete is not itself unlawful; (3) the history of telecommunications, where regulated monopoly—not competition—was the norm; (4) in light of that history resisting competition can be viewed as routine market conduct; and (5) defendants’ conduct was in line “with a wide swath of rational and competitive business strategy unilaterally prompted by common perception of the market.” Where allegations of conspiracy to violate the antitrust laws are based on parallel conduct, “they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.” Put another way, allegations of conspiracy are deficient if there are “obvious alternative explanation[s]” for the facts alleged.

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

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208 *Id.*
209 *Id.*
210 *Twombly* 550 U.S. at 557.
211 *Id.* In a footnote, the Court described examples of parallel conduct that would make claims of conspiracy plausible.
1. Parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli or mere interdependence unaided by an advance understanding among the parties;
2. conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement; and
3. complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason. *Twombly*, 550 U.S. 557, n. 4.
212 *Id.* at 567; see *In re: Insurance Brokers Antitrust Litigation*, 618 F.3d 300, 322-23 (3d Cir. 2010).
basis of plaintiff’s race, religion and national origin.\footnote{Iqbal, 129 S. Ct. at 1943-44.} Asserting qualified immunity, defendants moved to dismiss the complaint.

Dismissing the complaint, the Court held that although allegations of plaintiff’s arrest and detention were consistent with discriminating intent, the more likely explanation for defendant’s conduct--intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist act “—renders the claims of discrimination implausible.\footnote{Id. at 1951-52.} In addition, the Court pointed out that “disruptive discovery” would force expenditure of resources “that might otherwise be directed to the proper execution of the work of the Government” and might deter or detract officials “from the vigorous performance of their duties.\footnote{Id.}

In \textit{Erickson} on the other hand, the Court upheld the complaint. There, the civil rights claim was straightforward and uncomplicated. The plaintiff was proceeding \textit{pro se}.\footnote{Twombly’s plausibility standard is flexible and does not alter the court’s hospitable approach to \textit{pro se} complaints Boykin v. KeyCorp., 521 F.3d 202, 213 (2d Cir. 2008).} Discovery costs were likely to be minimal. Litigation of the claim would not create a significant diversion of monetary resources or state personnel. National security concerns were not relevant, nor were there concerns about false positives. There was also no obvious alternative and lawful explanation for the facts alleged.

In short, context matter.\footnote{Phillips v. County of Allegheny, 515 F.3d 224, 232 (3d. Cir. 2008) (“Context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case—some complaints will require at least some factual allegations to make out a “showing that the pleader is entitled to relief in order to give the defendant fair notice of what the … claim is and the grounds upon which it rests”); but \textit{see} Maurice Stucke, Does the Rule of Reason Violate the Rule of Law, 42 U.C. Davis L. Rev. 1375, 1472 (the plausibility test “seems completely subject we” and to say that “pleading requirements are contextual does not much advance the inquiry or practice”).} What emerges from these three Supreme Court cases is a kind of sliding scale for determining plausibility, \textit{i.e.}, whether a complaint will survive
a motion to dismiss. As the Seventh Circuit has stated, “the height of the pleading requirement is relative to the circumstances.” For example, in a straightforward personal injury case, pleadings drawn from the Official Forms will suffice. However, in “a complex antitrust or RICO case a fuller set of factual allegations than found in the sample complaints in the civil rules’ Appendix of Forms may be necessary to show the plaintiff’s claim is not ‘largely groundless.” On the other hand, in antitrust conspiracy cases where the complaint alleges direct evidence of agreement, a complaint will survive a motion to dismiss without setting forth significant additional factual enhancements. On the other hand, where plaintiff seeks to infer conspiracy from parallel business behavior without allegations of direct agreements, additional allegations are required to render the conspiracy plausible at the motion to dismiss stage. Thus, in Starr v. SONY BMG Music Entertainment, the Second Circuit upheld an antitrust price fixing conspiracy complaint containing the following factual enhancements:

1. Defendants, through the creation of two joint ventures, controlled about 80% of the internet music business and used the joint ventures as well as trade association meetings to exchange price information.

218 Schwartz and Appel, supra, n. 50 at 1127 (Factual specificity is a matter of degree, the demands of which may change depending on the case”); Limestone Development v. Village of Lemont, 520 F.3d 797, 803-04 (7th Cir. 2008) (if discovery is likely to be more than usually costly, the complaint must include as much factual detail and argument as may be required to show that plaintiff has a plausible claim”); Austen v. Catterton V, LP 2010 WL 625389 at *2 (D. Conn. 2010) (“Context, good judgment and commonsense mattered long before the Supreme court decided Twombly and Iqbal, and they remain significant in deciding Rule 12(b)(6) motions even after those decisions.”).
219 Cooney v. Rossiter, 583 F.3d 967, 971 (7th Cir. 2009).
220 See, e.g., Hamilton v. Palin 621 F. 3d 816, 818 (8th Cir. 2010) (upholding FELA complaint that complies with Appendix of Forms).
221 Limestone Development v. Village of Lemont, 520 F. 3d 797, 803 (7th Cir. 2008).
223 Twombly, 550 U.S. at 556-575.
224 592 F.3d 214, 123 (2d Cir. 2010), cert. denied, ___U.S. ___ 2011 WL 55814 (U.S. Jan. 10, 2011). (The “present complaint succeeds where Twombly’s failed because the complaint plausibly suggest that the parallel conduct alleged was the result of an agreement among the defendants.”)
2. The prices charged by defendants for Internet Music were unreasonably high and did not reflect the enormous savings over distribution of music via CDs, nor were terms of sale consumer friendly.

3. Third parties, whom defendants used to distribute Internet Music had to sell to consumers on the same terms as defendants.

4. Defendants used most favorable nation clauses in dealing with their joint ventures and tried to hide this fact, lest they attract antitrust scrutiny.

5. Defendants agreed to sell music at a whole-sale price of 70 cents per song at a time when rival independent sellers charged 25 cents per song.

6. Defendants jointly agreed not to deal with eMusic, the second largest Internet Music retailer.

7. Defendants were subject to at least three governmental antitrust investigations.

8. Defendants jointly agreed to raise their price of Internet Music from 65 cents to 70 cents per song.225

Other courts have rejected conspiracy claims based on parallel conduct unless at least one “plus factor” is alleged.226

Outside of the antitrust area, courts have upheld tort complaints that comply with the Official Forms appended to the Federal Rules of Civil Procedure.227 Some courts have gone so far as to suggest that a federal complaint must set forth all of the elements

225 Id.
226 See, e.g., In re Insurance Brokerage Antitrust Litigation, 618 F. 3d 300, 322-23 (3d Cir. 2010) (complaint needs to allege “something plausibly suggest[ive of] (not merely consistent with) agreement.”).
227 See Hamilton v. Palin 621 F. 3d 816, 818 (8th Cir. 2010).
of the cause of action,228 but this is clearly at odds with Twombly.229 Determining whether the claim is plausible in the factual context in which it is raised so as to warrant discovery is a labor-intensive task. A complaint may well contain a range of allegations, some plausible, while others are fanciful or ungrounded.230 All of this must be sorted out by the courts. That process is seldom easy. On the other hand, a party can plead itself out of court “by pleading facts that show [it] has no legal claim.”231

D. Cost Matters

The outcome in Twombly is inextricably linked to the high cost of litigation, specifically the high cost of discovery in antitrust cases.232 Twombly is “designed to spare defendants the expense of responding to bulky, burdensome discovery, unless the complaint provides enough information to enable the inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand.”233 The Court admonished trial judges considering motions to dismiss

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229 Twombly, 550 U.S. at 555 (Rule 9(a)(2) “requires only ‘a short plain statement of the claim showing that the pleader is entitled to relief’”); see also Boykin v. KeyCorp., 521 F.3d 202, 212 (2d Cir. 2008) (a complaint need not “allege specific facts establishing a prima facie case of discrimination”).
230 In Atkins v. City of Chicago, __ F.3d ___, 2011 WL 206155 at *7 (7th Cir. Jan. 25, 2011), the Seventh Circuit described the task:
So suppose some of the plaintiff’s factual allegations are unrealistic or nonsensical and others not, some contradict others, and some are “speculative” in the sense of implausible and ungrounded. The district court has to consider all these features of a complaint en route to deciding whether it has enough substance to warrant putting the defendant to the expense of discovery.
231 Hecker v. Deere & Co., 556 F.3d 575, 588 (7th Cir. 2009).
232 Id. at 558.
233 In re Text Messaging Antitrust Litigation, ___ F. 3d ___, ___ (7th Cir. 2010).
not “to forget that proceeding to antitrust discovery can be expensive.” 234 The Court was also concerned that high discovery costs can be used as a lever to extract significant settlements from defendants, irrespective of the merits of the case. 235 Accordingly, deficiencies in claims should “be exposed at the point of minimum expenditures of time and money by the parties and the court.” 236

Nor was the Court concerned solely about costs in terms of dollars. In Twombly, the Court ruled that deficiencies in claims must be exposed at the motion to dismiss stage because otherwise, “a largely groundless” claim would be permitted to “take up the time of a number of people, with the right to do so representing an in terrorem increment of the settlement value.” 237 Similarly, the Court in Iqbal opined that the burden of defending deficient civil rights claims could hinder public officials in carrying out their assigned duties. 238

Courts have heeded Twombly’s admonishment to be mindful of discovery costs in evaluating pleadings at the motion to dismiss stage. The Seventh Circuit has ruled that where anticipated discovery costs are unusually high, the trial court may require more factual detail in assessing plausibility. 239 Courts have also been mindful of discovery

234 Twombly, 550 U.S. at 558; but see In re: Rail Freight surcharge Antitrust Litigation, 587 F.Supp. 2d 27, 32 n. 3 (D.D.C 2008) (Yet, as sensitive as the courts must be to the cost to litigants of discovery, where plaintiffs have made out a plausible antitrust claim, … they are entitled to discovery in order to determine to what relief, if any, they are entitled.”)
235 Id.
236 Id.
237 Id. at 557-58.
238 Iqbal, 129 S. Ct. at 1953.
239 Limestone Development v. Village of Lemont, 520 F. 3d 797, 803-04 (7th Cir. 2008) (Posner, J.) (“the complaint must include as much factual detail and argument as may be required to show that the plaintiff has a plausible claim.”) accord, Tamayo v. Blagojevich, 526 F. 3d 1074, 1083 (7th Cir. 2008); see generally, Stephen B. Burbank, The Continuing Evolution of Securities Class Actions Symposium: Pleading and the Dilemma of “General Rules,” 2009 Wis. L. Rev. 535, 548 (2009).
costs in assessing threshold issues, such as standing and antitrust injury. Yet, no court has dismissed a claim, without considering the allegations in the complaint, solely because the cost of discovery might be high. Moreover, the courts have recognized that once a complaint passes muster, plaintiffs are entitled to discovery and that discovery may reveal evidence that “further tilts the balance in favor of discovery.” Finally, Twombly should not be read as a blanket bar to discovery prior to the resolution of a motion to dismiss.

IV. Analytical Holes in Twombly and Iqbal

A. Fact v. Conclusion

Iqbal reaffirmed the Twombly ruling that in considering the sufficiency of a Complaint on a motion to dismiss for failure to state a claim, the court need only consider properly alleged facts and can ignore allegations that are “conclusory”, “formulaic”, or “bare”. The Court offered no analytic taxonomy to distinguish between “fact” and “conclusion”, as if the differences were self-defining. The reality is, however, that it is very difficult in practice in draw the difference between a factual allegation and a

241 See In re Rail Freight Fuel Surcharge Antitrust Litigation, 587 F. Supp. 2d 27, 33 n.3 (D.D.C. 2008) (“as sensitive as the courts must be to the cost to litigants of discovery where plaintiffs have made out a plausible antitrust claim… they are entitled to discovery in order to determine to what relief, if any, they are entitled.”).
242 In re: Test Messaging Antitrust Litigation ___F.3d___, ____ (7th Cir. 2010); see also In re Florida Cement and Concrete Antitrust Litigation, 2010 WL 4136306 at * ____, n. 23 (S.D. Fla. Oct. 12, 2010) (allegations in the complaints are specific enough to reduce a potentially enormous discovery burden).
244 Iqbal, 129 S. Ct. 1949-50.
conclusory allegation. A rule that makes the validity of an allegation turn on such a distinction is most unfortunate because it shows that the Court has not learned some important lessons of history.

The Federal Rules of Civil Procedure, which replaced code pleading, which in turn had replaced common law pleading, make no mention of any distinction between “facts” and “conclusions”. The Rules specifically state that “no technical form of pleading will be required.” The codes required that a complaint plead facts sufficient to make out a cause of action. The Achilles heel of code pleading became manifest when courts got bogged down on the fact/conclusion distinction in reviewing the

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245 See Scott Dodson, New Pleading, New Discovery, 109 Mich. L. Rev. 53, 2010 (“One of the primary shortcomings of Code pleading was the distinction between ‘ultimate’ facts, which were required to be pleaded, and ‘evidentiary’ facts and ‘conclusions of law’ which were not to be pleaded. Those distinctions proved unworkable in practice and resulted in a level of technicality and factual detail I the pleadings that became counterproductive.”); Schwartz and Appel, supra, n. 50 at 1115 (“In practice the difficulty in distinguishing between operative facts, evidentiary facts and legal conclusions made code pleading a spectacular failure. Like its common law predecessor, code pleading proved immensely technical, and uncertainty in what needed to be pled to give sufficient notice to a party quickly devolved into an overly—inclusive approach to pleading. In the end, the system was “excruciatingly, slow, expensive and unworkable.” (Citations omitted). See generally, Twombly, 550 U.S. at 574-75 (Stevens, J. dissenting): The Court’s dichotomy between factual allegations and “legal conclusions” is the stuff of a bygone era [Citations omitted]. That distinction was a defining feature of code pleading, see United States v. employing Plasterers Assn. of Chicago, generally Clark, the Federal Rules were enacted I 1938. See United States v. Employing Plasterers Assn. of Chicago, 347 allegations of effects on interstate commerce must be taken into account in deciding whether to dismiss the complaint “[w]hether these charges be called ‘allegations of fact’ or ‘mere conclusions of the pleader’”); Brownlee v. Conine, 957 F.2d 353, 354 (C.A.7 1992) (“The Federal Rules of Civil Procedure establish a system of notice pleading rather than of fact pleading, … so the happenstance that a complaint is ‘conclusory,’ whatever exactly that overused lawyers’ cliché means, does not automatically condemn it”); Walker distributing Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 3-4 (C.A.9 1963) (“[O]ne purpose of Rule 8 was to get away from the highly technical distinction between statements of fact and conclusions of law …”); Oil, Chemical & Atomic Workers Int’l Union v. Delta, 277 F.2d 694, 697 (C.A.6 1960) (“Under the notice system of pleading established by the Rules of Civil Procedure, … the ancient distinction between pleading ‘facts’ and ‘conclusions’ is no longer significant”); 5 Wright & Miller, 121, at 267 (“[T]he federal rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties”). “Defendants entered into a contract” is no more a legal conclusion than “defendant negligently drove,” see Form 9; supra, at 1977.

246 Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F.2d at 3-4.
pleadings and lost sight of the larger goals of litigation – the just resolution of meritorious claims.\textsuperscript{249} The genius of the Federal Rules was that the drafters avoided this pitfall by adept use of language, eliminating any references to “facts” or “conclusions” or “cause of action”\textsuperscript{250} and simply requiring a “claim showing that a pleader is entitled to relief”.\textsuperscript{251} Unfortunately, \textit{Iqbal} is a step backwards. In asserting that the trial court’s first task in reviewing a complaint is to screen out conclusory allegations, \textit{Iqbal} thrusts litigants and courts right back into the thicket that existed prior to the adoption of the Federal Rules.\textsuperscript{252}

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Opponents of a change in Rule 8 as presently construed stress the difficulty of distinguishing between “ultimate fact” and “evidentiary facts” and between “ultimate fact” and “conclusions of law”. They assume that by adopting a new name, “claim for relief”, in place of the old, “cause of action”, these difficulties vanish. It may be granted that the difficulties sometimes exist. But they are inherent in the materials with which the law must deal. Supplanting “cause of action” by “claim of relief” and then construing “claim for relief” as no more than a notice of disaffection on the part of the plaintiff do not spirit the difficulties away. They merely defer the difficulties to a later point in the litigation.

Supplanting the term “cause of action” by “claim for relief” merely indulged a professorial foible and a common fallacy that changing labels achieves reform. The “new” pleader points to the many decisions that grappled with the concept of a cause of action as a reason for abandoning the term. And so we now have many cases dealing with “claim for relief”. Nor have we thereby escaped the basic question which arises in many contexts, such as in the application of res judicata, statute of limitations, and the like.
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Conspicuously absent from Federal Rule 8(a)(2) is the requirement found in the codes that the pleader set forth the “facts” constituting a “cause of action.” The substitution of “claim showing that the pleader is entitled to relief” for the code formulation of the “facts” constituting a “cause of action” was intended to avoid the distinctions drawn under the codes among “evidentiary facts,” “ultimate facts,” and “conclusions” and eliminate the unfortunate rigidity and confusion surrounding the words “cause of action” that had developed under the codes. The draftsmen of the federal rules obviously felt that the use of a new formulation would emphasize the modern philosophy of procedure espoused by the federal rules, destroy the viability of the old code precedents, which were a source of considerable confusion, and encourage a more flexible approach by the courts in defining the concept of claim for relief.
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\textsuperscript{249} Charles E. Clark, \textit{Simplified Pleading} 3 F.R.D. 456, 460 (detailed pleading under the codes was “wasteful, inefficient and time-consuming” and “at most productive of confusion as to the real merits of the cause of action and even actual denial of justice”).


\textsuperscript{251} \textit{Fed. R. Civ. P. 8(a)(2)}. \textit{See} 5A Charles Alan Wright and Arthur R. Miller 5 \textit{Federal Practice and Procedure}, § 1216:

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\textsuperscript{252} \textit{See, supra}, n. ___ and accompanying text.\textend{flushright}
Worse, *Iqbal* encourages courts to use the kinds of outcome-determinative labels decried in *Twombly* and licenses courts arbitrarily to engineer outcomes and to ignore inconvenient facts by simply describing them as “conclusions”. The fact/conclusion dichotomy does not provide a workable standard for courts to adjudge viability of pleadings on a motion to dismiss.\textsuperscript{253}

**B. What Documents Are Properly Before the Court On A Motion To Dismiss?**

Historically, on a motion to dismiss a complaint for failure to state a claim, only the complaint is properly before the court; and the defendant accepts all allegations as true for the purposes of the motion.\textsuperscript{254} *Twombly* and *Iqbal* have substantially eroded this concept, while at the same time paying it lip service. As discussed above,\textsuperscript{255} only factual allegations count; conclusory allegations can be disregarded. Moreover, in both *Twombly* and *Iqbal*, the Court obviously looked to sources outside the complaint to reach its decisions, piecing together “rational” explanations of defendants’ conduct.\textsuperscript{256}

In *Twombly*, the Court relying on economic theory not part of the record before it, gave allegations that the defendants had jointly frustrated new entry by CLECs into their respective territories the cruel back of the hand, stating that defendants’ resistance was “the natural unilateral reaction of each ILEC intent on keeping its regional

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\textsuperscript{253} See Stucke, supra, n. 212A at 1472 (criticizing the subjective nature of the plausibility test).

\textsuperscript{254} Fletcher v. Burkhalter, 505 F. 3d 1091, 1098 (10th Cir 2010).

\textsuperscript{255} See, supra, n. ___ and accompanying text.

\textsuperscript{256} See, e.g., Twombly 550 U.S. at 556 (observing that ILECs refusals to deal with CLECs could be viewed as rational business behavior); Iqbal 129 S.Ct. at 1951 (stating that in the aftermath of the 9/11 attacks, the Attorney General had ample reason to detain Muslims illegally in the United States who might be linked to terrorists.
dominance.” Further, the Court held that “resisting competition is routine market conduct” and that “there is no reason to infer that companies had agreed among themselves to do what is only natural anyway.” The court also found that “each ILEC has reason to avoid dealing with CLECs” and “each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs.”

Similarly, regarding plaintiff’s assertions that ILECs agreed among themselves not to invade each other’s territories, the Court ruled that “a natural explanation for the noncompetition alleged is that the former [g]overnment – sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.” Relying on a treatise, the Court found that as a matter of fact “[f]irms do not expand without limit and none of them enter every market that an outside observer might regard as profitable or even a small portion of such markets.” The Court remarked that “Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, but the disappointment does not make conspiracy plausible.”

In *Iqbal*, again with only the complaint before it, the Court found that in view of the events of 9/11, arrests overseen by the Director of the FBI were likely lawful and justified by the intent to detain aliens having a link to the 9/11 attacks. This “obvious

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257 Twombly, 550 U.S. at 556.
258 Id.
259 Id.
260 Id.
261 Id.
262 Id.
alternative explanation” for plaintiff’s arrest makes his claim of inrideous discrimination “not a plausible conclusion.”

At the very least, *Iqbal* and *Twombly* authorize, if not encourage, trial courts to make probablistic determinations of facts at the motion to dismiss stage. This not only preempts the fact-finding function at trial but also threatens to substitute fact-based decision-making with decision-based fact-finding *prior to trial*; contrary to the Federal Rules of Civil Procedure.

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263 *Iqbal*, 129 S.Ct. at 1951.

264 See Robert L. Rothman, *Twombly and Iqbal: A License to Dismiss*, Litigation 1, 2 (Spring 2009).

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

In a particularly troubling sentence, the Court suggests that a complaint must not only be consistent with the claim asserted, but must also exclude “more likely explanations.” *Id.* at 14. What, exactly, does that mean? At a minimum, it appears to be a standard that invites district court judges to dismiss cases based on their own subjective notions of what is *probably* true—a determination that apparently can be made based on events outside the four corners of the complaint. For example, in *Iqbal*, the plaintiff—a Pakistani Muslim—sued numerous government officials asserting violation of various constitutional rights, alleging that, following the events of September 11, 2001, he was classified as a “high interest” detainee and held in extremely harsh conditions as a matter of policy based “solely on account of [his] religion, race, and/or national origin, and for no legitimate penological reason.” *Id.* at 14. Although conceding his allegations, taken as true, are consistent with his theory of being classified as “of high interest” based on race, religion or national origin, the Court nonetheless found *Iqbal’s* allegations of discriminatory treatment implausible. *Id.*

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The apparent simplicity of the Court’s diktat obscures important questions about the adjudication of motions to dismiss after *Iqbal*. First, courts are in the business of providing reasons. They do not simply announce decisions, but explain why they follow from accepted premises. Second, various legal rules governing how a court is supposed to evaluate a motion to dismiss are designed to *limit* the information the court may consider. A court, for example, must convert a motion to dismiss into a motion for summary judgment if the motion presents matters outside the pleadings.

For both these reasons, the sources of information a court relies on to sub-stantiate its “judicial experience and common sense” are important. If “judicial experience and common sense” constitutes a license to rely on broad new categories of extrinsic information at a motion to dismiss, the critics’ fears that motion to dismiss practice will be unduly influenced by individual judges’ differing views of life, the universe, and everything may be warranted. If, on the other hand, “judicial experience and common sense” introduces only a few new premises into courts’ analysis, the critics’ fears may be overstated.
C. Information in Exclusive Control of Defendants

Both Twombly and Iqbal are silent on the question of what should be done where the facts are in the exclusive control of the defendants or otherwise not readily available to plaintiffs, thereby putting plaintiffs at a serious disadvantage. In antitrust conspiracy cases, for example, it is not unusual for the conspirators to meet and agree covertly and then do whatever is necessary to cover their tracks. Not surprisingly, under those circumstances, the plaintiff may not have access to facts evidencing agreement prior to the filing of any complaint; and dismissal for failure to allege facts showing agreement seems unfair, as does the end-result of letting conspirators go free because they were careful enough to conceal the damning evidence. Similarly, in civil rights cases, discrimination claims are after proven statistically using data in the exclusive control of defendants. The fact that the Court did not address the asymmetry problem when faced with that very type of cases where asymmetry is not atypical—Twombly (antitrust) and Iqbal (civil rights—is troubling).

V. Synthesis

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

A. Proportionality
The level of factual content in a pleading required by *Twombly* and *Iqbal* is directly proportional to the complexity of the case and the likely costs of pretrial discovery.\(^{265}\) Underlying the call for heightened scrutiny of the complaints in *Twombly* and *Iqbal* were the special cost concerns presented in complex cases.\(^{266}\) In *Twombly*, the Supreme Court held that defendants should not be forced to shoulder the heavy financial burdens of pretrial discovery based on threadbare allegations of a complex antitrust conspiracy coupled with stray claims of consciously parallel behavior.\(^{267}\) The Court was also concerned with the cost of false positives,\(^{268}\) refusing to condemn conduct “just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perception of the market.”\(^{269}\) In *Iqbal*, the Court similarly ruled that forcing the Attorney General of the United States and the Direction of the FBI to defend civil rights claims based on broad allegations that raised no more than the possibility of wrongdoing would be costly to the public because it would likely impair the ability of these officials from executing their responsibilities to the public.\(^{270}\) The rationale underlying the pleading standards in *Twombly* and *Iqbal* “thus applies where both the cost and likelihood of false positives are high.”\(^{271}\) On the other hand, where the expected cost is not high, the enhanced pleading standards implemented in *Twombly* and *Iqbal* “is not justified.”\(^{272}\)

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

\(^{265}\) Cooney v. Rossiter, 583 F. 3d 967, 971 (8th Cir. 2009) (“the height of the pleading requirement is relative to circumstances”); *See, supra, n. ___ and accompanying text.*

\(^{266}\) Cooney v. Rossiter, 583 F.3d at 971; *In re Text Messaging Antitrust Litigation, ___F.3d at ___.* Smith v. Duffey, 576 F. 3d 336, 339-40 (7th Cir. 2009).

\(^{267}\) *Twombly*, 550 U.S. at 564-65.

\(^{268}\) *False positives -- the mistaken inferences of anticompetitive effects -- “are” especially costly because [they] chill the very conduct that the antitrust laws are designed to protect. Law Office of Curtis V. Trinko v. Bell Atlantic Corp. 540 U.S. 398, 414 (2004); see generally, Edward D. Cavanagh, The Private Antitrust Remedy: Lessons from the American Experience, 41 Loy. L. J. 629, 637 (2010).*

\(^{269}\) *Twombly*, 550 U.S. at 554.

\(^{270}\) *Iqbal*, 129 S.Ct. at 1953.


\(^{272}\) *Id.*
Although neither Twombly nor Iqbal countermand the time honored practice of assuming the truth of the allegations in the complaint on a motion to dismiss, those cases do, of course, distinguish between well-pleaded allegation of fact, which must be accepted as true, and mere conclusory allegations, which can be ignored.\textsuperscript{273} Indeed, Iqbal encourages courts as a first step to peruse the pleadings for conclusory statements that can be immediately tossed aside.\textsuperscript{274} As discussed above,\textsuperscript{275} that exercise is easier said than done because “the distinction between a ‘conclusion’ and a ‘fact’ is not always easy to discern.”\textsuperscript{276} It may be tempting for a court to draw that distinction in the twinkling of an eye. However, history has taught us that this exercise is at best unproductive, if not futile; and that is precisely the reason the Federal Rules of Civil Procedure abandoned so-called fact pleading. Accordingly, courts must be wary of fact/conclusion divide.

This is not to say that every statement in every pleading must be taken as true. As the court in Austen v. Catterton V, LP has observed “[c]ontext, good judgment and common sense mattered long before the Supreme Court decided Twombly and Iqbal.”\textsuperscript{277} The court in Austen provides an apt example of how Twombly and Iqbal should sensibly be applied in passing on the sufficiency of the complaint without entering the thorny fact/conclusion thicket:

\begin{quote}
If a plaintiff says that a defendant intended to, and did, punch the plaintiff in the nose, is that a statement of fact about the defendant’s act and intent, or is it a conclusion since none of us is a mind reader? In most circumstances, the Court would consider that statement to be one of fact that the Court would be required to assume is true for purposes of a Rule 12(b)(6) motion. On the other hand, if a plaintiff baldly asserts that she was subjected to a “hostile work environment” with more, the Court would consider that statement be a mere conclusion—in the parlance of the Supreme
\end{quote}

\textsuperscript{273} Iqbal, 129 S.Ct. at 1950.
\textsuperscript{274} Id.
\textsuperscript{275} See, supra, n. \_, \_\_\_\_ and accompanying text.
\textsuperscript{277} Id.
Court, a “threadbare recital”-to which the Court need not defer. In the latter example, further facts would be needed (and in this example, the plaintiff certainly would know what environment she had been subjected to) in order to provide adequate notice to the defendant of the basis for the lawsuit and to make the plaintiff’s hostile work environment claim plausible.\(^\text{278}\)

Context, good judgment and common sense—not any quick fact conclusion bucketizing—should decree the court’s decision on a motion to dismiss.\(^\text{279}\)

C. Distinguish Rule 12 and Rule 56

\textit{Twombly’s} formulation of the pleading standard for antitrust conspiracy cases draws heavily from the summary judgment cases, but the standards for dismissal applicable on a Rule 12(b)(6) motion and on a motion for summary judgment remains distinct.\(^\text{280}\) The Court in \textit{Twombly} thus aligned the standard for Rule 12(b)(6) and Rule 56 but declined to merge them.\(^\text{281}\) Moreover, the lower courts have correctly recognized that there may be situations where allegations of parallel behavior may not be sufficient to get to a jury (and thus fail on summary judgment) but may be enough to justify further discovery (and thus defeat a motion to dismiss).\(^\text{282}\) \textit{Twombly} itself supports this position and would uphold a pleading with “enough fact to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.”\(^\text{283}\)

Summary judgment, on the other hand, tests the sufficiency of the claim, the court has before it not only the pleadings, but also all evidence adduced on discovery. Even an admittedly well-pleaded antitrust conspiracy complaint may fall short if plaintiff cannot proffer evidence to support its allegations

\(^{278}\) Id.

\(^{279}\) Id.

\(^{280}\) In re Insurance Brokerage Antitrust Litigation, 618 F.3d 300, ___ n. 21 (3d Cir. 2010).

\(^{281}\) Id.

\(^{282}\) Id., see Starr v. SONY BMG Music Entertainment, 592 F. 3d 314, 329 (2d Cir. 2010) (Newman, J. concurring) [“e]ven in those contexts in which an allegation of [conspiracy based on] parallel conduct will not suffice to take an antitrust plaintiff’s case to the jury, it will sometimes suffice to overcome a motion to dismiss and permit some discovery, perhaps leaving the issue for later resolution on a motion for summary judgment.”]

\(^{283}\) In re Insurance Brokerage Antitrust Litigation, 618 F.3d at 323 n. 21.
of joint activity or defendants can adduce uncontroverted evidence to undermine conspiracy claims.

D. Special Considerations

_Erickson_ makes clear that _Twombly_ does not alter the federal court’s longstanding policy of solicitousness of _pro se_ complaints. District courts should similarly be circumspect in considering motions to dismiss complaints in cases where there is an asymmetry of information, as is frequently the case in antitrust conspiracy and civil rights cases. Dismissal is harsh in such cases precisely because the plaintiffs do not have access to all the facts. Rather than terminate the litigation with prejudice, the better approach would be to provide limited and specifically targeted discovery before entertaining the motion to dismiss. The amount of access and costs thereof would be governed by the proportionality standards embedded in the Federal Rules and the sound discretion of the trial court. Similarly, antitrust complaint in private enforcement actions that are follow-ons to successful government enforcement actions should be dismissed at the pleading stage on _Twombly_ grounds only in the most unusual circumstances. The fact that the government has already been successful should allay any fears that the private action might be largely groundless. In these circumstances, a poorly drafted complaint is best handled by a remedy other than dismissal. On the other hand, if a government investigation is


285 See, e.g., _Bausch v. Stryrer Corp._, ___F.3d___, 2010 WL 5186062 at *10 (7th Cir. Dec. 23, 2010). Ruling that a defective products claim had been improperly dismissed prior to discovery, Judge Easterbrook stated:

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

286 Such a complaint might be subject to dismissal if the claim goes significantly beyond the government’s claims of wrongdoing or if the plaintiff lacks standing or antitrust injury.

287 _Cf. In re Air Cargo Shipping Services Antitrust Litigation_, 2009 WL 344 3405 at *1 (E.D.N.Y. Aug. 21, 2009) (“The additional fact that numerous defendants have pled guilty to price fixing on air cargo shipments farther support that conclusion [upholding the complaints]”).
merely ongoing and no action has been filed, the presumption of merit of the private claim would not pertain.\textsuperscript{288}

E. Dismissal Without Prejudice

If the complaint were found deficient on a motion to dismiss, the preferred remedy would be dismissal without prejudice.\textsuperscript{289} That is, the plaintiff ordinarily should be given a second shot at stating a claim. Nevertheless, the trial court should and does retain the power to dismiss those claims that lack legal merit and cannot be resuscitated by any amount of pleading.\textsuperscript{290}

VI. An Assessment

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

\textsuperscript{288} \textit{In re} Elevator Antitrust Litigation 502 F.3d 4751 (2d Cir. 2007).

\textsuperscript{289} \textit{In re} TFT-LCD (Flat Panel Antitrust Litigation, 2010 WL 2610641 at *3 (N.D. Cal. June 28, 2010) ("The Ninth Circuit has repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.") citing Lopez v. Smith, 203 F. 3d 1122, 1130 9th Cir. 2000); see also Associated General Contractors, Inc. v. California Council of Carpenters, 459 U.S. 519, 528 n. 17 (1983). ("Had the District Court required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged. In making the contrary assumption for purposes of our decision, we are perhaps stretching the rule of Conley v. Gibson, 355 U.S. 41, 47-48, 78 S.Ct. 99, 102-03, 2 L.Ed.2d 80 (1957), too far. Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.").

\textsuperscript{290} \textit{In re} TFT-LCD (Flat Panel Antitrust Litigation, 2010 WL 2610641 at *3 (N.D. Cal. June 28, 2010).
Twombly gives short-shift to this approach. The Court simply throws up its hands and, somewhat, incredulously, asserts that discovery is beyond the practical ability of the courts to control, ignoring developments in the Federal Rules of Civil Procedure over the last three decades providing presumptive limits on discovery and empowering the trial courts to actively manage the pretrial phase of the case by, inter alia tailoring discovery to the particular needs of the case..291

Moreover, the Twombly approach has at least three inherent contradictions. First, it insists on greater factual content in the complaint292 (and logically more discovery) while at the same time decrying the runaway costs of pretrial discovery. Second, it encourages trial judges -- the very same trial judges who cannot effectively control discovery--to dismiss claims at the outset of the case,293 the time when the court knows least about them. Third, Twombly invites motions to dismiss in every case, thereby increasing, not decreasing, the burdens on the courts.

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

291 Twombly, 550 U.S. at 558-59.
292 Id.
293 Id.
If the complaint were found deficient on a motion to dismiss, the preferred remedy would be dismissal without prejudice. ²⁹⁴

VII. Conclusion

The Twombly decision has not proven to be the *de facto* death sentence to federal civil litigation that many had feared. Still, the Court’s choice to use heightened scrutiny of complaints at the motion to dismiss stage as the vehicle for addressing the problem of excessive discovery costs is puzzling, especially in light of the availability of existing tools in the Federal Rules directly addressing the amount and scope of discovery and the collateral damage that can be inflicted by use of such a blunt instrument to effectuate change. Accordingly, courts should heed Judge Posner’s admonition that *Twombly* “must not be overread” ²⁹⁵ and should remain vigilant to assure preservation of the fundamental goal of the Federal Rules of Civil Procedure that meritorious litigants have their day in court. Courts must also take seriously their case management responsibilities and, where appropriate, actively impose the discovery limitations authorized by the Federal Rules of Civil Procedure.

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²⁹⁴ *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641 at *3 (N.D. Cal. June 28, 2010) (”The Ninth Circuit has ‘repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.’”) citing *Lopez v. Smith*, 203 F. 3d 1122, 1130 9th Cir. 2000); see also *Associated General Contractors, Inc. v. California Council of Carpenters*, 459 U.S. 519, 528 n. 17 (1983). (“Had the District Court required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged. In making the contrary assumption for purposes of our decision, we are perhaps stretching the rule of *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 102-03, 2 L.Ed.2d 80 (1957), too far. Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”).

²⁹⁵ *Limestone Dev. Corp.*, 520 F.3d at 803.