Iqbal, Twombly, and the Expected Cost of False Positive Error

Max Huffman
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Iqbal and Twombly introduced a new standard for pleading federal claims, overruling five-decades old language from Conley v. Gibson. Instead of plaintiffs’ being entitled to discovery unless the complaint affirmatively forecloses the possibility of recovery, Iqbal and Twombly require a more searching evaluation of the complaint under an ambiguous “plausibility” standard. The policy behind this increased burden on plaintiffs is to prevent the false positive error that burdensome discovery creates.

How the plausibility standard from Iqbal and Twombly should operate in the real world is poorly understood. There is general acknowledgement that no clear guidance exists about how to ensure only plausible inferences are indulged. Professor Josh Davis recently summed up the sentiments: “Twombly is a very confusing decision. I really do think … it’s going to be a while before we get a rule that produces predictable results.” Professor Adam Steinman is more hyperbolic: “thanks to” Twombly and Iqbal, “federal pleading standards are in a crisis.”

This article fills the void in scholarly and judicial thought by providing an understanding of the Twombly/Iqbal pleading standard that is both theoretically sound and pragmatic. Our approach turns on the policy underlying Iqbal and Twombly – a concern that permitting the case to proceed past the motion to dismiss creates a high expected cost of false positive error through non-merits-based settlements. The expected cost of false positive error is a function of two variables: the cost to society if the error occurs and the likelihood that the error will occur. The cost to society if false positive error occurs varies among different areas of substantive law. The likelihood that false positive error will occur varies by the type of facts in controversy. We use antitrust law as an example of the effects of those two variables. Because false positive error in antitrust is costly to society, the analysis focuses on the likelihood of false positive error.

The likelihood of false positive error depends on the nature of facts in controversy and the manner in which proof of those facts will be made. If evidence of contested facts is uniquely in the defendant’s hands, it can be retrieved (or its absence shown) only through burdensome, and asymmetrical, discovery of the defendant. If evidence of contested facts is public or quasi-public in nature, it can be gathered without disproportionate burden being placed on the defendant. Whether discovery will be disproportionately burdensome on the defendant will affect the defendant’s incentive to settle. Settlements to avoid burdensome discovery result in false positives. Using antitrust law as an example, we demonstrate that different elements of different substantive claims give rise to different likelihoods of false positives. This approach is trans-substantive, and the same inquiry we conduct should be conducted for any claim brought in federal litigation. This analysis resolves the uncertainty left in the wake of Twombly and Iqbal.
I. INTRODUCTION

In Ashcroft v. Iqbal, the plaintiff alleged that then Attorney General John Ashcroft and FBI Director Robert Mueller violated his civil rights by causing him to be incarcerated under harsh conditions in the wake of the September 11, 2001, terrorist attacks on account of his race, religion, or national origin. The plaintiff’s complaint failed to state a claim under Rule 8 and, the Supreme Court held, was subject to dismissal. In Bell Atlantic Corp. v. Twombly, plaintiffs alleged that defendant local telephone carriers had failed to enter into competition with one another in their respective monopoly service markets, despite the plaintiffs’ expectation that competition would occur after local telephony was deregulated in 1996. On information and belief, the defendants had conspired, but again, the complaint failed to state a claim and was dismissed.

Iqbal made clear for the first time that Twombly’s controversial pleading standard applied to all civil actions under the Federal Rules, and not only to the antitrust conspiracies directly at issue in Twombly. The pleading standard set forth in Rule 8 and enforced by dismissals under Rule 12(b)(6) controls when a plaintiff will have access to discovery – and potentially trial – in federal court in all civil claims. Twombly and Iqbal set forth a murky standard phrased in terms of the “plausibility” of the inferences to be drawn from the factual allegations in the complaint. Because the plausibility standard controls access to litigation in every civil action in federal court, piercing the murk of the Twombly/Iqbal plausibility standard is crucial. This article analyzes the underlying rationale for the Twombly/Iqbal standard and argues that the trans-substantive rule applies differently to various types of factual allegations. The height of the plausibility standard thus varies depending on the nature of the facts relevant to the substantive element pled.

The Twombly/Iqbal plausibility standard is rooted in a concern that allowing a plaintiff to proceed to discovery creates a possibility that a defendant facing a non-meritorious claim will settle rather than endure the burdens of discovery. Such settlements create so-called “false positives,” since a plaintiff recovers a remedy to which it is not entitled. False positives reflect a wealth transfer from an innocent defendant to an undeserving plaintiff. They also induce parties to order their affairs to avoid innocent behavior that might give rise to false positives in the
future. This over-deterrence results in harm to parties who never end up in court, and has external social cost where the over-deterred party’s conduct is beneficial. The relevant question is not absolute cost, but the expected cost of false positive error. The expected cost of false positives depends also on their likelihood.

Likelihood turns on the burdensomeness of discovery in a particular context. Non-burdensome discovery does not produce a great incentive to settle. Burdensomeness depends on the nature of the contested facts. Facts that are uniquely in the hands of the defendants threaten a substantial burden. Contested facts available both to the plaintiff and the defendant threaten a much lesser burden. Whether facts are uniquely in the hands of the defendant varies depending on the particular element of a substantive claim in controversy.

Part II analyzes the change in the pleading standard that occurred in *Twombly* and *Iqbal*. Part III examines the rationale for the *Twombly/Iqbal* plausibility standard and its relationship to the various types of facts that can be put in controversy by different types of elements of substantive claims. This examination produces the conclusion that applying the *Twombly/Iqbal* standard requires separately analyzing the likelihood of false positives raised by each element of a substantive claim. Part IV undertakes this analysis in the context of antitrust claims under Sections One and Two of the Sherman Act. The sub-parts of Part IV identify an element of a Sherman Act claim, analyze the nature of facts necessary to prove the element, and explain how the plausibility standard should apply to facts of that nature. In Part V we test decided cases for their adherence to the expected cost of false positive error framework. We conclude in Part VI with the suggestion that a similar element-by-element analysis is necessary for each substantive field of federal civil litigation.

### II. DEVELOPMENT OF THE PLAUSIBILITY STANDARD

Prior to 2007, with *Conley v. Gibson* the leading authority on federal pleading, most believed plaintiffs were entitled to litigate beyond the complaint so long as the complaint itself did not affirmatively foreclose the plaintiff’s right to relief. That dogma is no longer valid.

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5 Of course, a defendant concerned about the result in litigation is incentivized to settle no matter how light the discovery burden, but such a settlement does not reflect a false positive connected to an unduly permissive pleading standard. *But see* Daniel Crane, *Technocracy and Antitrust*, 86 Tex. L. Rev. 1159, 1185 (2008) (explaining *Twombly* by reference to fears of jury incompetence).

6 One of us has argued that this understanding of *Conley* is short-sighted, and was never
Twombly was a 2007 holding on a cartel-conduct claim. Allegations of
column culminating in an allegation that “on information and belief, the defendants
conspired” did not sufficiently make out the conspiracy claim to survive the motion
to dismiss. The Court “retire[d]” the “any state of facts” standard from Conley v. Gibson\(^7\) for evaluating complaints.\(^8\)

Iqbal arose two years later in the entirely different context of a Bivens\(^9\) action
against the nation’s top law enforcement officials, then-Attorney General John
Ashcroft and FBI Director Robert Mueller. The plaintiff alleged that the defendants
had discriminated against him as a Pakistani Arab Muslim man, in violation of his
rights under the U.S. Constitution. The complaint alleged that the defendants
“adopted an unconstitutional policy that subjected respondent to harsh conditions of
confinement on account of his race, religion, or national origin.”\(^10\) Iqbal is a more
dramatic departure from the previously settled understanding of the law governing
pleading federal court cases. At a minimum, Iqbal demonstrates that courts
holding Twombly applicable outside its narrow context have been correct.\(^11\) Iqbal is

\(^7\) 355 U.S. 41 (1957).

\(^8\) Twombly, 550 U.S. at 562-63. Twombly set off shock waves jarring antitrust and civil
procedure scholars alike. See Kevin Clermont, Litigation Realities Redux, 84 N.D. L. Rev. 1919, 1934
n.74 (2009) (citing articles). The reaction to Twombly in the courts is more difficult to gauge.
Twombly has been widely cited and discussed. See \textit{id.} n.73. But although thousands of courts have
cited and discussed Twombly, relatively few have spilled much ink on careful analyses of the
purportedly new pleading standard and its impact on their decisions on motions to dismiss.
Twombly’s enormous citation counts are misleading. Pleading cases not surprisingly attract
substantial citations for their legal propositions, without attracting discussion or analysis. But see
Adam Steinman, The Pleading Problem, \textit{\_\_\_\_} Stan. L. Rev. \textit{\_\_\_\_} (forthcoming 2010), draft at 4 n.9,
available at ssrn.com/abstract_id=1442786 (drawing conclusions regarding Twombly’s influence from
the number of citations the case has received).

private right of action for violation of constitutional rights by federal government officials).


\(^11\) See, \textit{e.g.}, In re Motor Fuel Temperature Sales Practices Litig., 534 F. Supp. 2d 1214, 1216
also informative for the application of the Rule 8 standard in antitrust cases. The remainder of this Part details the development of the Rule 8 pleading standard over the past two decades in the Supreme Court.

A. Leatherman and Dura Pharmaceuticals

Pleading authorities growing out of Conley v. Gibson – primarily Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit\textsuperscript{12} and Dura Pharmaceuticals, Inc. v. Broudo\textsuperscript{13} – detail courts’ review of allegations by private plaintiffs in various circumstances. Leatherman teaches that heightened pleading under Federal Rule of Civil Procedure 9(b) is not available for claims – in that case, federal civil rights claims – not specifically listed in Rule 9.\textsuperscript{14} Dura held that the plaintiff must plead all elements of the private damages claim under the securities laws. Specifically, in Dura, the plaintiff must plead that the alleged fraud caused the loss the plaintiff alleged it incurred.\textsuperscript{15} Both of those recent pleading authorities are important for properly understanding Iqbal and Twombly.

1. Plain-Language Interpretation of the Federal Rules

Leatherman arose in the context of civil rights claims against local law enforcement officers. Many courts and commentators at the time – including the two lower courts in Leatherman\textsuperscript{16} – believed that the chilling effect on the work of law enforcement officers and municipal defendants from the expense and inconvenience of defending against private litigation (which reflects an external cost borne by society at large) necessitated holding those claims to a “heightened” pleading standard.\textsuperscript{17} A split in the circuits had developed over the question of heightened pleading in civil rights claims against local officials entitled to qualified immunity and municipalities. The Supreme Court reversed the Fifth Circuit in Leatherman.\textsuperscript{18} It unanimously accepted a plain language interpretation of Rule

\begin{itemize}
\item \textsuperscript{12} 507 U.S. 163 (1993).
\item \textsuperscript{13} 544 U.S. 336 (2005).
\item \textsuperscript{14} Leatherman, 507 U.S. at 168. Rule 9(b) provides, in relevant part: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”
\item \textsuperscript{15} Dura Pharm., 544 U.S. at 346-347.
\item \textsuperscript{16} See Leatherman v. Tarrant Cty. Narcotics & Intelligence Unit, 954 F.2d 1054 (5th Cir. 1992).
\item \textsuperscript{17} Id. at 1056-59 (explaining the rationales that underlie a rule requiring the plaintiffs to plead their claims with particularity, which echo the rationales underlying the Court’s conclusions in Twombly and Iqbal).
\item \textsuperscript{18} Leatherman, 507 U.S. at 168.
\end{itemize}
9(b), and held that because civil rights claims were not in the enumerated list of claims subject to heightened pleading by Rule 9, requiring pleading with particularity was error. That rule would apply equally to antitrust claims, as in Twombly, and Bivens actions, as in Iqbal, neither of which are enumerated in Rule 9. Leatherman may be the high-water mark of applying textualist interpretive philosophy to the federal rules.

Leatherman did leave open a substantive route to treating antitrust claims differently from other claims. The defendants in that case had argued that “the degree of factual specificity required of a complaint by the Federal Rules of Civil Procedure varies according to the complexity of the underlying substantive law.” That approach, which the Court did not reject, seemingly would allow a complex claim requiring circumstantial proof of conduct or proof of the effects of conduct to be held to an ostensibly higher standard than a simple tort claim. But as we show infra, it is not the complexity of the claim, but the burden of discovery, that drives the closer scrutiny of allegations in a complaint.

When Leatherman was decided, it set a ceiling for the specificity of allegations necessary to state claims for any but the causes of action referenced in Rule 9(b). The Rule 8 pleading standard was held to be trans-substantive and apply to all other claims. When Twombly altered courts’ and commentators’ understanding of the Rule 8 pleading standard, however, the effect of Leatherman is to maintain that trans-substantivity, this time by setting a floor for the minimum specificity of allegations. Leatherman seemingly mandated that Twombly not be limited to antitrust claims. When Iqbal came up for decision, the application of the Twombly rule was foreordained.

2. Pleading Elements

Dura involved a claim of fraud in the purchase or sale of securities under SEC Rule 10b-5. The claim required proof of six elements, including “loss

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19 Id.
20 Leatherman, then, forecloses one procedural route to treating antitrust claims differently from other sorts of claims. Leatherman does not necessarily end the procedural analysis, however. One of us has argued for another procedural approach, based on plain-language interpretations of Rules 8(a), 8(f), and 12(b)(6). See Huffman, supra n.6, at 635-45.
21 Leatherman, 507 U.S. at 167.
22 See Huffman, supra n.6, at 640-41 (contrasting the complexity of pleading a conspiracy claim with the simplicity of pleading a negligence claim in the case of an automobile accident).
causation.” Loss causation is the existence of a proximate causal link between a material misrepresentation and the plaintiff’s loss. The Court held that the failure to plead loss causation undermined the notice to the defendant that Rule 8 and Conley required. Dura holds simply that the notice requirement of Conley requires the plaintiff to plead facts creating an inference on each element of the plaintiff’s claim.

Dura descends from a long tradition of judicial skepticism of private business tort litigation. That skepticism started with securities law claims, notably Blue Chip Stamps v. Manor Drug Stores. It was imported in dictum into antitrust in 1983, in Justice Stevens’ opinion for the Supreme Court in Associated General Contractors v. California State Council of Carpenters. The overriding concern in those business tort cases is one of “strike suits” brought by enterprising plaintiffs’ counsel resulting in settlements unrelated to the merits of claims, or – in the rare case that a case makes it to trial – jury verdicts imposed by juries with wealth-transfer impulses that drive companies into bankruptcy. The false positive rationale is deeply embedded in the Court’s Rule 8 jurisprudence.

The primary teaching of Dura relates to the process of evaluating complaints for sufficiency. Dura makes clear that the sufficiency of the complaint is analyzed on an element-by-element basis.

B. Twombly

Twombly involved claims by a purported class of plaintiffs, made up of all users of telephone and internet services in the United States from the date of deregulation in local telephony in February 1996, that the defendant local telephone companies (1) had conspired not to compete with one another in their

24 Dura Pharms., 544 U.S. at 346. Although securities fraud claims are in many contexts subject to a heightened pleading standard under the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b), the Dura Pharms. Court assumed “at least for argument’s sake, that neither the Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss.” 544 U.S. at 346.


27 See, e.g., Blue Chip Stamps, 421 U.S. at 740-42.

28 The purported class was comprised of “subscribers of local telephone and/or high speed internet services ... from February 8, 1996 to present.” Amended Complaint in No. 02 CIV. 10220(GEL) (SDNY) ¶ 53.
respective monopoly service markets, and (2) had conspired to prevent would-be new entrants from gaining toe-holds in their respective markets. The market allocation would be a hard core, per se violation of the Sherman Act if properly pleaded and proved. Criminal fines and jail time are likely in the case of a Justice Department prosecution.

The dispute centered on the sufficiency of plaintiffs’ allegations regarding the defendants’ agreement. The plaintiffs alleged circumstantial evidence of agreement, as opposed to direct evidence that the defendants or their representatives had met and formed an agreement. The plaintiffs also alleged various circumstantial facts supporting their views that the observed conduct must have resulted from a conspiracy. The defendants’ territorial markets appeared gerrymandered; the defendants were members of trade organizations that gave them opportunities to meet and to reach agreement; and the CEO of one defendant had said publicly that entering into competition as a new entrant “might be a good way to turn a quick dollar, but that doesn’t make it right.”

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29 Twombly, 550 U.S. 544. “Second, the complaint charges agreements by the ILECs to refrain from competing against one another. Those are to be inferred from the ILECs’ common failure “meaningfully [to] pursu[e]” “attractive business opportun[ity]” in contiguous markets where they possessed “substantial competitive advantages,” id., ¶¶ 40-41, App. 21-22, and from a statement of the chief executive officer (CEO) of the ILEC Qwest, that competing in the territory of another ILEC “might be a good way to turn a quick dollar but that doesn’t make it right,” id., ¶ 42, App. 22.”

30 “Plaintiffs say, first, that the ILECs “engaged in parallel conduct” in their respective service areas to inhibit the growth of upstart CLECs. Complaint ¶ 47, App. 23-26.” Twombly, 550 U.S. 544.


33 Twombly, 550 U.S. 544 (noting allegations of a “statement of Richard Notebaert, chief
Twombly plaintiffs alleged the penultimate legal fact: “upon information and belief that Defendants have entered into a contract, combination or conspiracy.”

The Court held the complaint insufficient, reversing the court of appeals and reinstating the district court’s dismissal. It applied to the complaint a procedural standard courts have applied for decades in antitrust cases in motions for judgment as a matter of law, requiring that the allegations create a “plausible inference” of an agreement among the defendants. The Court had never before adopted that standard for the motion to dismiss. The “mere possibility” standard from the Second Circuit was “short of the line.”

executive officer (CEO) of the ILEC Qwest, that competing in the territory of another ILEC ‘might be a good way to turn a quick dollar but that doesn’t make it right,’ id., ¶ 42, App. 22.” (citing the complaint). Plaintiffs inferred from the statement that not taking advantage of the available “quick dollar” was best explained by the existence of a conspiracy. The complaint couches its penultimate allegations this way:

In the absence of any meaningful competition between the [ILECs] in one another’s markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another. Id., ¶ 51, App. 27.

Ibid. (quoting the complaint). That allegation, if it were to have been treated as sufficient, would by itself have fulfilled the plaintiffs’ pleading burden, because of the irrebutable presumption of market effects in a claim of per se illegal market allocation under Section One. See Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990).


See Twombly, 550 U.S. 544, 127 S. Ct. at 1964 (cataloguing prior decisions and noting “this case presents the antecedent question of what a plaintiff must plead in order to state a claim”); Epstein, Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgment Motions, 25 Wash. U. J. L. & Pol’y 61, 62 (2007) (arguing the Court’s analysis is “flawed”: “In reality, Twombly III was a disguised motion for summary judgment . . . .”). Other scholars agree that the Court’s analysis in Twombly is flawed, but many, unlike Professor Epstein, believe the wrong result was reached. See, e.g., Amy Wildermuth, What Twombly and Mead Have in Common, 102 Nw L. Rev. Colloquy 276, 280 (Apr. 11, 2008) (describing a “spinning sensation” on reading Twombly).

Twombly, 550 U.S. at 546. Scholars interested in civil procedure have been understandably befuddled by the various terms used to describe the appropriate probability of illegal conduct based on the allegations in the complaint. The Court settled on “plausibility,” but the Second Circuit had used “plausible possibility.” Twombly, 425 F.3d at 111 (“conspiracy must be among the range of plausible possibilities”) (citing Todd v. Exxon Corp., 275 F.3d 191, 197 (2d Cir.)
An inference of conspiracy from the plaintiffs' factual allegations was insufficiently plausible to permit discovery. The Court addressed the allegations singly.38 Allegations of parallel inhospitality to entry and parallel failure to enter spoke at most to interdependent conduct (which does not amount to an agreement).39 Plaintiffs' allegations were not inconsistent with a conspiracy, but

38 The approach of addressing plaintiffs’ allegations singly might be inconsistent with Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962), which held that “plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.” If Twombly does depart from Continental Ore, because the earlier case arose at the directed verdict stage of litigation, Twombly, in treating the allegations individually, might be thought to impose a higher standard at the motion to dismiss stage than at later stages of litigation.

39 The district court had recognized independent explanations for some of the observed conduct. The district court noted that the service markets took the shape they did as a result of historical accident during the period of regulated monopoly in local telephony. It also rejected the inference of agreement the plaintiffs drew from the defendants' acting in parallel fashion in refusing to be hospitable to new entry. That conduct would be in each defendant's unilateral best interest. The fact that they all did it, then, did not support an inference of an agreement. There was also an independent explanation for the defendants' mutual failures to enter into competition. The district court and the Supreme Court recognized the fundamentally different nature of the business model of a new entrant competitor from that of an incumbent telephone service provider. Each defendant had an independent reason not to enter other service markets as a new entrant because its business was not so structured. Success at one endeavor did not guarantee success at the other.

neither did they tend to exclude the possibility of unilateral conduct. The allegations therefore did not create a plausible inference. Plaintiffs’ other allegations were entirely neutral with regard to the question of agreement. A plausible inference required more.

What was missing in Twombly was an allegation that was anything other than purely neutral as to whether the defendants had conspired together. Such an allegation could be direct – “the defendants met in a hotel room in Des Moines” – or circumstantial – “the observed conduct could not have occurred but for an agreement.” Plaintiffs made neither form of permissible allegation. The agreement element of the Section One claim was not sufficiently pleaded.

At bottom, Twombly was about the burden of defending against private antitrust claims. For that reason as well, Dura is its natural progenitor. The concern for undue burden in private claims has a long history in private securities litigation, reaching as far back to Blue Chip Stamps. The Court was not oblivious to the burdens of private antitrust claims at that time, either, although the concern had not been as often voiced.

C. Iqbal

The Court recently clarified that the Twombly standards are not unique to antitrust. Undue burden on defendants from discovery in spurious cases – a driving concern underlying Twombly – is not unique to the false positive concerns that underlie modern antitrust courts’ skepticism with regard to private claims. The requirement of pleading the substantive law, which Twombly learned from Dura, carries over into other legal arenas. Iqbal offers a fresh lesson about the application of the Rule 8 standard.

In other ways beyond the substantive arena of its application, Iqbal is a dramatic extension of the principles from Twombly. Twombly required a plaintiff to plead facts about conduct that were best, if not uniquely, knowable to the defendants themselves. Iqbal requires a plaintiff to plead facts about personal motivation that may be known only to the defendants. Unlike antitrust claims, the civil rights claims in Iqbal do not permit respondeat superior liability.

1. The Story of Iqbal

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40 Twombly, 550 U.S. at 554 (finding no “factual context suggesting agreement, as distinct from identical, independent action”).
Muslim men including named-plaintiff Iqbal sued then Attorney General John Ashcroft and FBI Director Robert Mueller over their mistreatment following the September 11 attacks. The complaint alleged that Ashcroft and Mueller had each violated the plaintiffs’ constitutional rights through purposeful discrimination on the basis of a prohibited characteristic, whether race (Arab), religion (Muslim), or national origin (Pakistani). Iqbal alleged that Ashcroft was the “principal architect” of a discriminatory policy. He alleged Mueller was “instrumental.” Together they “knew of, condoned, and willfully and maliciously agreed” to mistreat Iqbal for discriminatory reasons lacking any “legitimate penological interest.”

Iqbal was required to plead, and ultimately to prove, that the defendants “acted with discriminatory purpose.” That standard required him to plead and prove that the actions of Ashcroft and Mueller were undertaken because of his membership in a protected class.

The Court held that the Bivens action does not cognize respondeat superior liability. Ashcroft and Mueller must each have individually acted with an impermissible purpose. It would not be sufficient to allege that they were liable for conduct of their subordinates. The Bivens action is also subject to the defense of qualified immunity, which shields government officials from personal damages liability, and suit, so long as the alleged conduct does not violate clearly established constitutional rights.

2. Iqbal’s Analysis of Twombly

The Court in Iqbal read in Twombly “two working principles.” First is the prohibition against pleading legal conclusions. That principle is
noncontroversial. The second principle is that the claim for relief must be plausible in light of the facts alleged to survive the motion to dismiss. That requirement finds support in Rule 8's requirement that the complaint “show” entitlement to relief. Once legal conclusions are discarded, the well-pleaded facts must “plausibly suggest” unlawful conduct. The plausibility rule has met with substantial distain from commentators. What precisely constitutes a “plausible” showing, rather than the insufficient “possibility” or the unnecessary “probability” is unknowable.

Iqbal explained that Twombly held the complaint insufficient because the non-conclusory allegations of parallel conduct were “not only compatible with, but indeed [were] more likely explained by, lawful, unchoreographed free-market behavior.” They were neutral as to the defendants' liability. The Iqbal majority also discarded the conclusory allegations. It then posed a choice between two competing rationales for the observed disparate impact of post-September 11 detention policies. One possibility was Iqbal's preferred inference: Ashcroft and Mueller, individually or collectively, intended to discriminate against Arab Muslim men of national origins including Pakistani, a constitutional violation. Another possibility was that even a purely race, religion and national origin neutral

requirements under the Federal Rules . . . .”); Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules, 86 Colum. L. Rev. 433, 435 (1986) (noting “a number of areas in which courts refuse to accept 'conclusory' allegations as sufficient under the Federal Rules”). See generally Huffman, supra n.6, at 640-641 (canvassing authorities interpreting the prohibition on conclusory allegations post-Twombly).

Charles E. Clark, the principal drafter of the federal rules and a proponent of the notice pleading standard, considered it “settled” that “the pleader shows the facts and the court applies the legal conclusion.” Charles E. Clark, Special Pleading in the “Big Case”, 21 F.R.D. 45, 52 (1957). Commentators have argued that the Federal Rules endorse legal conclusions in certain circumstances. See Scott Dodson, Pleading Standards After Bell Atlantic Corp. v. Twombly, 93 Va. L. Rev. In Brief 121, 141 (2007), and A Benjamin Spencer, Plausibility Pleading, 49 B.C. L. Rev. 431, 442 (2008) (both noting conclusory allegations of “negligence” and “recklessness” were specifically endorsed by Form Complaints 9 and 10 to the Federal Rules).

Iqbal, 129 S. Ct. at 1950.

See, e.g., Spencer, supra n.49, at 460-89.

See Iqbal, 129 S. Ct. at 1950 (“mere possibility” insufficient).

Twombly, 550 U.S. at 556 (Court “does not impose a probability requirement at the pleading stage”).

Iqbal, 129 S. Ct. at 1950.

Unlike the Section One claim at issue in Twombly, nothing about the Bivens action in Iqbal turns on the existence of a conspiracy between Ashcroft and Mueller. Unilateral discriminatory motive on the part of either official would be a basis for a Bivens claim against that official.

Iqbal, 129 S. Ct. at 1951.
The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.57

The Court preferred the latter, “obvious alternative explanation.”58

3. A Dissenting View

Justice Souter, the author of Twombly, dissented. He believed substantive legal principle of no supervisory liability on which the Court relied was erroneous.59 Under Souter’s rule, allegations of fact giving rise to a plausible inference of individual animus on the parts of Ashcroft and Mueller would be unnecessary. Because of that disagreement on the controlling substantive rule of law, the majority and the dissent are somewhat like ships passing in the night with regard to the meaning of Twombly.

But Souter did argue that the majority misapplied Twombly. He believed the allegations that Ashcroft was the “principal architect” of the discriminatory policies; that Mueller was “instrumental in the[ir] adoption”; and that the two “knew of, condoned, and wilfully and maliciously agreed to subject” plaintiff to conditions of confinement “solely on account of his race, religion and/or national origin and for no legitimate penological interest” were sufficient to meet the Twombly standard.60

Reading the dissent compels the question why Justice Souter believed, in Twombly, that a bare assertion of “conspiracy” would be insufficient to meet the Rule 8 standard, but the bare assertion of “malicious intent” should be sufficient in Iqbal. Each assertion is a legal conclusion. The best explanation lies in the

57 Id.
58 Id. at 1951-52.
59 Id. at 1957-58 (Souter, J., dissenting).
60 Iqbal, 129 S. Ct. at 1959 (Souter, J., dissenting).
complexity of the concept of conspiracy in antitrust, in contrast to the relative simplicity of the concept of discriminatory motive in civil rights. The assertion that defendants conspired gave insufficient notice to the Twombly defendants of the conduct in which they, or their agents, were supposed to have engaged. The concept of conspiracy invokes functionally infinite different factual scenarios where large organizational defendants, acting through agents, are concerned. It also invokes difficult and unsettled legal questions of what forms of coordinated conduct in an oligopoly setting actually meet the legal standard. The allegation that conduct was taken solely for race-, religion-, or national origin-based reasons offers no such factual or legal complexity.

4. Overreaching

Iqbal went further than Twombly. That is so on a surface level because Twombly could reasonably be thought limited, prior to Iqbal, to antitrust claims generally, or even to antitrust conspiracy claims specifically. Iqbal now has clarified that Twombly applies equally to all federal civil litigation. Iqbal also outpaced Twombly because the information necessary to establish Iqbal’s claims was more likely to be uniquely held by the individual defendants from whom discovery is not allowed. The Twombly defendants’ organizational natures renders the information necessary to plead the plaintiff’s claim semi-public in nature. A disgruntled or loose-lipped employee would be sufficient for plaintiffs’ to make their allegations.

Iqbal also extends the plausibility standard from a substantive legal arena in which decades of economic research have shaped the substantive rule of law into one in which defendants’ subjective motivations are insufficiently understood. The Twombly Court relied on economic teachings, which remain largely undisturbed in the modern literature, that rational, profit-maximizing competitors, faced with an oligopolistic marketplace, and who have been granted monopoly service territories by past government policy, are likely unilaterally to decide not to enter into direct competition. The Court enjoyed support for that proposition from antitrust law

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61 This “conclusory” allegation is thus most closely comparable to the allegation of “negligence” expressly approved in Form 9 to the Federal Rules. See Huffman, supra n.6, at 640-41.
62 Iqbal, 129 S. Ct. at 1953.
63 Allegations of a Section One conspiracy between sole proprietors would present a more precise analogy to the circumstance of Iqbal.
64 But see Maurice Stucke, Behavioralists At the Gate, 38 Loyola U. Chicago L. Rev. 513 (2007) (arguing that behavioral economics suggests likely rationales for corporate conduct other than unilateral profit maximization).
scholars and economists, in both scholarly writings and briefs as *amici curiae* submitted in the litigation. Those economic principles had become part of the substantive rule of law in antitrust conspiracy cases decades before *Twombly* was decided.

No such deep social science authority supported the conclusion in *Iqbal* that “as between that ‘obvious alternative explanation’ [of simple disparate impact of a neutral policy] . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.” The Court did not cite any psychological, sociological, or penological studies regarding government officials’ subjective motivations for detention policies in the wake of cataclysmic events. *Iqbal*’s most dramatic extension of *Twombly* is the Court’s appropriation of power to conclude for itself what inferences to be drawn from observed facts are “plausible” and what are not.

**D. Unifying Rationales**

*Iqbal* and *Twombly* share the unifying rationale that avoidance of litigation *per se* – independent of any resulting liability – is a sufficiently worthy goal to restrict court access to plaintiffs. Underlying *Twombly* and its antitrust- and securities-law ancestry was the concern for the chilling effect on firms’ beneficial

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66 See generally Huffman, *supra* n.6, at 645-57 (discussing the adoption of economic principles in Section One conspiracy claims from 1954 through 1993).


68 The historical data and scholarship that was presented to the Court rather supports the view that plaintiff *Iqbal*’s allegations of race-, religion- and national-origin-based animus were plausible. One *amic* brief noted that racial animus historically underlay detention policies analogous to those complained of in *Iqbal*. See Brief of *Amici Curiae* Japanese-American Citizens League et al. In Support of Respondents, *Ashcroft v. Iqbal*, No. 07-1015, at 13-15 (noting historical support for an understanding of disparate impact of detention policies following being based on animus rather than race- or national origin-neutral security concerns) (citing *Hirabayashi v. United States*, 320 U.S. 81 (1943)); Nelson Lund, *The Conservative Case Against Racial Profiling in the War on Terrorism*, 66 Alb. L. Rev. 329 (2003). Lund discussed public opinion polls strongly supporting racial profiling of Arab men post September 11 (*id.* at 330 & nn. 6-7); the ineradicable nature of racial profiling in human interactions, and the inability of governments (as distinct from the private sector) to rely on market forces to overcome it (*id.* at 332-33, 335-38); and *Hirabayashi* and *Korematsu v. United States*, 323 U.S. 214 (1944) as examples of government misuse of racial profiling (*id.* at 339-340).
conduct caused by over-enforcement by private plaintiffs.\textsuperscript{69} The \textit{Twombly} Court devoted much of its opinion to a discussion of the importance of avoiding burdensome discovery in private Sherman Act litigation.\textsuperscript{70} That concern has underlain private antitrust cases since at least the Court’s 1983 \textit{Associated General Contractors} opinion, which noted in a footnote that the “massive factual controversy” at issue gave the district court power to “insist on greater specificity in the pleadings.”\textsuperscript{71} It cited several sources for the proposition that discovery in antitrust litigation is extraordinarily expensive, and noted the decades-old dictum imported from private securities litigation that expensive discovery increases settlement value in a manner out of proportion to the merits of plaintiffs’ claims.\textsuperscript{72}

Even Justices Stevens and Ginsburg, dissenting in \textit{Twombly}, accepted the Court’s portrait of the realities of antitrust litigation: “Private antitrust litigation

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\item \textsuperscript{69} \textit{Twombly}, 550 U.S. at 556-60 (citing authority regarding the problem of false positives and concerns for abusive discovery; “proceeding to antitrust discovery can be expensive”; citing \textit{Associated General Contractors v. California State Council of Carpenters}, 459 U.S. 519, 528 n.17 (1983)). This concern may be limited to private antitrust enforcement. \textit{Cf.} Daniel Crane, \textit{Antitrust Antifederalism}, 96 Cal. L. Rev. 1, 38-40 (2008) (arguing that the “pathology” of excessive reliance on private litigation in antitrust undermines just outcomes and overwhelms public enforcement); Max Huffman, \textit{Bridging the Divide? Theories for Integrating Competition Law and Consumer Protection}, ___ European Competition Journal ___ (draft at 27) (forthcoming 2010), available at www.ssrn.com/abstract_id=1546106.

\item \textsuperscript{70} This portion of the Court’s opinion in \textit{Twombly} has been roundly criticized on several grounds. The Court relied on securities law precedents to state the concern that discovery can be abusive and out of proportion to the merits, but it fails to draw the necessary link between securities and antitrust claims, except for listing several authorities stating in qualitative terms the expense of antitrust discovery, and considering it “obvious enough” that discovery will be “sprawling, costly, and hugely time-consuming.” \textit{Twombly}, 550 U.S. at 560 n.6. The Court did not rely on quantitative analysis of the particular expense of discovery in antitrust suits, which does not appear to exist in the literature even today.

\item \textsuperscript{71} \textit{Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters}, 459 U.S. 519, 528 n.17 (1983). Earlier examples of concern for discovery expense in antitrust litigation are not readily known, but hostility to private litigation has its roots in the neo-classical economic revolution in antitrust that took root in the 1970s, and was given the Supreme Court’s imprimatur in a series of cases in 1977, including primarily \textit{Brunswick Corp. v. Pueblo Bowl-o-Mat}, 429 U.S. 477 (1977) and \textit{Continental T. V., Inc. v. GTE Sylvania Inc.}, 433 U.S. 36 (1977).

\item \textsuperscript{72} \textit{Twombly}, 550 U.S. at 558-60 (citing \textit{Blue Chip Stamps v. Manor Drug Stores}, 421 U.S. 723, 741 (1975), and cases and commentators speaking to discovery expense in antitrust cases). The concern for “blackmail settlements” in private litigation has a long pedigree. In his 1973 \textit{Federal Jurisdiction}, then-Chief Judge Henry Friendly cited antitrust expert Milton Handler for the concern that civil class-action litigation “produce[s] blackmail settlements.” \textit{Federal Jurisdiction: A General View} 120 (citing Milton Handler, \textit{The Shift from Substantive to Procedural Innovations in Antitrust Suits—the Twenty-Third Antitrust Review}, 71 Colum. L. Rev. 1, 9 (1971)). In the securities arena, discovery expense was one of the driving factors behind legislation limiting private rights of action.
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can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement . . . .”73 Justices Stevens and Ginsburg believed those concerns warranted care in case management, but not a departure from settled procedures for pleading and proving cases.

*Iqbal* turned on special concerns for harm from forcing government defendants to undergo burdensome litigation, including “disruptive discovery.”74 “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.”75 Like the antitrust claim in *Twombly* and the private securities claims in cases such as *Dura Pharmaceuticals* on which *Twombly* relied, the *Bivens* action in *Iqbal* was held to present a sufficiently intolerable risk of harm from litigation to justify restrictions on plaintiffs’ access to federal courts to remedy alleged harms.76 That suspicion of suits against government officials, particularly in law enforcement or security settings, also has a long history.77 And the reliance on the motion to dismiss to protect against the threat of social harm from excessive private enforcement is well established in the civil rights arena, perhaps even more than in the circumstance of commercial torts.78 Part III develops a framework for application of those unifying rationales to all civil claims in federal court.

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73 *Twombly*, 550 U.S. at 573 (Stevens, J., dissenting).
75 *Id.*
76 *Id.*
77 Cf. *Spalding v. Vilas*, 161 U.S. 483 (1896) (suit against high ranking postal officer) (“It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government, if he were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals.”).
78 See *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982) (citing *Butz v. Economou*, 438 U.S. 478, 507-08 (1978) (“Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief ..., it should not survive a motion to dismiss.”)).
III. APPLYING THE TWOMBY/IQBAL FRAMEWORK TO DIFFERENT TYPES OF FACTS

The pleading standard of Rule 8 controls the plaintiff’s access to later stages of the litigation process. Those later stages include the answer, discovery, summary judgment motions, trial, post trial motions and appeal. Those later stages are where the parties, the court and the fact-finder gain access to information about the contested facts. All other things being equal, more information about contested facts will result in a better determination about the validity of a claim. In a perfect world we would have instant and free access to information about the validity of the plaintiff’s claim, without compromising a defendant’s legitimate concern for privacy and security of its sensitive information. In such a world, invalid claims would be identified and instantly dismissed. Valid claims would be quickly vindicated. However, the imperfection of the real world includes the fact that information has costs and is never certain. The pleading standard of Rule 8 can be used to address those imperfections. It can try to predict when the benefits of moving a case to later stages of litigation outweigh the costs.

A. False Positive Error Can Result From Denying a Motion to Dismiss

Some costs are easy to spot. Going forward with discovery, motion practice, trial and appeal involves attorneys’ fees, expert expenses, and the time of parties. Other costs of moving a case past the complaint by denying a motion to dismiss are real but less obvious. One cost of moving a case past the complaint is the risk that the litigation will result in false positive error. A false positive occurs when a non-meritorious claim results in an award or a settlement for the plaintiff. The easiest false positive to understand is an erroneous judgment for the plaintiff following trial and appeal. The litigation process is not perfect and sometimes results in erroneous judgments. Some of those erroneous judgments are for plaintiffs.

A less obvious false positive occurs when a defendant facing a non-meritorious claim settles with the plaintiff. A defendant facing a non-meritorious claim must confront the likely expense of defending in terms of attorneys’ fees,

\[79\] Cf. Paul Stancil, *Balancing the Pleading Equation*, 61 Baylor L. Rev. 90, 114-16 (2009) (making an economic defense of notice pleading, and comparing the “net social welfare decrease[,]” where plaintiffs cannot bring claims because of lack of necessary information to meet the pleading standard with the “economic costs” of notice pleading).

\[80\] Rule 8 includes sub-part 8(e), which enjoins courts: “All pleadings shall be so construed as to do substantial justice.” See Huffman, *supra* n.6, at 644-45 (interpreting Rule 8(e) to grant courts discretion to consider complaints more deeply than the concept of “notice pleading” suggests is appropriate); id. at 644 n.114 (same with regard to Fed. R. Civ. P. 1).
expert expenses, and the time of its employees. It must also face the possibility that even if it fully litigates the matter, the litigation process is not perfect and it might still end up losing. In those circumstances, it may be rational for the defendant to settle even a non-meritorious claim.81

Yet a third manifestation of false positive error is the maybe defendant that is deterred from engaging in desirable activity because of the threat of litigation. Recognizing \textit{ex ante} the danger of incurring discovery expenses and possible liability, defendants are incented to keep well short of the line that separates legal from illegal conduct. In eschewing legal conduct that may give rise to litigation, defendants dumb down their conduct to their own and society’s detriment. That, too, is a cost of false positive error.

The detriment to society caused by false positive error is a product of two factors: whether it is very likely to occur in a particular setting, and – if it does occur – whether it will be very costly. Both of those variables, likelihood and cost, vary depending on the area of substantive law involved. In the next sub-Part, we show that both \textit{Twombly} and \textit{Iqbal} involve areas of substantive law where the cost

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81 Of course, false negative error may also occur even after the plaintiff survives a motion to dismiss. A fully litigated case might result in an erroneous judgment for the defendant following trial. Further, the same settlement calculus that affects defendants facing non-meritorious claims affects plaintiffs asserting meritorious claims. (In fact, empirical research on the decision-making bias of “loss aversion” suggests false negative error due to settlement is more likely than is false positive error. \textit{See} Jeffrey J. Raichlinski, \textit{Gains, Losses and the Psychology of Litigation}, 70 S. Cal. L. Rev. 113, 144 (1996) (presenting empirical research that demonstrates plaintiffs are risk averse in settlement negotiations while defendants are risk-seeking).) They may settle a case for less than the full remedy that would be available from fully litigating the claim, or even abandon a case without settlement. The plaintiff faces attorneys’ fees and related expenses that in many situations will not result in a fee award. Also, the plaintiff with a meritorious claim must face the possibility that even if it fully litigates the claim, the litigation process is not perfect and may result in the plaintiff’s erroneously losing.

Beyond the possibility that a fully litigated case may result in an erroneous judgment, and the usual settlement calculus, the Rule 8 pleading standard creates another possibility for false negatives. If the pleading standard is not satisfied, the case is dismissed on a 12(b)(6) motion. This is so even if further litigation would have revealed that the plaintiff’s claim is meritorious. For example, in \textit{Twombly} it is possible that employees of the telecommunications company defendants actually met somewhere and expressly agreed to divide the country into non-competitive territories. Because a 12(b)(6) motion was granted, the defendants were not even required to file an answer denying that such an express agreement existed, much less answer questions about that possible agreement under oath. \textit{See} \textit{Twombly}, 550 U.S. at 571, 572 (Stevens, J., dissenting). If that agreement actually existed, the Court’s terminating the plaintiff’s case yielded a false negative. An analogous possibility exists in \textit{Iqbal}. But working within the parameters the Court established in \textit{Twombly} and \textit{Iqbal}, this paper focuses on the cost of false positives rather than false negatives.
of false positive error, when it occurs, is high.

B. False Positive Error is Costly in Antitrust and Civil Rights Claims

False positive error in antitrust over-deters efficient, legal behavior.\(^{82}\) False positives under Sherman Act Section One,\(^{83}\) which prohibits agreements that unreasonably restrain trade, can occur in several ways. An erroneous judgment or settlement for the plaintiff may occur if an agreement among the defendants did not exist and the concerted action element is not satisfied. Alternatively an error could occur in the application of the reasonableness element of Section One. That might occur if a per se rule – which outlaws agreements regardless of their effects – was applied to the defendants’ behavior, when analysis under the Rule of Reason would reveal that the defendants’ behavior was competitively neutral or net pro-competitive.\(^{84}\) An error in the application of the reasonableness element could also occur under the Rule of Reason, which requires an inquiry into the net competitive effect of the agreement. False positive error could occur if the defendants’ behavior was competitively neutral or net pro-competitive, but nonetheless was the basis for a settlement or verdict. Under any of those scenarios, the defendants’ behavior was lawful, but a false positive could occur if the defendants settled or suffered an erroneous judgment.

That false positive error, of course, involves wealth transfers from the defendants to the plaintiffs and the expenditure of resources by all parties in the litigation. However, the prospect of litigation can also lead to over-deterrence of lawful, efficient behavior. This is easiest to see in analyzing the reasonableness element of a rule of reason claim. If firms could be confident that the competitive effects of their agreements would always be quickly, cheaply and accurately determined in litigation, they would engage in efficient, lawful agreements and avoid inefficient, unlawful agreements. However, the prospect of litigation can cause firms to avoid agreements that might be erroneously condemned, either by erroneous judgments or settlements. This deprives the economy of the benefits of the efficient agreements.\(^{85}\) It is important to recognize that that loss occurs even though the firms might never have been sued for their participation in the


\(^{84}\) See, e.g., Texaco Inc. v. Dagher, 547 U.S. 1 (2006).

\(^{85}\) It also limits firms’ disincentive to engage in inefficient, unlawful agreements, because both good and bad agreements are equally impacted if litigation does not predictably condemn only wrongful conduct.
agreements, and even if, had they been sued, a false positive would not have occurred. That over-deterrence thus affects all firms contemplating agreements (and all economic activity that depends on their conduct).

The costs to the economy caused by false positive error involving the agreement element are less obvious. A false positive involving the agreement element would occur when a judgment or settlement for the plaintiff occurs even though an agreement was absent. This is the false positive that concerned the Court in *Twombly*. Had the litigation in *Twombly* proceeded past the complaint, the defendants might have been tempted to settle even if they had not actually entered into an agreement dividing the nation into non-competitive territories in violation of the *per se* rule against horizontal market allocation. 86

How would such a false positive over-deter lawful unilateral behavior? One paradox of *Twombly* is that the Court failed to identify exactly what firms in a situation similar to the defendants would avoid doing out of a fear of litigation. Such firms might avoid any contact with competitors out of a fear that they will be erroneously determined to be in an agreement. It is possible that such contact would have had pro-competitive effects if it had occurred. It is also possible that firms will avoid entering into a pro-competitive agreement out of a fear that they will erroneously be alleged or found to have entered into a second anti-competitive agreement. 87

False positive error can also occur in the context of Section Two of the Sherman Act, which prohibits monopolization. 88 The monopolization offense has two elements: the possession of monopoly power and the acquisition or maintenance of that power by unlawful conduct. An erroneous judgment or settlement for the plaintiff may occur if the defendant did not possess monopoly power or had not engaged in conduct giving rise to liability under Section Two. The cost of over-deterrence is especially obvious in the context of the conduct element. Firms that possess monopoly power face on a daily basis decisions that could negatively affect their competitors. The fear of litigation may cause a monopolist to keep prices high, reduce production, and avoid efficient bundles of its products or efficient exclusive arrangements with its customers or suppliers. That over-deterrence prevents the monopolist from operating efficiently. Thus, litigation can over-deter efficient

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86 See supra text accompanying notes 30-34.
87 Cf., e.g., *Starr v. Sony BMG Music Entertainment*, ___ F.3d ___, 2010 WL 99346, at *2 (2d Cir. 2010) (conceded joint venture agreement alleged to be the basis for a secret and unlawful price fixing agreement).
88 See infra text accompanying notes 138-140.
behavior both in the context of Section One and Section Two. It is difficult to know how wide a swath over-deterrence cuts across the economy. Over-deterrence affects firms that might never even have been sued had they engaged in the deterred behavior.

The cost to society of false positive error is also high in the civil rights claim addressed in Iqbal. In order to overcome the defendants’ assertion of qualified immunity, the plaintiff must establish that the defendants violated a clearly established right.\(^8^9\) Even that strict standard will produce false positive error if a plaintiff collects an erroneous judgment or non-merit-based settlement.

Governmental officials, sometimes even at the highest levels, such as Iqbal defendants Ashcroft and Mueller, concerned about litigation might avoid lawful conduct in the pursuit of a governmental interest. The avoidance of that lawful conduct by governmental officials does not merely reduce the efficient functioning of private markets. It impairs the effective pursuit of society’s non-economic interests. Iqbal itself addresses a dramatic example of that potential problem. The defendants were senior officials responding to a coordinated multi-pronged attack that killed thousands of people. They were trying to prevent further attacks. Society has a strong interest in preventing such attacks with lawful policies. If policies that could be lawful and effective are over-deterred by the fear of litigation, society’s interests are impaired.

C. Determining the Expected Cost of False Positive Errors

Merely concluding that false positive error in a particular area of law is costly when it occurs, as it is in antitrust claims and in the civil rights claim at issue in Iqbal, does not determine that such error results in a significant detriment to society. That detriment occurs only if error is particularly likely. It is only when false positive error is both costly and likely that it produces significant detriment. We define that circumstance to be one in which there is a high expected cost of false positive error.\(^9^0\)

When is false positive error especially likely? False positives occur in at least three ways. First, a trier of fact may erroneously conclude that the elements of a

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\(^{8^9}\) Iqbal, 129 S. Ct. at 1948-49.

\(^{9^0}\) Cf. Robert G. Bone, Twombly, Pleading Rules, and the Regulation of Court Access, 94 Iowa L. Rev. 873, 911 & n.169 (2009) (false positive error one component of expected error cost). Bone’s broader expected error cost framework does not accommodate the Iqbal and Twombly Courts’ narrow focus on false positive error.
cause of action are met. Second, a defendant facing a non-meritorious claim may settle rather than face the chance of an erroneous judgment or especially burdensome discovery. Third, an actor may avoid conduct altogether because of the danger of litigation. The likelihood of all of those false positives varies depending on the nature of the facts in controversy. The nature of the facts in controversy varies with each element of the substantive law involved.

D. The Likelihood of False Positive Error is Greater If Discovery Will Be Especially Burdensome

Some factual questions relate to facts that are known to more than one person while others relate to facts directly known only to one person. In a simple negligence claim arising from a car accident, some of the relevant facts are known to more than one person. Both the plaintiff and the defendant know the time, date and location of the accident. Each party knows the condition of the roadway, the weather at the time of the accident, what they observed about each car's speed and direction of travel prior to the accident and the apparent condition of all parties after the accident. Third-party witnesses also may have observed some of those facts. But even in a simple car accident, some relevant facts are known only to one person. The extent of pain suffered by the plaintiff is directly known only to the plaintiff. Similarly, only the plaintiff knows whether the pain has subsided over time. Only the plaintiff knows the extent to which the pain impairs his or her ability to work.\textsuperscript{91} Similarly, only defendants knows whether they saw the plaintiff's car prior to colliding with it. Only defendants knows whether they took their eyes off the road immediately prior to the accident.

Whether facts are known to more than one person affects the likelihood of false positive error. When facts are known only to one person, the likelihood of errors by a trier of fact increases. The trier of fact has only one direct source of information about the relevant fact and that source may be a party with an incentive to avoid revealing the fact. Alternatively, the source of the information may appear biased and therefore be tainted in the eyes of the trier of fact. In that situation, the trier of fact may reach an erroneous conclusion about the fact resulting in a false positive or a false negative. The possibility of an erroneous conclusion by the trier of fact may also induce the parties to settle. The settlement may result in a false positive or a false negative. And the concerns for error in

\textsuperscript{91} Stancil points out that facts known only to the plaintiff increase the plaintiff's litigation costs vis-à-vis the defendant. Stancil, \textit{supra} n.79, at 126. Facts of that sort will increase the risk of false negative error. \textit{See supra} n.81.
litigation may impact the parties’ conduct outside the litigation setting. In the car accident example, would-be defendants are incented not to drive.

Whether facts are known to more than one person may also affect the likelihood of error by affecting the extent and nature of discovery. If facts are known to both parties, discovery is not likely to be especially burdensome. Returning to the car accident example, both parties know the location of the accident. The location of the accident will determine the applicable speed limit. No extensive discovery will be required to allow plaintiffs to prove that fact since they may testify to it.\footnote{Cf. Stancil, supra n.79, at 129-30 (risk of “cost arbitrage suits” in which a rational plaintiff will file a truly frivolous claim increases with increases in the defendant’s internal pretrial costs); \textit{id.} at 133 (“there is a real risk of frivolous suit in the perfect storm . . . [w]hen cost disparity significantly favors the plaintiff”).} In contrast, plaintiffs probably have no direct knowledge about whether defendants adequately maintained their car prior to the accident. Depositions and document productions may be appropriate to collect evidence about that potentially relevant fact. In more complex cases differences in the amount of appropriate discovery depending on who has direct access to relevant facts may be significant.

This produces a paradox, which the Court neither recognized nor resolved in \textit{Iqbal} and \textit{Twombly}. The less public the fact, the more burdensome the discovery required to prove it. Therefore, under \textit{Iqbal} and \textit{Twombly}, the more searching should be the inquiry into the complaint. But because the fact is non-public, it is all the less likely the plaintiff would be able to allege it in the complaint.\footnote{See Stancil, supra n.79, at 133 (“This correlation presents a conundrum: the cases in which a stricter pleading standard is most justified on Type I error grounds are precisely the cases in which a more liberal pleading standard is most justified on Type II error grounds.”).}

In \textit{Twombly}, the plaintiffs’ horizontal market allocation claim hinged on whether employees of the largest telecommunications companies in the nation had entered into an express agreement to divide territories. The plaintiffs had no direct knowledge of the existence of such an agreement. If the complaint had survived the motion to dismiss, plaintiffs could have conducted discovery trying to find evidence of that agreement to present at trial. That discovery could have been very burdensome. Since the corporate defendants would have been liable for agreements entered into by their employees, a large number of employees could have been deposed to determine if they had entered into any of the forbidden agreements.\footnote{The complexity of the concept of agreement also threatens further to complicate discovery on that element, as it is difficult to know in advance what sorts of conduct is relevant to proving}
Document and electronic discovery in advance of those depositions regarding the travel and telephone records as well as paper and email correspondence could have been appropriate. Determining whether any of a large number of employees at one defendant communicated with any of a large number of employees at any of several other defendants is a daunting task.

*Iqbal* involves another situation where the plaintiffs have no direct knowledge of a relevant fact. The plaintiff had no direct knowledge about whether Attorney General Ashcroft and Director Mueller had the required discriminatory intent. Unlike *Twombly*, however, there were not a large number of employees of a corporate defendant who might have direct knowledge of those contested facts. In *Iqbal*, unlike *Twombly*, the doctrine of *respondeat superior* did not apply. Therefore, only Ashcroft and Mueller knew whether they had the prohibited discriminatory intent.

Like the plaintiff in *Twombly*, the plaintiff in *Iqbal* could not establish the contested fact based on his own testimony. Discovery related to discriminatory intent by Ashcroft and Mueller would not be limited only to their own depositions. The plaintiff would also want to review paper and electronic correspondence connected to Ashcroft and Mueller. Further, there were a number of subordinate governmental officials who were defendants in the case. It is possible that those defendants, and other governmental officials who might be deposed as witnesses, would testify that Ashcroft and/or Mueller knew of and agreed with their actions. Counsel for Ashcroft and Mueller would want to participate in discovery to monitor that possibility. Although the extent of discovery relevant to possible discriminatory intent by Ashcroft and Mueller would probably be less extensive than that related to the possible anti-competitive agreement in *Twombly*, it would still be burdensome.

The prospect of burdensome discovery increases the likelihood of false positive error. When discovery is likely to be especially burdensome for the defendant, that increases the incentive for the defendant to settle. That is so even if fully litigating the case would result in a judgment for the defendant. Even defendants who could confidently predict that they would win the case at trial have an increased incentive to settle if discovery would be especially burdensome. That agreement. See supra n.39; see Huffman, supra n.6, at 645-57.  

95 See supra text accompanying n.45.  

96 *Iqbal* demonstrates well the *Twombly* paradox that the less publicly available the fact, the more specifically plaintiffs will be required to allege it.
increased incentive to settle caused by the prospect of burdensome discovery increases the likelihood of false positive error.

E. The Plausibility Standard Turns on the Expected Cost of False Positive Error

The plausibility standard developed in Twombly and Iqbal is intended to avoid false positive error. Its application therefore must vary depending on the expected cost associated with false positives on the particular element of the claim. The first variable is whether the substantive area of law involved is one where error is costly if it occurs. That will depend on whether false positives will over-deter especially important, beneficial behavior.

The second variable is whether error is especially likely. That will depend on whether discovery will be especially burdensome, which in turn depends on whether the contested facts are public, quasi-public, or known only to the defendant. In turn, that will vary depending on which element of which claim is in controversy.97 Even in one claim, different elements might give rise to different types of contested facts. Therefore, the likelihood of false positives will be a function of which element is in controversy. The pleading standard must vary, element by element, depending on the type of facts relevant to making proof of each element.98

The strongest case for a high plausibility standard exists where the expected cost of false positive error is great. This is so when false positive error is both likely and costly. This was the case in both Twombly and Iqbal. As discussed above, both cases involve substantive areas of law where false positives are costly if they occur. Also, the element raising the pleading question in each case related to facts uniquely in the hands of the defendants, the agreement issue in Twombly and the discriminatory intent issue in Iqbal. Each of those factual issues raised the prospect of burdensome discovery, making false positives especially likely.

Since both cases addressed situations where false positives are both costly and likely, the Court has not faced a situation where one or both of those variables come out the other way. If either the cost or likelihood of a false positive is low, the

97 Prof. Stancil notes that “several claim types” are characterized by disparities in costs for plaintiffs and defendants, because “the range of permissible inquiry into defendant’s affairs increases as pleading specificity requirements decreases, especially for claims in which the plaintiff’s own conduct is of little moment.” Stancil, supra n.79, at 116.

98 See supra nn. 23-27 and accompanying text (discussing the lesson from Dura Pharmaceuticals that pleading is driven by the substantive elements of the claim).
high plausibility standard applied in *Twombly* and *Iqbal* is not justified. Each element of each claim in each area of substantive law needs to be examined to assess whether the high plausibility standard applied in *Twombly* and *Iqbal* is justified.\(^99\) Antitrust law provides an important example. It is an area of law where false positives if they occur are costly. It has several types of claims, each of which have several elements, each of which raise different types of factual questions. It demonstrates how substantive law interacts with the rationale for the plausibility standard to raise pleading standards of different heights consistent with the rationale of mitigating the expected cost of false positive error.

**IV. Applying the *Twombly/Iqbal* Framework to Antitrust Claims**

In this Part we consider the elements of individual antitrust claims in the light of the framework developed in Part III. That consideration enables us to determine the appropriate application of Rule 8 to each claim. The Sherman Act has two principal sections, one\(^100\) and two\(^101\). Each of those sections has two elements. The first element of a claim under Section One is the existence of an agreement between two or more actors.\(^102\) The second element of a claim under

\(^{99}\) We argue that the treatment of allegations at the motion to dismiss stage depends on the expected cost of false positive error in litigation. The impact of that rule, this Part demonstrates, is disparate treatment of different elements of different claims, seemingly violating the principle of trans-substantivity of the Rule 8 pleading standard that is implicit in the *Leatherman* rule. See *supra* nn. 16-22 and accompanying text. In a recent opinion, Judge Posner has implicitly approved

The [*Twombly*] Court held that in complex litigation (the case itself was an antitrust suit) the defendant is not to be put to the cost of pretrial discovery – a cost that in complex litigation is so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak – unless the complaint says enough about the case to permit an inference that it may well have real merit. The present case, however, is not complex. ... *Iqbal* is special in its own way, because the defendants had pleaded a defense of official immunity and the Court said that the promise of minimally intrusive discovery “provides especially cold comfort in this pleading context . . . .”

*Smith v. Duffey*, 2009 WL 2357872, at *4 (7th Cir. Aug. 3, 2009) (Posner, J.). Judge Posner makes the point that the scope of review of a plaintiff’s allegations turns not on some labeling of claims, but on the realities of false positive error with regard to certain kinds of claims. It is thus possible, as we have shown above, that a rule uniformly applied across different claims, even within a particular area of law, will mandate disparate treatment of those claims.

\(^{100}\) 15 U.S.C §1.


\(^{102}\) The agreement element arises from Section One’s requirement of a “contract,
Section One is that the agreement must be in “unreasonable” restraint of trade.\textsuperscript{103}

The first element of a monopolization claim under Section Two is that the defendant has monopoly power.\textsuperscript{104} The second element requires that the defendant acquire or preserve its monopoly power with prohibited conduct.\textsuperscript{105} A two section statute giving rise to two claims, each of which has two elements might seem simple to apply. However, over 120 years, courts, litigants and commentators have discovered that those four elements – individually and in combination – create a massively complex body of law. The complexity of the substantive law makes analyzing the pleading standard applicable to each element commensurately complex.

Part III articulates the framework for applying the \textit{Twombly/Iqbal} standard to antitrust claims. It demonstrates that one part of the expected cost inquiry – the cost of false positives where they occur – is high for antitrust claims, although there are differences among claims depending on the particular conduct at issue. In this Part we analyze the individual elements of the primary antitrust claims – both \textit{per se} and rule of reason claims under Sherman Act Section One and monopolization claims under Sherman Act Section Two – under the expected cost inquiry from Part III. We then go on in Part V to analyze cases decided since \textit{Twombly}, and the relatively few cases decided since \textit{Iqbal}, for their fidelity to the correct rule.\textsuperscript{106}

\textbf{A. Conspiracies Restraining Trade}

1. Agreement

A single actor cannot unilaterally violate Section One.\textsuperscript{107} Section One

\textsuperscript{103} See infra text accompanying notes 128-132.
\textsuperscript{104} See infra text accompanying notes 137-145. The statement in the text applies to a claim of actual monopolization. Section Two also prohibits attempted monopolization and conspiracies to monopolize.
\textsuperscript{105} See infra text accompanying notes 146-148.
\textsuperscript{106} We do not examine other antitrust claims, including merger challenges under Clayton Act Section Seven and secondary-line price discrimination claims under the Robinson-Patman Act. The former comprise a small portion of federal courts’ antitrust docket and are even more rarely the subject of private litigation. (\textit{But see Paul Stancil, Atomism and the Private Merger Challenge}, 78 Temple L. Rev. 949 (2005).) The latter are disfavored under most modern antitrust analyses.
\textsuperscript{107} [T]here is the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman

\textsuperscript{103} Section One
requires an agreement between two separate actors. Whether such an agreement exists raises both factual and legal issues, which have different impacts depending whether the agreement is to be proved directly or circumstantially. Factual issues include such basic questions as who talked to whom, when, where and what did they say. In Twombly, for example, it would be important to know whether the chief executive officer of one defendant telephone company telephoned the chief executive officer of another defendant telephone company. If such a telephone call occurred – and the executives agreed that the corporations would stay out of each other’s territories – that would constitute direct proof of an agreement that is illegal under Section One.

Even if the facts of what happened in an antitrust case are undisputed, whether those facts add up to an agreement cognizable under the agreement element of Section One raise conceptually complex legal questions. The legal issues are simple at the margins. If two parties expressly communicate, whether orally or in writing, and agree about what one or both of them will do, that communicated agreement satisfies the first element of Section One. Similarly easy is a case where two parties do not communicate with each other and engage in independent conduct. Conduct is independent when it is profit maximizing for one party regardless of the conduct of another party. Such purely independent conduct does not constitute an agreement for purposes of Section One. A difficult conceptual question is whether conduct which is neither the product of an express communicated agreement, nor independent, constitutes an agreement for purposes of Section One.

Act requires that there be a “contract, combination ... or conspiracy” between the manufacturer and other distributors in order to establish a violation. Independent action is not proscribed.


Persons within a single firm are deemed to be part of one actor for purposes of that requirement. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (holding that a parent and a subsidiary corporation cannot conspire within the meaning of Section One).

Such an overt agreement may be investigated and prosecuted criminally. See 15 U.S.C. § 1 (agreement to restrain trade is a “felony” carrying lengthy prison sentences and fines).

Of course, that agreement would be lawful under Section One if it did not unreasonably restrain trade. See Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).


Conduct by two parties is interdependent when its profit maximizing nature for each party depends on the conduct of the other. When the two parties are competitors they might act like cartelists without ever talking to each other and expressly agreeing. They might raise prices above the competitive level or stay out of each other’s territories merely recognizing that it is in their collective interest to do so. In such a case, economists recognize the harm to competition would be similar to that caused by a communicated agreement. However, no communicated agreement would be present. In \textit{Twombly} the Court stated that such “mere interdependence” would not be sufficient to establish an agreement under Section One.

Even “conscious parallelism,” a common reaction of “firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions” is “not in itself unlawful.” \footnote{Twombly, 127 S. Ct. at 1964 (citing Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993); 6 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 1433a, p. 236 (2d ed.2003) (hereinafter Areeda & Hovenkamp) (“The courts are nearly unanimous in saying that mere interdependent parallelism does not establish the contract, combination, or conspiracy required by Sherman Act § 1”); Turner, \textit{supra} n.36, at 672 (“[M]ere interdependence of basic price decisions is not conspiracy”).}

Thus, in pleading and proving an agreement under Section One, the plaintiff must establish a communicated agreement.\footnote{See William H. Page, \textit{Communication and Concerted Action}, 38 LUC L.J. 101, 101 (2007) (defining agreement by reference to the existence of actual communication between the parties). Professor Page applied his test post-Twombly, reading cases reviewing the agreement element as turning on whether the plaintiff has alleged “communication” among the defendants. William H. Page, \textit{Twombly and Communication: The Emerging Definition of Concerted Action Under the New Pleading Standards}, 5 J. Comp. L. & Econ. 439 (2009). Page’s thoughtful analysis holds in many post-Twombly cases analyzing allegations of agreement. \textit{See id.} at 455-64. That is consistent with our argument that a plaintiff seeking to prove conspiracy directly will be required to plead with greater specificity because of the burden of discovery. \textit{See infra} nn. 120-122 and accompanying text.} In many cases, if an agreement is established, the plaintiff wins. This is so because some agreements are deemed to be unreasonable \textit{per se}. Since in those \textit{per se} cases there is no factual inquiry into the competitive effects of the agreement, the entire case turns on the agreement element. “The \textit{per se} rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work...”\footnote{Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 886-87 (2007). A per}
reiterates that a per se claim is functionally a one-element claim. Successfully pleading and proving the agreement element subjects the defendant to automatic liability. The second element – reasonableness of the restraint – has been determined as a matter of law.116

As with all antitrust claims, error cost of a false positive in a per se claim is high. An erroneous determination of an agreement can subject the defendant to liability for socially beneficial conduct. If threatened with antitrust liability, a competitor might be disinclined to attend trade shows, where engineering and marketing improvements – including cost savings, which in a competitive marketplace inure to consumers’ benefit – may be discussed.117 The firm might be disinclined to imitate product improvements implemented by competitors, for fear of the optics of parallel conduct. The firm might be disinclined to match price reductions implemented by competitors for the same reason.118 Those harms are antithetical to the antitrust laws’ purpose of enhancing competition for the benefit of consumers.

The expected cost of false positive errors analysis next requires an assessment of the likelihood of a false positive. The likelihood of a false determination of liability (or settlement) on the agreement element of a Section One claim depends on the manner in which the agreement is to be pleaded and proved. A plaintiff can prove a conspiracy with direct evidence. The Third Circuit, in Cosmetic Gallery, Inc. v. Schoeneman Corp., has defined direct evidence as evidence that “evince[s] with clarity a concert of illegal action.”119 That court listed several examples, including (1) a direct threat by one competitor to the plaintiff that

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se rule reaches a generally applicable conclusion about the economic effect of a category of behavior. Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) at 50, n. 16.

116 To be sure, legal arguments remain on whether particular conduct is, or is not, sufficiently anti-competitive to warrant per se treatment. However, those arguments do not implicate the pleading analysis.

117 Cf., e.g., Maple Flooring Mfrs. Ass’n v. United States, 268 U.S. 563 (1925) (industry group discussed costs of shipping product).

118 The error cost is amplified in the case of the per se rule because triers of fact do not have the power to mitigate the harsh result of liability by declaring the conduct engaged in to be “reasonable.” If the agreement element is met, liability is automatic.

119 Cosmetic Gallery, Inc. v. Schoeneman Corp., 495 F.3d 46, 52 (3d Cir. 2007).
competitors would prevent plaintiff’s success; (2) a threat that a supplier would cut off access if the distributor failed to maintain prices; (3) a memorandum detailing discussions of a group of conspirators; and (4) a public resolution by conspirators.\textsuperscript{120}

If the plaintiff will rely on direct evidence of an agreement, it is relatively simple to assess the pleadings and weigh the evidence. But the evidence on which the plaintiff will rely is uniquely in the hands of the defendant. Unless the fact of an agreement was communicated to the plaintiff or to third parties – which is unlikely, given the criminal liability that attaches to \textit{per se} violations of Section One\textsuperscript{121} – discovery targeting direct evidence of an agreement requires depositions and document discovery of the defendant. Where the defendant is an organization, in which multiple – perhaps hundreds or thousands – of individual agents are authorized to act on its behalf, the scope of that discovery threatens to be massive.

Finally, the discovery is entirely one-sided. Nothing about the one contested element of a \textit{per se} claim requires discovery from the plaintiff. Such one-sided discovery presents a moral hazard problem. If the chances of a lucrative settlement are enhanced by burdensome discovery of the defendant, and if there is no concern for tit-for-tat discovery of the plaintiff, the plaintiff is incentivized to make its requests as burdensome as possible. For an allegation that the defendants, or their agents, met and agreed, the threatened burden of discovery, and therefore the likelihood of a false positive settlement, is high.\textsuperscript{122} \textit{Twombly} dealt with that precise circumstance. That Court held the threatened burden of discovery warranted a searching analysis of the complaint.

Circumstantial allegations of agreement present precisely the reverse circumstance. As a matter of substantive law, a plaintiff relying on circumstantial evidence should succeed in proving the agreement element only if it can prove the observed conduct – usually parallel behavior, which, as \textit{Twombly} holds, is innocent – would not have occurred but for an agreement.\textsuperscript{123} If there is an equally plausible

\textsuperscript{120} \textit{Id.} (citing cases). \textit{Cosmetic Gallery}, decided on summary judgment, held that the evidence was not sufficient directly to demonstrate a conspiracy. \textit{Id.} at 53.

\textsuperscript{121} See 15 U.S.C. § 1 (violation is a felony permitting up to 10 years in jail and $100,000,000 in fines).

\textsuperscript{122} Of course, it remains possible that the plaintiff could simply make up a fact, rendering even direct allegations of agreement unreliable. Any such activity is the subject of Federal Rule of Civil Procedure 11.

\textsuperscript{123} See Sullivan, Hovenkamp & Shelanski, Antitrust Law, Policy & Procedure 264 (6th ed. 2009) (describing circumstantial proof of agreement by reference to a “but for” allegation). An example is the historically unprecedented pattern of parallel pricing behavior discussed in footnote 4 of \textit{Twombly}.
non-conspiratorial explanation for the observed conduct, the proof will be insufficient. What observed conduct meets that standard is a complex question best answered by those trained in economics, based on observations of marketplace conduct that are occurs in the public eye.

Although the legal analysis and its factual predicate are detailed and complex, and commensurately expensive to undertake (requiring, at a minimum, the parties to retain economic experts), the burden on the defendant of discovery relating to its own conduct in a circumstantial evidence case is low. The discovery burdens are not borne uniquely by the defendant, because the facts relevant to proving an agreement by circumstantial evidence are as likely to be available from third parties throughout the market as from the defendant. Many relevant facts – for example, industry pricing trends or product changes and marketing practices – will be publicly available without resort to the discovery process. The discovery that is undertaken involves depositions of the other party’s expert witness, a burden borne equally by the plaintiff and the defendant. The moral hazard created by asymmetric discovery expenses is not present in a circumstantial evidence case. For that reason, the false positive concern is commensurately less.

We have, then, with regard to per se claims, a dichotomous result. Where agreement is to be proved by direct evidence, the expected cost of the false positive error is high – it is costly if it occurs and likely to occur. The importance of avoiding that cost is commensurately high, so the specificity required in pleading agreement by direct evidence is high. That is precisely the conclusion the Court reached in *Twombly*. Where agreement is to be proved by circumstantial evidence, the expected cost of the false positive error is moderate. It is costly if it occurs, but unlikely to occur. *Iqbal* and *Twombly* properly are read to teach that where proof is to be made by circumstantial evidence, allegations of agreement may be pleaded with less specificity.

This dichotomy produces a surprising result. Properly to evaluate a complaint alleging agreement in violation of Section One under the rules announced in *Iqbal* and *Twombly*, the court must know whether the plaintiff’s proof will be direct or circumstantial. If the proof will be direct, the plaintiff must create a

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124 We discuss here the standard for proving an agreement on the basis of circumstantial evidence.

125 See *Twombly*, 550 U.S. at 557 n.4 (historical pricing patterns can be a “plus factor” nudging innocent parallel conduct over the line to impermissible conspiratorial conduct).

126 It is in this circumstance that the purest form of the “notice” pleading standard should be applied.
sufficient plausible inference that an agreement exists, based on the observed facts, that the court will be willing to subject the defendant to burdensome, one-sided discovery requests. The plausibility rule mitigates the false positive concern by increasing the likelihood that the defendant actually engaged in prohibited conduct. But if the proof of agreement will be circumstantial, the two-sided, and less burdensome, nature of the discovery reduces the expected cost of false positive error, so the need for specificity in the complaint is reduced. It would therefore be understandable if courts required plaintiffs to commit, when opposing a motion to dismiss, to one or another approach to proving agreement.127

2. Reasonableness

Only agreements that “unreasonably” restrain trade violate Section One.128 Agreements not held to be per se illegal are judged under some form of the “rule of reason”. Sometimes the rule of reason is applied by thoroughly analyzing the pro-competitive and anti-competitive effects of the agreement. In other cases the rule of reason is applied in a truncated fashion, sometimes referred to as a “quick look” rule of reason. Like the per se claim, the rule of reason claim often centers on one element only. That is because, for the rule of reason claim, the fact of an agreement is usually publicly known, so is easy to plead and is not the subject of argument on a motion to dismiss. The contested element for the rule of reason claim usually will be the effect of the agreement. As elsewhere, the Twombly/Iqbal expected cost of false positive error governs the pleading requirement.

The Supreme Court has not been clear about how the rule of reason should be applied. The rule is often phrased as an open ended inquiry into the reasonableness of the restraint on competition imposed by the agreement. “Under this rule, the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”129 The Court in Continental T.V., Inc. v. GTE Sylvania Inc. supported its statement by quoting one of the original – and most famous – statements of the rule of reason:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or

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127 This approach would be consistent with a district court’s power to control discovery and to permit only discovery likely to lead to the discovery of admissible evidence. See Fed. R. Civ. P. 26(b)(1).
128 Board of Trade v. United States, 246 U.S. 231, 238-239 (1918).
whether it is such as may suppress or even destroy competition . . . .
The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.\textsuperscript{130}

The rule of reason has evolved into a structure of shifting burdens of proof, a structure that improves its predictability. The plaintiff bears the initial burden to establish that the challenged agreement is likely to have anti-competitive effects. A plaintiff may meet its initial burden in one of two ways. First, the plaintiff may meet its burden by engaging in a full analysis of the effect of the restraint in the market – the so-called “full blown” rule of reason. Second, in cases of inherently suspect restraints, the plaintiff is able to meet its burden on a “quick look” basis without a full analysis of the market.\textsuperscript{131} A full market analysis is complex and expensive because it requires a definition of the applicable market and an inquiry into how the challenged restraint affects that market. Just as importantly, given the complexity of the analysis, the expense of the analysis and the lack of predictability of the outcome of the analysis, a potential plaintiff may not want to try to make the required showing. Plaintiffs much prefer the lighter initial burden of production that the quick look standard promises.

If the plaintiff makes that initial showing of potential anti-competitive effects, the burden shifts to the defendant to demonstrate that the challenged restraint has offsetting pro-competitive justifications. If the defendant establishes such pro-competitive justifications, the burden shifts back to the plaintiff to establish that the anti-competitive effects outweigh the pro-competitive justifications. Theoretically, the rule of reason requires a balancing of the anti-competitive effects and pro-competitive effects of the challenged restraint. However, the balancing question never arises if either party fails in its initial

\textsuperscript{130} Id. n.15.

\textsuperscript{131} The Supreme Court developed the quick look standard in a series of three cases. In \textit{National Society of Professional Engineers v. U. S.}, 435 U.S. 679 (1978), the government sued to void an ethical cannon prohibiting competitive bidding. The Court imposed the burden on the defendant to demonstrate a pro-competitive justification without engaging in a thorough analysis of the effect of the restraint on the market. \textit{Id.} at 692-93. In \textit{National Collegiate Athletic Association v. Board of Regents of University of Oklahoma}, 468 U.S. 85, 104-06 (1984), agreements that on their face restrained output and price were sufficient to establish the likelihood of anticompetitive effects without a thorough market analysis, or even a definition of a relevant market or a demonstration of market power. \textit{Id.} at 104-06. In \textit{F.T.C. v. Indiana Federation of Dentists}, 476 U.S. 447 (1986), the Court imposed on the defendants the burden of establishing a procompetitive justification without requiring the Commission to establish the likelihood of anticompetitive effects with a thorough market analysis. \textit{Id.} at 459.
burden of production – if the plaintiff cannot demonstrate the required anti-competitive effect, or if the defendant fails thereafter to establish a pro-competitive justification.132

The likelihood of a false positive on the reasonableness element of a full-blown rule of reason claim is low. As with an agreement to be proved by circumstantial evidence (discussed in the prior section), the high burden and expense of litigating the issues of relevant market, likely anti-competitive effects, and countervailing pro-competitive considerations is a distraction. For purposes of applying the Twombly/Iqbal standard, what is important is that proof of market effects of an agreement generally will be available from sources other than the defendant. The discovery of the defendant that does take place is simpler as well. Unlike the secret agreement in a per se claim, a defendant in a rule of reason case should know which of its agents was involved in the decisions being challenged, because those decisions are publicly known. The true expense of litigation is in the preparation of expert testimony and the taking of expert discovery, and that is borne equally by the plaintiff and by the defendant. No problematic asymmetries exist.

When bringing a quick-look claim, the plaintiff traditionally is permitted to rely on an assertion of harm. The defendant is then required to respond with pro-competitive justifications, before the plaintiff bears the ultimate burden to prove the harm to competition outweighs any possible pro-competitive justifications for the restraint. Unlike the full-blown rule of reason, the plaintiff's initial burden, traditionally conceived, is merely to demonstrate the existence of a suspect agreement.

The likelihood of a false positive should be the same, whether the claim is a quick look claim or a full-blown rule of reason claim. This is because questions involved in both quick look and full-blown rule of reason claims relate to the economic effects of the agreement and do not implicate burdensome discovery. One

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132 The leading discussion of the respective burdens of the plaintiff and the defendants in a rule of reason case is found in California Dental Association v. F.T.C., 526 U.S. 756 (1999). California Dental consists of a debate between Justice Souter, writing for a five justice majority, and Justice Breyer in dissent. The disagreement is whether the plaintiff in a rule of reason case must, in meeting its initial burden of establishing the likelihood of anti-competitive effects, analyze possible pro-competitive effects of the challenged restraint. Id. at 771-76. The answer to this question affects whether the claim can be analyzed on a quick look basis. Justice Souter’s opinion for the Court holds that the plaintiff must engage in an analysis of possible pro-competitive effects of the agreement in bearing its initial burden of establishing the likelihood of anti-competitive effects. Id.
exception exists. Quick-look claims deal with inherently suspect restraints. It is possible that the agreements underlying a quick look analysis took place in secret. The asymmetric discovery burden on the agreement element would apply to such a claim in equal measure with a per se claim.133

B. Monopolization

Section Two of the Sherman Act prohibits monopolization.134 The monopolization offence has two elements, power and conduct.135 Unlike the Section One claim, circumstances rarely arise in which one of the two elements is for practical purposes uncontested.136 Calculating the expected cost of false positive error on a Section Two claim therefore requires considering the cost of false positive errors (determined above to be high throughout the body of antitrust law) and the likelihood that each element produces a false positive.

1. Market Power

The market power element requires that the defendant possess substantial power over price.137 Such power is commonly inferred from the defendant’s possession of a high share of an appropriately defined antitrust market.138

133 See supra nn. 119-122 and accompanying text.
134 Only a few cases discuss Twombly in the context of Section Two. See, e.g., Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117 (2d Cir. 2007) (dismissing monopolization claims based on unilateral refusals to deal with competitors, citing Twombly for the standard on a motion to dismiss). The Supreme Court’s opinion in Pacific Bell Tel. Co. v. Linkline Comm’ns, Inc. 129 S. Ct. 1109, 1123 (2009), also makes reference to the necessity that the complaint in that Section Two case meet the Twombly standard on remand.
135 “The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966). See also Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004), and Pacific Bell Telephone Co. v. Linkline Communications, Inc., 129 S.Ct. 1109, 1118 (2009).
136 For example, Microsoft Corp., with as much as 95% market share, nonetheless contested the market power element in the suit brought by the United States in 1998. See William H. Page & John E. Lopatka, The Microsoft Case 96-114 (2007). Microsoft was able to raise a difficult legal question on the issues of market definition and entry barriers, two issues inextricable from the larger market power question. Likewise, the conduct element of a Section Two claim will nearly always be contested.
138 The percentage we have already mentioned—over ninety—results only if we both include all 'Alcoa's' production and exclude 'secondary'. That percentage is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent
Therefore, market definition plays a crucial part in monopolization cases.

A market is determined by asking what alternatives a purchaser has to satisfy his or her demand if an alleged monopolist raises its price. The most obvious alternative is to purchase exactly the same product from another seller at exactly the same location. Such alternative sellers of the same product in the same geographic location are obviously included in the market. More difficult line drawing questions arise with respect to other possible alternative suppliers. Should sellers of somewhat different products at the same location as the defendant be included in the market? The answer is reached through an economic calculus, and is called the “cross-elasticity of demand.” If the customer views those other products as good substitutes for the product produced by the alleged monopolist, there is high cross-elasticity. The substitutable products should be included in the market because their presence reduces the power of the alleged monopolist to control price.139 Similarly, if producers of a different product at the same location could easily begin making the product produced by the alleged monopolist, those other potential producers restrain the alleged monopolist’s ability to raise price. Those potential alternative producers should also be included in the market. This economic calculus of likely entry is called the “cross-elasticity of supply.”140

In addition to the product market definition, a “geographic market” must be defined. This is because producers at other locations may restrain the alleged monopolist’s power over price.141 In response to a high price locally, customers may

would be enough; and certainly thirty-three per cent is not. Hence it is necessary to settle what he shall treat as competing in the ingot market.


140 The two forms of cross-elasticity require wholly separate economic analyses. Cross elasticity of supply does not depend on cross elasticity of demand. For example, from a purchaser’s viewpoint, auto hub caps and fenders are poor substitutes for each other. However, if a supplier can easily switch from making hub caps to fenders, hub caps and fenders are in the same market. Such markets can be defined based on a process of production rather than on the basis of the end product produced. For example, hub caps and fenders may both be produced by firms in the light metal stamping market.

141 This applies to producers of identical products, producers of highly substitutable
go to other geographic areas to purchase the product. Those remote producers will therefore have a price-constraining effect on the defendant. Alternatively, producers from distant areas may move to the defendant’s location. They are thus – like the producers of different products who can retool to make the identical product as the defendant – potential competitors.

The task of defining the relevant market, without which market power cannot be proved, is notoriously bound up in factual complexity, including difficult and expensive expert testimony. Expert opinion may even require statistical support to be admitted. Like the reasonableness element of a Section One claim, the market power element of a Section Two claim threatens expensive investment in expert advice and opinion. But that is a red herring: also like the reasonableness element of the Section One claim, the expense of discovery on the market power element is borne uniformly between the parties. Discovery is not directed uniquely at the defendant in a way that incentivizes the plaintiff to engage in burdensome discovery requests to coerce settlement.

Also, the factual development required on proof of market power often involves facts found in the public domain, or maintained by third parties. For example, demonstrating cross-elasticity of supply requires interviewing or deposing third parties competitors or experts in the dynamics of the particular marketplace.

products, and potential producers of identical or highly substitutable products.

The customer’s ability to purchase at a distance and the sellers’ ability to sell in a new area do not depend on each other. Customers may find it difficult to purchase an ice cream cone from a seller located far away. However, sellers of ice cream cones may find it relatively easy to open a store in a new location.


See Keith N. Hylton, Antitrust Law: Economic Theory and Common Law Evolution 230-31 (2003) (“It should come as no surprise that parties spend vast sums of money in litigation in efforts to get the Court to accept their definition of the relevant market.”). Professor Hylton notes two other means of measuring market power: profit margins and constraints on pricing. The first is “unsatisfying” because the appropriate measure of profits, economic profit (which is profit net of opportunity cost) “is difficult to measure, and courts typically make feeble efforts at best.” Id. at 231. The second alternative approach Hylton describes is little different from measuring market share. Constraints on pricing are precisely the demand and supply cross-elasticities we describe above. And “the key point is that the analysis of pricing constraints is a fact-sensitive, tedious process.” Id. at 234.

Demonstrating cross-elasticity of demand requires interviewing or deposing customers and experts. Market share data is sometimes publicly available. None of that discovery is disproportionately burdensome for the defendant. The likelihood of a false positive occurring on the market power element of a Section Two claim is very low.

2. Conduct

A plaintiff’s obligation to plead and prove conduct reflects the well-established rule that merely acquiring, or possessing, monopoly power is not illegal.146 In addition, the defendant must do something to acquire or maintain the monopoly which the law condemns.147 The conduct element of the monopolization offense presents some of the most difficult problems raised by the antitrust law.148 The law wants to prohibit the acquisition or maintenance of monopoly power by inappropriate means. However, the law also wants to encourage vigorous, even cutthroat, competition by all firms, including those with monopoly power or with an ability to acquire it. Establishing clear rules to draw the distinction between illegal conduct and vigorous competition – the height of desirable conduct – is difficult. Murky rules addressing that distinction can both erroneously allow inappropriate conduct and erroneously condemn or deter competitive conduct.

The difficulty of the problem is exacerbated by the fact that both illegal monopolizing conduct and legal competitive conduct can injure other firms, even to the point that they leave the market. The Supreme Court has focused its attention to the conduct element in recent decades on three areas: predatory pricing, unilateral refusals to deal with competitors, and monopoly leveraging. We apply

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146 Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004); Pacific Bell Telephone Co. v. Linkline Communications, Inc., 129 S. Ct. 1109, 1118 (2009). This is because monopoly power can be achieved through superior efficiency, reflected in charging lower prices to customers and providing a superior product or service. Antitrust law does not condemn succeeding by being a more efficient competitor. But see United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).


148 In 2006 and 2007 the United States Department of Justice and the Federal Trade Commission held a year long series of hearings to inquire into the conduct element of the monopolization offense. In September 2008 the Department of Justice issued a report stating its view regarding the conduct element. Despite its co-sponsorship of the hearings, the Federal Trade Commission declined to join in the report. In May of 2009, following a change in administrations, the Department of Justice expressly withdrew the report stating its disagreement with the report’s conclusions. This series of events reflects the division of opinion regarding the conduct element and the difficult issues it raises.
the Twombly/Iqbal pleading framework to the conduct element of Section Two by also focusing on those three types of conduct.

a. predatory pricing

A monopolist reaps the benefits of a monopoly position by pricing high and cutting output.\textsuperscript{149} High prices injure purchasers but they do not exclude rival firms. Indeed, it is a tenet of neo-classical economic theory that high pricing by a monopolist encourages entry and expansion by rival firms.\textsuperscript{150} This entry and expansion, whether it actually occurs or is threatened, can reduce or eliminate the power of the monopolist.

Low pricing by a monopolist, on the other hand, can exclude rivals.\textsuperscript{151} However, courts are hesitant to condemn low prices, which benefit customers and move prices closer to those that would prevail in a competitive market, the antitrust ideal.\textsuperscript{152} The Supreme Court has addressed that conundrum in \textit{Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.}\textsuperscript{153} by imposing a two-part test to determine if pricing by a monopolist represents illegal conduct meeting the second element of

\begin{flushright}
\textsuperscript{149} The phrase “high price” actually refers to “quality adjusted price,” such that the high price can be achieved also through decreasing the quality of the product or service offered.
\textsuperscript{150} Either approach to reaping monopoly rents – increasing prices or decreasing quality – will encourage entry by competitors, who are attracted by the spread between the costs of production and the revenue to be gained from the sale of the product or service.
\textsuperscript{152} [O]ne must ask why the Sherman Act ever forbids price cutting. After all, lower prices help consumers. The competitive marketplace that the antitrust laws encourage and protect is characterized by firms willing and able to cut prices in order to take customers from their rivals. And, in an economy with a significant number of concentrated industries, price cutting limits the ability of large firms to exercise their ‘market power’; at a minimum it likely moves ‘concentrated market’ prices in the ‘right’ direction-towards the level they would reach under competitive conditions. Thus, a legal precedent or rule of law that prevents a firm from unilaterally cutting its prices risks interference with one of the Sherman Act’s most basic objectives: the low price levels that one would find in well-functioning competitive markets.
\textsuperscript{153} 509 U.S. 209 (1993).
\end{flushright}
Section Two. Pricing is predatory, and therefore impermissible, if (1) it is below “an appropriate measure of” the monopolist’s cost of production, and (2) the monopolist has a dangerous probability of recouping the losses it incurs by raising its prices later. The recoupment element of a price predation claim ensures consumers suffer a net detriment from the overall course of conduct by the monopolist.

Courts and commentators have spilled much ink over the high cost of false positive error on predatory pricing claims. By pricing low and increasing output, the alleged predator serves consumers’ interests perfectly. Only if the defendant is able to (1) succeed in eliminating its rival through the price war, and (2) maintain its monopoly position for long enough to recoup the losses incurred through predatory pricing, are consumers net harmed by the defendant’s conduct. The Supreme Court has taken the position that successful predation is highly unlikely, which means consumers are net benefitted by the unsuccessful effort. Litigation that deters unsuccessful predation thus harms consumers. Also, non-predatory competitive conduct – cutting prices to compete, or to sell off distressed merchandise, or to establish a toe-hold in a new marketplace – presents no chance of consumer harm, because the non-predatory conduct does not threaten recoupment of the defendant’s investment and consequent net consumer harm. But to an antitrust plaintiff or court, it may be difficult to distinguish innocent price-cutting conduct from predatory conduct. Even non-predatory consumer-friendly pricing strategies may thus threaten the possibility of sanction. Those concerns for false positive error motivate the substantive law regarding predatory pricing contained in the Brooke Group test. However, the focus here is on false positive error flowing from pleading standards.

The likelihood of false positive error on the conduct element of predatory pricing claims caused by burdensome discovery turns, as elsewhere, on the expected

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154 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-226 (1993) (applying the test in the context of the price discrimination prohibition contained in Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a), and stating that the same test applies to actions under Sherman Act Section Two.) The Court has never had occasion to decide what measure of cost is “appropriate.” See *Brooke Group*, 509 U.S. at 223 n.1 (parties agreed that average variable cost was the appropriate measure of cost, and Court “decline[d] to resolve” the question).

155 The Court has also applied the *Brooke Group* test to alleged predatory buying schemes in which a firm acquires power as a buyer by bidding up the prices to drive other purchasers from the market. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007).

156 Because the predator necessarily has market power, its pricing low forces all competitors to price low as well. Consumers thus benefit from the low prices whether or not they actually purchase from the defendant.

cost of litigation for the defendant after the pleading stage. We must ask what the
discovery burden is and whether it is likely to fall disproportionately on the
defendant. The answer is a mixed bag. The first element of impermissible
predatory pricing conduct, which asks whether the prices charged are below an
appropriate measure of the defendant’s costs, requires comparing the prices charged
to some calculus of the defendant’s costs. Discovering the prices charged is not
difficult – that information should be available either in the public domain, through
discovery of the defendant’s customers, or both. The defendant might, for example,
publish price lists, and evidence of undisclosed discounting will be available through
interviews or depositions of customers.\textsuperscript{158} Even discovery of the defendant seeking
that information is not burdensome. That discovery does not disproportionately
impact the defendant in any substantial fashion. So, too, with the recoupment
element of the claim. The defendant’s ability to recoup losses incurred in predation,
by pricing at monopoly levels after the victim is driven from the market, is a
function of the sustainability of the defendant’s resulting monopoly power. The
questions of cross-elasticity of supply and demand, which are so readily addressed
with publicly available information on the monopoly power question, are just as
readily answered on the recoupment element.\textsuperscript{159}

But the inquiry into the defendant’s cost structure does require onerous and
asymmetric discovery of the defendant. Some elements of the defendant’s cost
structure, such as costs of inputs (including products used in manufacturing or
services, such as shipping) and taxes will be readily available to the plaintiff, who is
usually the defendant’s competitor. Other elements, including labor costs, costs of
proprietary technology, and costs of capital, may be known only by the defendant.
Too, there are accounting problems inherent in allocating joint costs incurred by a
defendant that operates in many marketplaces to the particular product or service
that is the subject of the predatory pricing claim. Discovery is therefore not limited
to the production process of a single product, but may require an analysis of the
defendant’s company-wide costs.

The foregoing paragraph demonstrates that discovery of the defendant’s cost
structure, which under \textit{Brooke Group} is essential to the determination whether the

\textsuperscript{158} Some markets are characterized by greater public availability of pricing information than
others. \textit{See, e.g., United States v. AMR Corp.}, 335 U.S. 1109 (10th Cir. 2003) (government predatory
conduct suit against American Airlines where prices are published through the Airline Tariff
Publishing system).

\textsuperscript{159} As elsewhere, we ignore the expense of expert testimony and discovery, which is
substantial. Because it is not asymmetric in nature, plaintiffs already are incentivized to minimize
the burden on the defendant and not to go forward with spurious claims.
price charged is above or below an “appropriate measure” of the defendant’s costs, places a tremendous burden on the defendant. That burden is borne uniquely by the defendant, implicating the moral hazard problem by encouraging burdensome requests in the absence of a credible threat of a tit-for-tat response. Another attribute of the discovery on the price element of a predatory pricing claim raises unique concerns. The information necessary to analyze the defendant’s price structure is extraordinarily competitively sensitive. Although protective orders are available in litigation to limit the exposure of that information, defendants understandably will be loath to produce that information.

The burden of discovery on the conduct element of a predatory pricing claim renders false positive error highly likely to occur. If a claim makes it past the motion to dismiss stage, defendants are heavily incentivized to settle even non-meritorious claims, paying money although they are innocent of the conduct alleged. More, those defendants, and others similarly situated, are disincentivized to engage in vigorous price competition that, though beneficial to consumers, might later be argued to be predatory in nature. *Iqbal* and *Twombly* counsel for a careful examination of complaints alleging predatory pricing.

b. unilateral refusals to deal

The question whether a refusal to deal by a monopolist violates Section Two arises in several forms. A monopolist may refuse to assist a rival. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the Court faced a claim by a rival that a monopolist violated Sherman Act Section Two by refusing to continue a cooperative selling arrangement. Defendant Ski Co. owned three of four ski hills in Aspen, Colorado. Plaintiff Highlands owned the fourth hill. Ski Co. and Highlands had cooperated for years in selling a joint six-day four-mountain ticket and sharing the revenues generated by the ticket. Ski Co. terminated the relationship by offering Highlands a revenue split that was unacceptable to Highlands. Ski Co. also refused to sell its own daily lift tickets to Highlands, preventing Highlands from creating its own bundled ticket for sale to consumers.

The Court held that Ski Co. violated Section Two by engaging in those unilateral refusals. The Court reasoned that the refusals injured Highlands,

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160 Such orders may, for example, limit exposure of the sensitive information to plaintiff’s counsel and testifying expert.
162 Id. at 592.
163 Id. at 593.
injured consumers, and were not motivated by any legitimate business justifications.\textsuperscript{164} It concluded that Ski Co. was foregoing revenues in order to injure Highlands, evidenced by the fact that Ski Co. had previously been willing to deal with Highlands and ceased doing so for no apparent reason. Its unilateral refusal to deal was therefore illegal.

A refusal to deal can take the form of declining to allow access to monopoly infrastructure. In \textit{Verizon Communications Inc. v. Law Offices of Curtis V. Trinko},\textsuperscript{165} the Court addressed another refusal by a monopolist to deal with a rival and reversed the lower court’s finding of a Section Two violation. In \textit{Trinko}, the defendant telephone company was required by the Telecommunications Act of 1996\textsuperscript{166} to share access to aspects of its local telephone network with its rivals. The plaintiff was a purchaser of telephone services who alleged that the defendant failed to meet its obligations, and the refusal to share access impeded competition by other telephone companies, much as Ski Co.’s refusal to include Highlands in its bundled ticket deal impeded competition by Highlands. The \textit{Trinko} Court distinguished \textit{Aspen} on the basis that Ski Co. had refused to sell its tickets to Highland, even though Highlands was willing to pay full retail price. By contrast, the network access that defendant \textit{Verizon} refused to sell to rivals was not voluntarily for sale in any market at any price. The conclusion that the defendant was foregoing revenues that was warranted in \textit{Aspen} was unwarranted in \textit{Trinko}.\textsuperscript{167}

Refusals to deal also may be directly aimed at customers or suppliers and have an indirect impact on rivals. In \textit{Lorain Journal Co. v. United States},\textsuperscript{168} a newspaper refused to sell advertising to local merchants who also advertised on a nearby radio station.\textsuperscript{169} The government argued that this conduct was part of a

\begin{footnotes}
\item[164] Id. at 605-611.
\item[166] 47 U.S.C. § 271.
\item[167] \textit{Aspen Skiing} is at or near the outer boundary of § 2 liability. The Court there found significance in the defendant’s decision to cease participation in a cooperative venture. The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. Similarly, the defendant’s unwillingness to renew the ticket even if compensated at retail price revealed a distinctly anticompetitive bent.

The refusal to deal alleged in the present case does not fit within the limited exception recognized in \textit{Aspen Skiing}. The complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion.

\textit{Trinko}, 540 U.S. at 409-410 (citations to \textit{Aspen Highlands} omitted).
\item[168] 342 U.S. 143 (1951).
\item[169] Id. at 148.
\end{footnotes}
plan to attempt to monopolize in violation of Section Two. The Court upheld an injunction prohibiting the publisher from refusing to accept such advertising. The Court acknowledged that in general sellers may choose with which customers to deal. However, it found that the right to freely select one’s customers was not absolute. “The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act.”

The conduct element in a unilateral refusal to deal with a rival can be understood, after *Highlands* and *Trinko*, to require two steps. The defendant must refuse to deal with its rival and must do so against its own economic self interest. In an indirect refusal to deal situation like *Lorain Journal*, the two steps are similar. The defendant must refuse to deal with its customer and must do so with the intent of harming its rival.

Discovery on one step of the conduct element, whether under a *Highlands/Trinko* theory or a *Lorain Journal* theory, is simple. The most likely plaintiff is the harmed rival, who is well aware of the reality of and the facts relevant to the defendant’s refusal to deal. If the refusal is indirect, the harmed rival will have access to information about the defendant’s refusal from the customer, whether through informal communications outside the judicial process or in discovery through interviews or deposition. No discovery burden is imposed on the defendant, so no likelihood of false positive error exists here.

The second step of the conduct element of a unilateral refusal to deal claim presents a high likelihood of false positive error. Under a *Highlands/Trinko* direct refusal to deal theory, evidence proving that the refusal to deal is contrary to the defendant’s economic self interest is uniquely in the defendant’s control. The burden of discovery is borne by the defendant exclusively, with the attendant concerns for moral hazard. The evidence may also be highly competitively sensitive, bearing on the defendant’s forward-looking business strategies. For example, one might well imagine the kind of business case analysis that could accompany a corporate decision to discontinue the historic business practice of selling a multi-mountain lift ticket. Aspen Highlands might have been interested only in eliminating a rival. It might also have envisioned undertaking an expansion or a

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170 *Id.* at 155.

171 Unlike predatory pricing, which is beneficial to consumers in the absence of sustained monopoly pricing producing net consumer harm, there is no initial benefit to consumers through a monopolists unilateral refusal to deal. Therefore, there is no need for a showing of likely or actual recoupment.
new marketing scheme that would make the multi-mountain ticket inconvenient or unnecessary.

But it is also possible the pertinent evidence on the second part of the conduct element is readily available to the plaintiff, with no threat of discovery burden being imposed on the defendant. One reading of *Aspen Highlands* would permit a claim to be pleaded and proved only on the basis of an unexplained change in the defendant’s competitive strategy. It would be sufficient to prove the defendant had previously found it advantageous to deal with the victim firm and inexplicably ceased doing so. Such circumstantial proof of the defendant’s acting against its own economic best interest is similar to circumstantial proof of agreement. The evidence of observed marketplace conduct would be as easily available to the plaintiff as it is to the defendant.\footnote{We do not address here whether, as a matter of substantive law, such purely circumstantial evidence would be sufficient to give rise to liability.}

Moreover, because the evidence is public or quasi-public in nature already, its disclosure does not implicate the competitive concerns that private information about the defendant’s strategic decisions implicates.

In the case of a *Lorain Journal* indirect refusal to deal theory, the second step in the conduct analysis is the defendant’s intent to harm its rival. Proof of the defendant’s intent often requires access to evidence that is exclusively in the hands of the defendant. Examples include deposition testimony of defendant’s executives or documents reflecting the reasons for business decisions. Discovery to find such evidence could be massively burdensome. Where the defendant is a large corporation, determining which of the myriad agents authorized to act on the defendant’s behalf held the individual intent to harm the rival might require interviewing with, and searching the documents of, hundreds of employees.\footnote{This replicates nearly precisely the burden concern raised in *Twombly*. Arguably, the burden of this discovery on a Section Two claim is less because the chance of criminal prosecution in the modern era is vanishingly small. It is thus less likely that the internal corporate decision-making process would be difficult to re-create.} But as with the direct refusal to deal, it is also possible to envision evidence of intent to harm a rival being readily available to the plaintiff, and thus the discovery burden on the defendant being minimal. The information might be quasi-public in nature, if, for example, the defendant announced to its would-be customer that it sought to prevent the success of a nascent competitor.

As with the *per se* Section One claim, the likelihood of false positive error turns on whether the conduct in a unilateral refusal to deal claim is to be proved circumstantially or directly. Direct proof implicates burden concerns in a way that
circumstantial proof does not. Thus, an allegation of a statement by the defendant (including an agent authorized to act on its behalf) has a higher expected cost of false positive error, and the allegations must be commensurately more specific. An allegation of a lack of a business justification for observed conduct, unsupported by direct evidence, has a lower expected cost, because it relies primarily on expert testimony and publicly available facts. Less specific allegations will be sufficient.

c. monopoly leveraging

Refusals to deal and other strategies may be used by monopolists to affect more than one market. In some situations monopolists are alleged to have leveraged their power in one market to gain power in another market. In Eastman Kodak Co. v. Image Technical Services, Inc.,\(^\text{174}\) Kodak was alleged to have a monopoly in repair parts for micrographic machines it manufactured. It was also alleged to have used that power to gain power in repair service for those machines. Kodak refused to sell parts to independent service organizations (ISOs), its rivals in the service market, or to customers who used ISOs for service.\(^\text{175}\) Kodak also entered into agreements with parts manufacturers, Kodak’s suppliers, that prohibited those manufacturers from selling parts to ISOs.\(^\text{176}\) The Court held that the plaintiff had presented sufficient evidence to withstand Kodak’s motion for summary judgment.\(^\text{177}\) The Court viewed the question regarding the conduct element as whether the exclusionary effects of Kodak’s policies were justified by legitimate competitive reasons.

The second element of a § 2 claim is the use of monopoly power “to foreclose competition, to gain a competitive advantage, or to destroy a competitor.” If Kodak adopted its parts and service policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2. ... Liability turns, then, on whether “valid business reasons” can explain Kodak’s actions.\(^\text{178}\)

The Court determined that sufficient issues of material fact existed regarding

\(^\text{175}\) \textit{Id.} at 458.
\(^\text{176}\) \textit{Id.}
\(^\text{177}\) \textit{Id.} at 485-486.
\(^\text{178}\) \textit{Id.} at 482-483 (citing \textit{Grinnell Corp.}, 384 U.S. at 570-71; \textit{United States v. Aluminum Co. of America}, 148 F.2d 416, 432 (2d Cir. 1945); \textit{Aspen Skiing Co. v. Aspen Highlands Skiing Corp.}, 472 U.S. 585, 600-605 (1985); and \textit{United States v. Griffith}, 334 U.S. 100, 107 (1948)).
Kodak’s asserted justifications to deny summary judgment.\footnote{Id. at 483-486.}

The legitimacy of justifications for conduct that adversely impacts rivals was examined further in a significant case that did not reach the Supreme Court. In \textit{United States v. Microsoft Corp.},\footnote{253 F.3d 34 (D.C. Cir. 2001).} the software giant was alleged to have maintained its monopoly in operating systems for personal computers by impeding the development of Netscape Navigator and Java, both forms of “middleware” that were thought to pose a threat to Microsoft’s Windows operating system. The fear was that developers of computer applications programs might ultimately write applications for middleware rather than for Windows.\footnote{Id. at 53.} In assessing whether Microsoft had violated the conduct element of Section Two, the court viewed its task as distinguishing actions which are net anti-competitive from those that are net pro-competitive.\footnote{Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it. \textit{Id.} at 58.} The court imposed on the plaintiff the burden of demonstrating that the challenged conduct harmed the process of competition rather than merely harming competitors.\footnote{253 F.3d at 58-59.} In undertaking that task, the court applied a methodology similar to the rule of reason applied in Section One cases.\footnote{\textit{See supra} text accompanying notes 128-132.} The court then shifted the burden to the defendant to come forward with a pro-competitive justification.\footnote{[I]f a plaintiff successfully establishes a prima facie case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a “procompetitive justification” for its conduct. \textit{See Eastman Kodak}, 504 U.S. at 483. If the monopolist asserts a procompetitive justification – a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal – then the burden shifts back to the plaintiff to rebut that claim. \textit{Id.} at 58-59.} It then shifted the burden of rebutting the proffered justification or demonstrating that the anti-competitive harm outweighed the pro-competitive justification back to the plaintiff.\footnote{“[I]f the monopolist’s procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.” \textit{Id.}} The court acknowledged that it borrowed that
methodology from Section One rule of reason cases. In evaluating whether the
government had met its initial burden of demonstrating that the challenged conduct
damaged the competitive process, the court focused on whether the conduct
insulated the defendant’s product from competition on the merits.

In its most recent Section Two case, the Supreme Court addressed predatory
pricing, refusals to deal and the effects of conduct on more than one market. In
\textit{Pacific Bell Telephone Co. v. Linkline Communications, Inc.},\textsuperscript{189} the defendant
telephone company provided high speed internet access (“DSL service”) to retail customers. Pursuant to regulatory requirements it also provided wholesale access
to DSL service to other retail providers of that service including the plaintiffs. The plaintiffs alleged that the defendant violated Section Two by charging a high
wholesale price to the plaintiffs while charging a low retail price to consumers. The
resulting price squeeze allegedly injured competition.

The Court assumed that the defendant had no antitrust duty to deal with the
plaintiff.\textsuperscript{190} The Court held that since the defendant had no duty to deal with the
plaintiff at all, the terms upon which it did deal were not subject to challenge under
Section Two.\textsuperscript{191} As to the retail price portion of the challenged conduct, the Court
held that the price would violate Section Two if it met the two pronged test for
predatory pricing set forth in \textit{Brooke Group}.\textsuperscript{192} The Court went on to state that on
remand the assessment of any \textit{Brooke Group} claim would be subject to the pleading
standard established in \textit{Twombly}.

Monopoly leveraging claims, not unlike the predatory pricing and unilateral
refusals to deal discussed in subsections “a” and “b,” under the modern analyses
demonstrated by \textit{Linkline}, \textit{Microsoft} and \textit{Kodak}, turn on the existence or lack of a
valid business justification for the observed conduct. As discussed above with
regard to refusals to deal under \textit{Aspen Highlands}, proof of a valid business

\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.} at 62, 65, 75 and 77.
\textsuperscript{189} 129 S. Ct. 1109 (2009).
\textsuperscript{190} \textit{Id.} at 1118, note 2.
\textsuperscript{191} But a firm with no duty to deal in the wholesale market has no obligation to deal
under terms and conditions favorable to its competitors. If AT & T had simply
stopped providing DSL transport service to the plaintiffs, it would not have run afoul
of the Sherman Act. Under those circumstances, AT & T was not required to offer
this service at the wholesale prices the plaintiffs would have preferred.
\textit{Id.} at 1119.
\textsuperscript{192} \textit{Id.} at 1120.
\textsuperscript{193} \textit{Id.} at 1123.
Iqbal, Twombly, and the Expected Cost of False Positive Errors

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justification sometimes will be possible through expert analysis of public or semi-public information, with little discovery burden imposed on either party. Such circumstantial proof presents a low likelihood of false positive error, because the proof of a business justification is derived primarily from expert testimony based on public record information about the market.

But where, as in Linkline, the business justification required is a cost analysis, i.e., that the pricing scheme complained of meets the Brooke Group “appropriate measure of cost” test, the discovery burden is identical to that discussed in subsection “a,” above. The information necessary to demonstrate the defendant’s prices are below cost is uniquely in the defendant’s hands, so is burdensome to produce, and is enormously competitively sensitive. The likelihood of false positive error is at its highest.\(^{194}\)

V. Testing Cases

Increasing numbers of antitrust courts have been tasked with deciding motions to dismiss since Twombly and Iqbal were decided. This Part considers representative cases in the light of the expected value of false positive error framework we derive from Twombly and Iqbal. This Part proceeds in the order in which the particular antitrust claims are discussed in Part IV.

A. Sherman Act Section One

1. Agreement

   Allegations on the agreement element have been well tested post-Twombly, although few cases have been decided post-Iqbal. Because the burden concern that underlies the Twombly rule is most powerful where the proof of agreement will be based on direct evidence, we would expect courts applying Twombly to hold complaints to a higher bar where proof by direct evidence will be necessary. But where there are circumstantial allegations, including a sufficient “but-for” allegation tending to exclude the possibility of innocent conduct, proof by circumstantial evidence is a possibility, and the complaint should normally be approved.

   a. circumstantial allegations

\(^{194}\) See supra nn. 159-160 and accompanying text.
In the first couple of years after Twombly, few complaints contained such a sufficient but-for allegation. A recent holding by the Second Circuit in Starr v. Sony BMG Entertainment is an exception.\textsuperscript{195} Starr dealt with a claim of horizontal agreement on price and non-price terms in the sale of digital music online. The plaintiffs alleged the defendants charged the same wholesale price for their music and employed identical restrictive contract terms.\textsuperscript{196} The Second Circuit relied on seven “non-conclusory factual allegations of parallel conduct” that it held “plausibly suggest that the parallel conduct alleged was the result of an agreement among the defendants.”\textsuperscript{197} The first was the allegation that the defendants agreed to enter into joint ventures to distribute music.\textsuperscript{198} Second was the allegation that prices stayed high despite distribution costs decreasing. Third was the parallel maintenance of high prices and restrictive contract terms even when other distribution channels were employed. Fourth and fifth were the use of most-favored nation clauses in licenses with distributors that had the effect of creating price rigidity among the defendants. Sixth was the parallel refusal to deal with one distributor, eMusic, who apparently acted as a maverick in the distribution marketplace. Seventh was a parallel price increase among all the defendants.

The court then listed other factors that it believed were consistent with conspiracy being a plausible interpretation of the observed facts. Those included high concentration, contract terms that “one industry commentator noted” were not competitive, and a statement by one defendant’s CEO stating that one of the joint ventures was meant to “stop the continuing devaluation of music.”\textsuperscript{199}

The Second Circuit’s treatment of the circumstantial allegations in Starr suggest the court believed the plaintiffs were prepared to proceed with proof of agreement without unduly burdensome, or at least not asymmetrically burdensome, discovery proceedings. It noted that the allegations of parallel conduct, with the plus-factor allegations, “taken together, place the parallel conduct ‘in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.’”\textsuperscript{200} The Second Circuit’s approach is consistent

\textsuperscript{195} ___ F.3d ___, 2010 WL 99346 (2d Cir. Jan. 13, 2010).
\textsuperscript{196} Id. at *1.
\textsuperscript{197} Id. at *6.
\textsuperscript{198} Although the allegation that the defendants “agreed” is certainly conclusory, the agreement at issue in that allegation was the agreement to form a joint venture, which was conceded, and not the alleged agreement to fix prices.
\textsuperscript{199} Id. at *6.
\textsuperscript{200} Id. (quoting Twombly, 550 U.S. at 557).
with the framework advanced in this article. Because the allegations suggested the plaintiffs were prepared to go forward with proof by circumstantial evidence, the likelihood of false positive error was minimized, and a lighter review at the motion to dismiss stage was warranted. The Second Circuit specifically rejected the argument that it was necessary to identify the specific time, place or person related to each conspiracy allegation.

The complaint in *In re Pressure Sensitive Labelstock Antitrust Litigation* alleged a price-fixing and market allocation agreement. The court had held prior to *Twombly* that “an agreement among oligopolists to fix prices at a supracompetitive level makes perfect economic sense” based on the alleged market conditions. Plaintiffs alleged price leadership by one defendant, despite that defendant’s “historical reticence to spearhead price increases.” That allegation invokes the one plus factor the *Twombly* Court appeared to recognize as sufficient – “complex and historically unprecedented changes in pricing structure.” With the sufficient

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201 This is so although one of us has stated elsewhere the Second Circuit over-read the importance of the allegations. Comparable to *Twombly*, the observed facts in *Starr* are entirely – and perhaps primarily – consistent with interdependent conduct rather than conspiracy. Jacqueline Bell, “2nd Circuit Rule Highlights Twombly Trouble,” Law360, Feb. 3, 2010 (quoting Max Huffman).


203 *Pressure-Sensitive Labelstock*, 566 F. Supp. 2d at 371 (quoting the court’s prior opinion, 356 F. Supp. 2d at 493 & n.4). The court may have been wrong in concluding from the allegations that the plaintiffs were prepared to proceed with proof by circumstantial evidence. The fact that it might be in the defendants’ economic best interests to collude – an assertion that the *Twombly* plaintiffs also made – is not sufficient to support a price-fixing claim, and in fact is nearly tautological. The allegation that that the defendants agreed not to compete for customers was backed by an industry structure allegation that there was substantial excess industry capacity and that one defendant was idling excess capacity in refusing to compete. *Id.* at 371. On its face, this allegation should fare no better. Any increase in price, whether achieved through innocent interdependent consciously parallel conduct or through illegal conspiracy, would have the effect of idling capacity by comparison to the lower prices. And although plaintiffs alleged that it made no sense economically to idle excess capacity in the absence of an agreement, basic economic theory teaches otherwise. Increasing prices and decreasing output is a common strategy for profit maximization. The fact that prices were at supra-competitive levels both shows the economic rationality of the output restrictions and is itself explainable through innocent interdependent consciously parallel conduct. The court in *Pressure-Sensitive Labelstock* also found relevant an allegation that one defendant had agreed with a third party not to compete, that the other defendant “was aware of the agreement,” and that the other defendant itself forebore to compete.” This “suggest[ed] its participation in an overarching conspiracy.” *Pressure-Sensitive Labelstock*, 566 F. Supp. 2d at 371 n.7.

204 *Pressure-Sensitive Labelstock*, 566 F. Supp. 2d at 372.

but-for allegation, the *Pressure-Sensitive Labelstock* plaintiffs demonstrated their capacity to proceed to proof by circumstantial evidence, mitigating the discovery burden and the attendant likelihood of false positive error.

Insufficient circumstantial allegations demonstrate a plaintiff’s reliance on the discovery of direct evidence through burdensome discovery. The Sixth Circuit, in *In re Travel Agent Commission Antitrust Litigation*,\(^\text{206}\) considered allegations of “a series of uniform base commission cuts adopted by defendant[airline]s over a seven year period.” The plaintiffs alleged the decisions to match commission cuts by the price leaders in the market were due to an illegal agreement.\(^\text{207}\) The plaintiffs further alleged that the uniform commission cuts “would not have occurred without collusion because such action, if taken independently, was contrary to the individual defendant’s economic self interest.”\(^\text{208}\) The *Travel Agent Commission* plaintiffs did not show their ability to prove their case through circumstantial evidence. Instead, the allegations demonstrate plaintiffs’ need to make proof by direct evidence of agreement, as the observed interdependent conduct of the airlines is insufficient to make a circumstantial case of conspiracy. Evidence of actual agreement would be necessary, raising the concern for burdensome and asymmetrical discovery. With the necessity for direct proof, the Sixth Circuit required specific allegations of facts that would give notice of plaintiffs’ plan for proving the agreement. Simply alleging that an agreement existed was conclusory and insufficient.\(^\text{209}\)

In *In re Elevators Antitrust Litigation*,\(^\text{210}\) plaintiffs relied exclusively on circumstantial allegations. The Second Circuit held that competitors’ use of similar contractual language, product prices and designs were consistent with competitive business decisions as well as with conspiracy.\(^\text{211}\) Those similarities did not provide

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\(^{206}\) *Travel Agent Commission*, 206 F.3d 896 (6th Cir. 2009).

\(^{207}\) *Id.* at 899.

\(^{208}\) *Id.* at 900.

\(^{209}\) *Id.* at 904-905.

\(^{210}\) *In re Elevators Antitrust Litigation*, 502 F.3d 47 (2d Cir. 2007).

\(^{211}\) The complaint in *Elevators* alleged the following conduct: (1) “a combination and conspiracy” (Para. 41), (2) “a continuing agreement, understanding and concert of action among the defendants and co-conspirators” (Para. 42), (3) “meetings and conversations in Europe and the United States to discuss the prices . . . and to discuss the applicable customers or markets” (Para. 43(a)), (4) that the defendants “Agreed, during those meetings and conversations, to charge prices at certain levels and otherwise increase or maintain prices” (Para. 43(b)), (5) that the defendants
“plausible grounds to infer an agreement.”212 Coupling them with “enumerat[ing] basically every type of conspiratorial activity that one could imagine . . . in entirely general terms without any specification of any particular activities by any particular defendant” did not help plaintiffs’ claims.213

The complaint that Elevators held insufficient more robustly alleged plus factors, tending to increase the opportunities for the defendants to collude, than did the Twombly complaint. The Elevators plaintiffs may have been better prepared than the plaintiffs in Twombly to go ahead with proof of agreement by circumstantial evidence. However, the Elevators complaint contained only a weak attempt at a “but for” allegation, alleging only that there was “no objective or pro-competitive justification” for the observed conduct.214 No allegation in the Elevators complaint took the essential step required of circumstantial allegations by Twombly of tending to exclude the possibility of unilateral conduct.215 Just as in Twombly,
then, the Elevators plaintiffs’ failure sufficiently to plead circumstantial evidence implicated the necessity of proving their claim through direct evidence, which raises the plausibility bar.

b. direct allegations

Starr and Pressure-Sensitive Labelstock are the rare complaints that survive on the basis of sufficient circumstantial allegations. Most complaints that survive rely on direct allegations of agreement that are sufficiency specific to mitigate the concern for burden. Pressure-Sensitive Labelstock also contained direct allegations that might meet the Twombly/Iqbal standard. Plaintiffs alleged “direct discussions about the need to collaborate on price increases during the October, 2000, conference” of the industry trade association. Such a specific allegation
permits the trial court carefully to cabin the discovery required to produce evidence relating to that allegation. The district court could limit discovery to those agents of defendants present at the October 2000 conference, and could limit it to topics related to that conference. Because of the specificity of the direct allegations, the burden concern is minimized.

Sufficient direct allegations of conspiracy existed in *Hyland v. Homeservices of America, Inc.* 218 The complaint “alleged admissions of price-fixing by real estate brokers[ and] an exchange of price information and catalogues between the parties.” 219 *Hyland* also alleged a rebate ban imposed on the individual defendants by their trade organization, which had been the subject of a civil action by the U.S. Department of Justice. 220 Because the complaint alleged a conspiracy directly, rather than circumstantially, burdensome discovery was threatened in *Hyland*. But the allegations were sufficiently detailed to offer the court a path to cabining discovery closely.

*Behrend v. Comcast Corp.* 221 involved a Section One claim based on direct allegations of “swap agreements” between cable service providers in different geographic locales. 222 The agreements involved trading customers such that the defendants gained greater market power in their respective locations. The complaints included direct allegations of agreements. 223 “The [complaints] provide factual descriptions of the parties, their roles as competitors in the geographic markets, when the agreements were completed, and how the terms thereof allegedly eliminated competitors in, and raised entry and reentry barriers to, the

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219 Id., 2007 WL 2407233, at *3.
221 532 F. Supp. 2d 735 (E.D. Pa. 2007).
222 The *Behrend* complaint alleged violations of both Sections One and Two by Comcast Corporation and its affiliates. 3d Amend. Compl. ¶¶ 3, 6, 9. The theories of harm are reminiscent of those advanced in *Twombly*. The Section One theory is one of market division, creating customer clusters to avoid competition within markets. Id. ¶ 10. The Section Two theory, also like *Twombly*, is that defendant refused to allow access to its facilities to would-be new entrant competitors. Id. ¶ 11. Unlike in *Twombly*, however, in *Behrend*, the plaintiffs were able to allege several specific agreements that they believed constituted market allocations. 3d Amend. Compl. ¶¶ 54-56. The Section Two allegations, likewise, included a litany of alleged mergers through which the defendants gained market share in the alleged markets. Id. ¶¶ 51-53. Both of the theories are suspect as a matter of substantive law, but unlike *Twombly*, the *Behrend* complaint did not turn on conclusory legal assertions.
223 *Behrend*, 532 F. Supp. 2d at 741.
Although direct allegations raise greater burden concerns, the allegations in Behrend were sufficiently specific to overcome the concern for burden associated with one-sided discovery.

City of Moundridge v. Exxon Mobil Corp. involved allegations of price fixing by natural gas refiners in a suit by plaintiff municipalities. The court considered circumstantial allegations of price fixing: ‘the natural gas total resource base had not decreased, . . . the prices had risen and never fallen below an agreed-upon price, . . . the defendants had reported high profits, and . . . Hurricanes Katrina and Rita should not have affected the market as the defendants claimed.’ Providing “historical supply and consumption levels, market prices, profit levels, and the use of industry reports,” was sufficient “to support an inference that the defendants engaged in not merely parallel conduct, but rather agreed” to fix prices. There were also some direct allegations: the complaint also identified “the years and locations where the agreement was reached and the defendants who participated.”

City of Moundridge is another case in which the circumstantial allegations are insufficient to obviate the need to rely on proof by direct evidence. The

224 Id. See also Omnicare, Inc. v. Unitedhealth, Inc., 524 F. Supp. 2d 1031, 1038 (N.D. Ill. 2007) (direct allegations of a merger agreement sufficient to allege an agreement to coordinate decisions pre-merger). Omnicare is a surprising result. The court held there were direct allegations of an agreement, although the terms of the agreement – to merge – were not the basis for the antitrust claim, which was pre-merger coordination. Id.


226 Id. (citing the Second Supp. Compl. ¶¶ 36, 37).

227 Id.

228 Id. (citing the Second Supp. Compl. ¶¶ 15, 17, 18).

229 See also Hackman v. Dickerson Realtors, Inc., 557 F. Supp. 2d 938 (N.D. Ill. 2008).

Hackman held that allegations against one defendant that she knew of a group animus, which later (in her absence) led to a conspiracy, and that she acted consistently with it were sufficient to permit discovery as to whether she was actually a member of the conspiracy. Hackman, 557 F. Supp. 2d at 944. The allegations against the defendant were that she took actions consistent with the alleged group boycott, that she “knew of the vendetta against” plaintiff, and that she had previously worked for the area realtor’s association. Amend. Compl. ¶ 43. The court acknowledged that the sufficiency of those allegations “is a closer call.” Hackman, 557 F. Supp. 2d at 944. Allegations against other defendants in Hackman, which include the allegation that at a specified meeting, “the agency Defendants . . . agreed not to do business with” plaintiff (Amend. Compl. ¶ 36), are sufficient under Twombly. The amended Hackman complaint did not include a direct allegation that the defendant communicated her involvement to the other alleged co-conspirators.

The Hackman court may have over-read the allegations. The circumstantial allegation in Hackman with regard to the one defendant were neutral as to whether she was a party to an
allegations that profits were high, that supply was restricted despite ample resources, and that those phenomena could not be explained by external forces such as hurricanes do not exclude the possibility of oligopoly pricing through interdependent conduct, so should not be sufficient “but for” allegations to permit plaintiffs to proceed on proof by circumstantial evidence. But the complaint provided sufficiently specific allegations with regard to the conduct from which an agreement could be inferred to permit the plaintiffs to proceed on a theory of proof by direct evidence.  

Courts are feeling their way in applying the Twombly/Iqbal standard to conspiracy allegations. The primary difficulty appears to be a lack of appreciation of the underlying rationales for the standard. The rationales advanced here explain the appropriate treatment of circumstantial and direct allegations. Where the allegations demonstrate the capacity to proceed with circumstantial proof, as in Starr v. Sony BMG and Pressure-Sensitive Labelstock, the expected cost of false positive error is low and discovery should be permitted to proceed. Where the allegations demonstrate a need to proceed with direct evidence, expected cost of false positive error is high. Only where the allegations are sufficiently detailed, as in cases like Hyland and Behrend, to cabin the discovery requests should the complaint survive. But in cases like Travel Agent Commissions, Elevators and City of Moundridge, insufficient circumstantial allegations coupled with no, or insufficient, direct allegations necessitate dismissal.

2. Reasonableness
The Ninth Circuit applied Twombly to a rule of reason claim in William O. Gilley Enterprises v. Atlantic Richfield Co.\footnote{561 F.3d 1004 (9th Cir. 2009), vacated on other grounds, 588 F.3d 659 (2009).} In Gilley, the agreement element was alleged with allegations of “exchange agreements” – express contracts – between defendant oil producers.\footnote{Id. at 1010. Gilley is an example of the reality, which we discuss above, that where the alleged violation is something other than hard-core cartel conduct it will usually be the case that the behavior is not hidden. It therefore does not present a pleading problem regarding the agreement element. See also In re Hypodermic Products Antitrust Litig., 2007 WL 1959224, at *14-*15 (D.N.J. June 27, 2007) (direct allegations of agreement sufficient to state a claim; allegations of anticompetitive effects could not be evaluated at the motion to dismiss stage); Starr v. Sony BMG, ___ F.3d ___, ___, 210 WL 99346, at *9 (Jan. 13, 2010) (challenge to a joint venture, the existence of which was conceded, precluded dismissal).} The question was the sufficiency of pleading the effects of those contracts. “Because each of the exchange agreements arguably affects only a small amount of CARB gas, Plaintiffs pleaded the cumulative effect of a single Defendant’s exchange agreements to show market power and anticompetitive effect.”\footnote{Id at 1021.} The majority held that aggregation of the effects of many discrete agreements is legally permissible.

Over arguments by the defendants that the exchange agreements were efficiency-enhancing, the court held the factual question of the anticompetitive effects of the aggregated contracts, netted against the procompetitive efficiencies they offered, could not be resolved at the motion to dismiss stage.\footnote{Id. at 1011. Contra Lady Deborah’s, Inc. v. VT Griffin Servs., Inc., 2007 WL 4468672, at *8 (S.D. Ga. Oct. 26, 2007) (dismissing on the basis of the defendant’s failure to allege injury to competition). The Gilley dissent recognized that “Twombly involved an alleged conspiracy based on parallel conduct and this case is ostensibly not a conspiracy case.” Gilley, 561 F.3d at 1019 (Callahan, J., dissenting). But the dissent read the complaint as being ambiguous as to what the agreements actually were, contending that rather than relying on each defendant’s aggregated bilateral exchange agreements, the plaintiffs were in reality hoping to establish a conspiracy represented by a web of bilateral agreements among the defendants. Under that understanding, the plaintiffs allegations fell short of adequately identifying the agreements. Id. at 1021.} Given the low, and symmetrical, burden of discovery on the reasonableness element, the Gilley court correctly applied the pleading standard defined by Iqbal and Twombly.

B. Sherman Act Section Two

1. Predatory Pricing

The en banc Sixth Circuit’s decision in NicSand, Inc. v. 3M Company,\footnote{507 F.3d 442 (2007) (en banc).}
while decided on the basis of antitrust injury, can be instructively analyzed as a Section Two decision.\textsuperscript{236} The Sixth Circuit held that the plaintiff would lack standing if the conduct it complained of was not illegal under Section Two. It then proceeded to consider the plaintiff’s allegations in the light of the substantive standard for Section Two liability.\textsuperscript{237}

\textit{NicSand} shows the difficulties facing a Section Two plaintiff pleading a claim after \textit{Twombly}. The \textit{NicSand} plaintiffs alleged that 3M had made cash payments to retailers to earn their business, “nothing more than ‘price reductions offered to the buyers.”\textsuperscript{238} The majority held the plaintiffs had conceded in their briefing the prices charged were not predatory.\textsuperscript{239} The dissent disagreed such a concession had been made. It compared the size of the up-front payments by 3M with the profits plaintiffs had earned in the market in a recent year. That comparison indicated that plaintiff would suffer a loss in many transactions if it made such a large up-front payment.\textsuperscript{240} The dissent argued that analysis created a sufficient inference that 3M was earning a loss in those transactions – thus, pricing below cost, implicating Section Two\textsuperscript{241} – that plaintiff should be entitled to discovery.\textsuperscript{242} The burden of discovery on the below cost aspect of the predation claim makes it

\textsuperscript{236} \textit{Nicsand} applied the \textit{Twombly} standard to the antitrust injury element of antitrust standing, which requires that the plaintiff allege harm from the anticompetitive impacts of an antitrust violation. \textit{Id.} at 451 (quoting \textit{Twombly}, 127 S. Ct. at 1966); see also \textit{CBC Companies v. Equifax, Inc.}, 561 F.3d 569, 571-72 (6th Cir. 2009) (same). Other courts have also applied \textit{Twombly} to the antitrust standing requirement, the most prominent factor of which is the requirement of antitrust injury. The court in \textit{Hypodermic Products} held that an allegation that “by unlawfully excluding and impairing competition, [defendant]’s conduct has caused Plaintiffs and the other Class members to pay more . . . than they otherwise would have paid” sufficiently alleged antitrust injury. \textit{Hypodermic Prods.}, 2007 WL 1959224, at *10 (quoting Amend. Compl. ¶ 107), *15.

\textsuperscript{237} \textit{NicSand}, 507 F.3d at 451.

\textsuperscript{238} \textit{Id.} at 452.

\textsuperscript{239} \textit{Id. Contra NicSand}, 507 F.3d at 463 (the majority’s assertion that plaintiff conceded this point is “misleading”).

\textsuperscript{240} \textit{NicSand}, 507 F.3d at 462 (Martin, J., dissenting).

\textsuperscript{241} See infra nn. 149-160 and accompanying text (describing standards for predatory pricing).

\textsuperscript{242} \textit{NicSand}, 507 F.3d at 462-63 (Martin, J., dissenting). Another of plaintiff’s claims against 3M in \textit{NicSand} – that 3M engaged in exclusive dealing with retailers through multi-year agreements, foreclosing plaintiff from the market – does not present the same problem under \textit{Twombly}, because there is no inference necessary. The plaintiff was able to allege the existence of an agreement, permitting the court to evaluate the alleged agreements on the merits. The Sixth Circuit concluded the agreements were not anticompetitive. \textit{NicSand}, 507 F.3d at 453-54. The dissent did not argue, as it did with regard to predatory pricing, that the court was required to indulge an inference with regard to a fact that was unknowable without discovery. The allegations were direct, but the conduct alleged was held not to be a Section Two violation.
appropriate, under *Iqbal* and *Twombly*, to subject the complaint to searching inquiry, to avert the false positive concern that ranks so high on those claims. But it seems likely the dissent has the better of the argument in *NicSand*. It is not clear what better a predatory pricing plaintiff can do than posit its own costs as a plausible proxy for the defendant’s costs and compare that proxy to publicly available information about the defendant’s prices. The plaintiff did so, and the complaint should have survived the motion to dismiss.

2. Monopoly Leveraging

In one of the few applications of *Twombly* to a Section Two claim, the district court in *In re Hypodermic Products Antitrust Litigation,*243 applied the *Twombly* standard in denying a motion to dismiss a complaint alleging violations of both Section One and Section Two.244 The court required that the complaint allege the two elements of a Section Two violation, “that [defendant] possesses monopoly power” and “that [defendant] has maintained such a monopoly by unlawful means.”245

The court held the first element sufficiently alleged by the claim that “[d]efendant illegally acquired and maintained monopoly power over various hypodermic products and markets for those products,” together with allegations of what those markets were.246 Because the market power element of Section Two

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244 Hypodermic Products also applied the *Twombly* standard to the antecedent question whether the plaintiffs had antitrust standing. 2007-2 Trade Cas. ¶ 75,771, 2007 WL 1959224, at *6-7. The allegations of harm suffered from the antitrust violation, a requirement of standing under *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), was sufficiently pleaded when plaintiff alleged facts creating an inference of harm that was inextricably intertwined with harm in the relevant product markets. Hypodermic Products, 2007-2 Trade Cas. 75,771, 2007 WL 1959224, at *9.

245 *Id.*, 2007 WL 1959224, at *10. It applied the elements of a monopolization claim under Section Two from *United States v. Dentsply*, 399 F.3d 181, 186 (3d Cir. 2005) (“(1) possession of monopoly power in the relevant product market and (2) . . . maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”).

246 Hypodermic Prods., 2007 WL 1959224, at *10, *12 (quoting Amend. Compl. ¶ 3). “The Court . . . has been given no reason to believe that the relevant markets, as plead in the Complaint, are anything but plausible.” Hypodermic Prods., 2007 WL 1959224, at *12. By contrast with Hypodermic Products, the district court in *Little Rock Cardiology Clinic v. Baptist Health*, 573 F. Supp. 2d 1125, 1139-50 (E.D. Ark. 2008), also applied *Twombly* to allegations about the relevant market both for a Section Two and a Section One rule of reason claim. The court held the plaintiff had failed to plead the relevant market properly. The plaintiffs’ failings were not due to a lack of...
reflects relatively little danger of false positive error, and the allegations provide sufficient specificity to overcome what discovery burden concerns do exist, the conclusion that the Hypodermic Products complaint sufficiently alleged market power is correct.

The conduct element of monopolization was sufficiently pleaded in Hypodermic Products with allegations that (1) “Defendant . . . has used . . . various anticompetitive and illegal practices to achieve and maintain its dominant market position” even as against “superior products . . . or cheaper products”; and (2) defendant “impos[ed] market share purchase requirements,” “bundl[ed] its goods for exclusionary purposes,” “conspir[ed] with [Group Purchasing Organizations] for the purpose of imposing exclusionary contracts,” and “conspir[ed] with other manufacturers to ‘impose rebate penalties on purchasers relating to a bundle of products.’” In addition to the general allegations of anticompetitive conduct, the complaint included specific allegations of vertical agreements between the defendant and purchasers, which had the effect of preserving defendant’s high market share. Comparing those allegations to those the Supreme Court held insufficient in Twombly, the Hypodermic Products court noted that the conspiracy alleged in Twombly was based on inference from observed innocent conduct, while the conduct alleged in Hypodermic Products was “specific anti-competitive agreements.”

The Hypodermic Products plaintiffs were able to allege the conduct directly. The court noted “such allegations . . . [were] in sharp contrast with the allegations found to be insufficient in [Twombly].” The Twombly complaint

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247 See supra nn. 144-145 and accompanying text.
248 The Hypodermic Products court found no need to discuss other allegations related to the market definition element of the monopolization claim. The plaintiffs had also alleged, with regard to either three or four different product markets, that “there is no product that can reasonably be substituted for” the product and that “defendant has . . . a market share in excess of 70%.” Amend. Compl. ¶¶ 29, 31, 34, 36, 39, 41, 44 and 46.
249 Hypodermic Prods., 2007 WL 1959224, at *10 (quoting Amend. Compl. ¶¶ 6, 7).
250 Id. at *13.
251 Id. at *14.
252 Cf. William O. Gilley Enterprises v. Atlantic Richfield Co., 561 F.3d 1004 (9th Cir. 2009).
“sought to demonstrate anti-competitive agreements based on parallel conduct through inference. To the contrary, the instant Complaint sets forth allegations of specific anti-competitive agreements . . . .” The varieties of conduct meeting the second element of a monopolization claim makes it difficult to generalize about the application of the Twombly/Iqbal framework to monopolization cases. But as with antitrust claims generally, when a monopolization claim requires proof by reference to a defendants’ internal documents and information, the threatened discovery burden will counsel for jaundiced review of the complaint’s allegations. When proof may be made with public or semi-public information (such as market analysis or customer testimony) the reduced discovery burden counsels for permissive treatment of the complaint.

C. Summary

Germs of the framework we outline can be found in caselaw decided since Twombly and Iqbal. Section One cases turning on the agreement element are not surprisingly the best represented in the small sample of antitrust cases that analyze the Supreme Court’s recent pleading authorities in depth. Within that category, the divide between the Second Circuit’s opinion in Starr v. Sony BMG and the Sixth Circuit’s opinion in In re Travel Agent Commissions exemplifies the important dichotomy between proof by circumstantial evidence and proof by direct evidence. A sufficiently robust showing of circumstantial allegations should give a court reviewing the complaint confidence that the plaintiff is prepared to proceed without unduly burdening the defendant during discovery, mitigating the likelihood (and thus the expected cost) of false positive error. But a skeletal showing of observed conduct, or a showing of conduct that produces an inference of unilateral activity, shows that proof by direct evidence will be necessary. The consequent burden on the defendant during discovery counsels for dismissal. The third category of agreement cases, represented by Behrend v. Comcast Corp., are those in which plaintiffs are able to plead specific direct allegations of agreement. Such allegations demonstrate the likely merit of the plaintiffs’ claims and impact the expected cost analysis by reducing the likely cost, because discovery will not be a fishing expedition.

The relatively low discovery burden on the reasonableness element of a Section One claim suggests courts should rarely dismiss when proof will turn on that element. William O. Gilley Enterprises v. Atlantic Richfield Co., in holding

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254 Id. See also In re Hypodermic Products Antitrust Litig., 2007 WL 1959225, at *12 (D.N.J. June 29, 2007).
that discovery was necessary to determine the effects of agreements (the existence of which was not contested), is consistent with that approach.

We demonstrate in Part IV that monopolization claims under Section Two are proved with facts showing monopoly power and facts showing conduct. The former present little concern for false positive error due to burdensome discovery because they are proved circumstantially. In re Hypodermic Products had little trouble concluding that element was sufficiently alleged. The facts required to prove conduct are more varied (in part because of the variety of conduct meeting that element of the monopolization claim). Predatory pricing, for example, requires a burdensome inquiry into the defendant’s cost structure, and the Sixth Circuit in NicSand v. 3M concluded the allegations in the complaint were insufficient to allow discovery on that element. Monopoly leveraging presents a more context-specific problem. Proof of the “no business justification” showing from Aspen Highlands can be made directly or circumstantially. As with the agreement element of a Section One claim, direct proof raises concerns for burdensome discovery into the defendant’s business plans, while circumstantial proof involves a non-burdensome market analysis. In re Hypodermic Products allowed discovery to proceed on a theory that was to be proved directly because the complaint is sufficiently specific to mitigate the burden.

As we conclude below, that same analysis of the facts required to prove a claim may be developed for any antitrust claim or any claim that may be the subject of private federal litigation.

VI. CONCLUSION

In Twombly and Iqbal the Court was faced with the question of when a plaintiff should be allowed to proceed with discovery. Procedurally that question arises when a court is asked to dismiss a plaintiff’s complaint. Granting a motion to dismiss creates the risk of false negative error, because the complaint may assert a claim that discovery and trial would reveal to be meritorious. Denying a motion to dismiss creates the risk of false positive error since the prospect of burdensome discovery may cause a defendant to settle a case that discovery and trial would reveal to be non-meritorious. In Twombly and Iqbal the Court chose to focus on the risk of false positives and imposed a stringent pleading requirement on plaintiffs whose complaints raised the prospect of burdensome discovery.

Both Twombly and Iqbal involved areas of substantive law in which the cost of false positive errors is high if it occurs. And both involved situations in which the
The likelihood of false positive error was high. The likelihood of false positives was high because the cases focused on elements of claims that raise the prospect of disproportionately burdensome discovery on the defendant. This was so because the facts relevant to those elements were known directly principally to the defendants. Because the expected cost of false positive error was high, the Court imposed a stringent pleading standard on both sets of plaintiffs.

The rationale of Twombly and Iqbal thus applies where both the cost and likelihood of false positives are high. If the expected cost is not high, the stringent pleading standard applied in Twombly and Iqbal is not justified. Applying the Twombly/Iqbal reasoning therefore requires an assessment of the expected cost implicated by each element of each substantive claim in controversy. Part IV demonstrated the application of that reasoning in the context of various elements of claims under Sections One and Two of the Sherman Act and concluded that the expected cost of false positive error was high only with respect to some of those elements. Thus the stringent pleading standard applied in Twombly and Iqbal would be justified in application only to those elements of Sherman Act claims. Determining the correct approach to pleading in other substantive areas of law will require similar element-by-element analysis.