

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

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War’s over. Wormer dropped the big one.  
What? “Over”?  
Did you say “over”?  
Nothing’s over until we decide it is!  
Was it over when the Germans bombed Pearl Harbor?  
Hell, no!  
- Germans?  
- Forget it, he’s rolling.  
And it ain’t over now.  
‘Cause when the going gets tough . . .  
(Patriotic instrumental music)  
. . . the tough get going! Who’s with me?  
Let’s go! Come on!<sup>1</sup>

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1. ANIMAL HOUSE (Universal Pictures 1978).

## Introduction

FOLLOWING THE U.S. SUPREME COURT'S *Bell Atlantic Corp. v. Twombly*<sup>2</sup> decision, many commentators predicted a similar fate for antitrust and other civil complainants as suffered by Mr. Blutarisky's famed (or infamous) Delta House. Considerable commentary quickly sprang up regarding the Court's supposed new and restrictive pleading standard under Federal Rule of Civil Procedure 8. These commentators insisted the standard meant likely—if not certain—doom for countless antitrust and other lawsuits.<sup>3</sup>

But while *Twombly* seems to have shocked the legal profession, the case actually did nothing to eviscerate, much less affect, Rule 8's long-standing pleading pronouncement. To the contrary, it reaffirmed it. For this reason, *Twombly* is remarkable only for its *unremarkability*—an unremarkability that some seek to elevate to something it isn't. Despite these plentiful views, *Twombly*'s language—coupled with the Court's pre-existing pleading principles—simply does not support the restrictive interpretation that many insist.

Part I of this Article describes Rule 8's origin and explains its intended application. Part II chronicles Rule 8's history of restriction and misapplication, and the Supreme Court's contribution to ensuring Rule 8's treatment in a manner consistent with its drafters' intentions. Part III then examines *Twombly*, focusing on the Court's consideration, expression, and application of Rule 8's pleading standard in more modern circumstances. Finally, Part IV explains how the *Twombly* Court, in keeping with the Court's longstanding goal of preventing Rule 8's misapplication, reaffirmed the intentions of Rule 8's drafters and re-expressed Rule 8's liberal pleading requirements.

### I. Origins of Rule 8

Rule 8 requires merely a “short and plain statement of the claim showing that the pleader is entitled to relief . . . .”<sup>4</sup> Described as “a

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2. 550 U.S. 544 (2007).

3. See, e.g., Edward D. Cavanagh, *Twombly*, *The Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 879 (2008) (*Twombly* “put an end to notice pleading as it has been understood in the seventy years since the enactment of the Federal Rules of Civil Procedure.”); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 493–94 (2008) (“[R]ather than simply being required to state a claim, plaintiffs must now plead ‘enough facts to state a claim to relief that is plausible on its face.’” (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007))).

4. FED. R. CIV. P. 8(a)(2); see also Harry Emmanuel Scozzaro, Jr., *Notice Pleading Under the Federal Rules of Civil Procedure Following Swierkiewicz v. Sorema N. A.: Standing on the*

jewel in the crown of the Federal Rules,”<sup>5</sup> Rule 8’s drafters intended it to resolve past pleading abuses at common law and beyond.<sup>6</sup>

### A. Common-Law Pleading and Its Complexity

Common-law pleading was originally oral, but this standard has changed over the centuries towards a more detailed written requirement.<sup>7</sup> As forms of action were developing and becoming far more complex, the limitations of oral pleading presented considerable difficulties.<sup>8</sup> A plaintiff had first to choose the right form of action, then the plaintiff’s lawyer would exchange pleadings with the defense counsel to generate a single issue for resolution.<sup>9</sup> By proceeding through numerous pleading stages—denial, avoidance, or demurrer—the parties would reduce the pleadings to a solitary dispositive factual or legal issue.<sup>10</sup> In this manner, common-law pleadings were slow, expensive, and impractical.<sup>11</sup> As a result, trial largely became an afterthought to the pleading process.<sup>12</sup>

The gamesmanship that common-law pleading engendered required parties to employ highly stylized and technical pleading formu-

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*Shoulders of Conley and Leatherman*, 26 AM. J. TRIAL ADVOC. 385, 416–17 (2002) (“[A] pleading is to do little more than indicate the type of litigation that is involved.”).

5. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1917 (1998).

6. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 444 (1986) (“After extensive debate, the Rules were amended in 1980 and 1983 to promote active case management through pretrial conferences that could ‘formulate issues’ and eliminate ‘frivolous claims and defenses’ and control the conduct and content of discovery.”); see also Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 554 (2002) (Rule 8 was “designed to rectify the pleading abuses of the past.”).

7. See Marcus, *supra* note 6, at 437; see also Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458 (1943) (“It is well known that the development of the jury system in England led to a substitution of formal written demands and answers in place of the earlier simple oral statements of counsel in response to the questions of the court . . . .”); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1202 (3d ed. 2004) (describing common law belief in objectives and functions of pleadings).

8. See Marcus, *supra* note 6, at 437.

9. *Id.*; see also Ettie Ward, *The After-Shocks of Twombly: Will We “Notice” Pleading Changes?*, 82 ST. JOHN’S L. REV. 893, 896 (2008) (“Common law practice centered on successive rounds of pleadings in the expectation that eventually the dispute would be reduced to a single issue of law or fact that would dispose of the case.”).

10. See CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 467 (6th ed. 2002) (describing how common law placed great importance on the pleadings).

11. See Fairman, *supra* note 6, at 554–55; see also Dace A. Caldwell, Comment, *Civil Procedure: Medical Malpractice Gets Erie: The Erie Implications of a Heightened Pleading Burden in Oklahoma*, 57 OKLA. L. REV. 977, 998 (2004) (“Common law pleadings were notoriously ‘slow, expensive, and unworkable’ because litigants were forced through various stages of pleading that courts ultimately relied upon to determine the outcome of the suit.”).

12. See Marcus, *supra* note 6, at 437.

lations known as “color,” even for the simplest disputes.<sup>13</sup> Color had scant relation to the underlying facts and thus told a defendant little about the plaintiff’s claim.<sup>14</sup> But this was of no consequence, as defendants often prevailed after plaintiffs bungled the common law’s hyper-technical pleading requirements.<sup>15</sup>

As pleading practice prospered, decisions on the merits became more and more infrequent.<sup>16</sup> What had begun as a seemingly workable pleading construct turned into a “wonderfully slow, expensive, and unworkable” plan.<sup>17</sup> Common-law pleading caused protracted disputes “by lawyers anxious to get admissions without committing themselves”<sup>18</sup> and spawned wide-ranging dissatisfaction that ultimately led to pleading reform.<sup>19</sup>

### B. The Field Code—Not Such a Dream

In 1848, at the same time as similar reforms were occurring in England,<sup>20</sup> David Dudley Field began spearheading pleading reforms in New York. In drafting the New York Code (“Field Code”), Field endeavored to “eliminate decisions based on technicalities.”<sup>21</sup> Instead of stylized language, the Field Code required that complaints contain a “statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.”<sup>22</sup>

While reformers hailed Field’s efforts, the Code did not deliver as expected.<sup>23</sup> Instead, lawyers encountered a “quagmire of unresolvable disputes as to whether allegations were ultimate fact, evidence, or conclusions—a categorization critical to whether the allegation was proper under the [C]ode.”<sup>24</sup> According to the Code, “[o]nly ultimate

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13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Fairman, *supra* note 6, at 555 (quoting CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 467 (1994)).

18. *Id.*; *see also* Clark, *supra* note 7, at 458.

19. Fairman, *supra* note 6, at 555.

20. *See* Marcus, *supra* note 6, at 438.

21. *Id.*

22. *Id.* (quoting An Act to Simplify and Abridge the Practice, Pleadings, and Proceedings of the Courts of This State, ch. 379, § 120(2), 1848 N.Y. Laws 521).

23. *See* Fairman, *supra* note 6, at 555.

24. *Id.*; *see also* Marcus, *supra* note 6, at 438 (The Field Code’s new pleading rules “invited unresolvable disputes about whether certain assertions were allegations of ultimate fact (proper), mere evidence (improper), or conclusions (improper).”).

facts satisfied [its] pleading standard; evidentiary facts and conclusions within a pleading could not state a claim.”<sup>25</sup> It was often difficult for courts to distinguish between facts and conclusions because so “many [legal] concepts, like agreement, ownership, and execution, contain a mixture of historical fact and legal conclusion.”<sup>26</sup> As a result, an increasing number of disputes arose over “whether allegations were evidence, facts, or conclusions of law.”<sup>27</sup> The Field Code rapidly devolved into a pleading system “that rivaled the waste, inefficiency, and delay of the common-law practice it was designed to reform.”<sup>28</sup>

### C. Finally, the 1938 Federal Rules

The origin of the 1938 Federal Rules dates back to the American Bar Association’s twenty-ninth annual meeting in St. Paul, Minnesota on August 29, 1906.<sup>29</sup> Roscoe Pound, dean of the University of Nebraska College of Law, initiated matters with a blistering speech entitled *The Causes of Popular Dissatisfaction with the Administration of Justice*.<sup>30</sup> The purpose of Pound’s remarks was to recount the “real and serious dissatisfaction with courts and lack of respect for law which exist[ed] in the United States . . . .”<sup>31</sup> He noted multiple reasons for his dissatisfaction with the American legal system, but he emphasized his displeasure with “our American judicial organization and procedure.”<sup>32</sup>

Pound’s comments were the catalyst of the 1938 Rules, but his proffered changes were slow to be implemented.<sup>33</sup> Only after count-

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25. David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 395 (1980).

26. Marcus, *supra* note 6, at 438.

27. Caldwell, *supra* note 11, at 999.

28. Fairman, *supra* note 6, at 555–56; *see also* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 47, at 300–03 (2d ed. 1947) (observing the requirements for pleading negligence under the Field Code were more demanding than under common law); Marcus, *supra* note 6, at 438 (“Pleading decisions caused increasing difficulty for even the most common claims. For example, the detail needed to allege negligence was regularly recalibrated. Such fencing among lawyers led to stagnation that interfered with resolution of disputes on their merits.”) (citation omitted).

29. Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 93 (2006); *see* AMERICAN BAR ASSOCIATION, REPORT OF THE TWENTY-NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 12–13, 55–65 (1906) (noting ABA concern over the federal judiciary’s organization and procedural rules).

30. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in REPORT OF THE TWENTY-NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 395–417 (1906).

31. *Id.* at 396.

32. *Id.* at 397.

33. Walker, *supra* note 29, at 93, 94–95.

less committees, protracted debates, and largely ineffective administrative efforts<sup>34</sup> did Congress finally approve the 1934 Rules Enabling Act.<sup>35</sup> The Act, which was all but identical to an earlier ABA proposal,<sup>36</sup> provided Congress the authority necessary to pass the 1938 Rules.<sup>37</sup>

In 1935, after a year of accomplishing very little, the Supreme Court appointed an advisory committee to assist in developing a uniform federal procedure.<sup>38</sup> The Committee's reporter was Yale Law School dean, Charles Clark.<sup>39</sup> In addition to Clark and the Committee Chairman—former Hoover administration attorney general and Coolidge administration solicitor general, William Mitchell—the Committee included eight practicing business attorneys and four senior academics from prominent law schools.<sup>40</sup>

Following two years of meetings, “[the Committee] submitted its final report to the Supreme Court on April 30, 1937.”<sup>41</sup> The Court adopted the final report and forwarded it to the Attorney General.<sup>42</sup> Attorney General Homer Cummings then sent it to Congress,<sup>43</sup> and Congress approved the report by inaction,<sup>44</sup> thus creating the Federal Rules of Civil Procedure. Clark described the Rules as “a significant reform, involving the due subordination of civil procedure to the ends of substantive justice . . . .”<sup>45</sup>

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34. *Id.*

35. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. §§ 723b, 723c (1934)); *see also* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1096-97 (1982) (chronicling origin and enactment of the Rules Enabling Act).

36. Burbank, *supra* note 35, at 1099.

37. *See* James S. Cochran, Note, *Personal Jurisdiction and the Joinder of Claims in the Federal Courts*, 64 TEX. L. REV. 1463, 1489 n.146 (1986) (“[T]he Federal Rules of Civil Procedure were created under the authority of [the Rules Enabling] Act . . . .”).

38. Walker, *supra* note 29, at 96; *see also* Order Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 971-73 (1987) (“The composition of the Advisory Committee, appointed by the Supreme Court, reflected both the conservatives, and the professional, professorial liberals who had joined in supporting uniform federal rules.”).

39. Walker, *supra* note 29, at 96.

40. *Id.* at 97.

41. *Id.*

42. *Orders Re Rules of Procedure*, 302 U.S. 783, 783 (1937).

43. *Rules of Civil Procedure for the District Courts of the United States*, 308 U.S. 645, 647 (1939).

44. Walker, *supra* note 29, at 98.

45. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938).

Clark intended the Rules to serve four key functions: “(1) giving notice of the nature of a claim or defense; (2) stating the facts each party believes to exist; (3) narrowing the issues that must be litigated; and (4) providing a means for speedy disposition of sham claims and insubstantial defenses.”<sup>46</sup> Rather than eliminate pleadings as initially advocated by Clark,<sup>47</sup> the Committee drafted Rule 8 such that it did not incorporate such highly charged words as such “fact,” “conclusion,” and “cause of action.”<sup>48</sup> The Committee settled on requiring a party only to plead a “short and plain statement of a claim” entitling the pleader to relief.<sup>49</sup>

To emphasize Rule 8’s simplicity, the Committee included a series of form complaints that satisfied the Rule’s standards.<sup>50</sup> For example, Form 9 reversed decades of pleading-related litigation by finding appropriate the allegation that “defendant negligently drove a motor vehicle against the plaintiff.”<sup>51</sup> Underlying this simplicity was Clark’s aversion to the use of a “mere formal motion”<sup>52</sup> to challenge the sufficiency of a plaintiff’s pleadings because it “really decides nothing of substance.”<sup>53</sup> Indeed, pleadings need “do little more than indicate generally the type of litigation that is involved.”<sup>54</sup>

Clark and his fellow drafters’ generous pleading standard stemmed from their belief that litigants should have their day in court.<sup>55</sup> This belief served as the basis for why they designed the Rules to encourage determination on the merits, not on the pleadings:<sup>56</sup>

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46. WRIGHT & MILLER, *supra* note 7, § 1202.

47. Fairman, *supra* note 6, at 556; Marcus, *supra* note 6, at 439.

48. Fairman, *supra* note 6, at 556; Marcus, *supra* note 6, at 439.

49. Fed. R. Civ. P. 8(a)(2).

50. Fed. R. Civ. P. 84 (“The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”).

51. Fed. R. Civ. P. app. of forms Form 9 (now Form 11); Marcus, *supra* note 6, at 439.

52. *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944) (Judge Clark issued the opinion, and indicated the plaintiff had “stated enough to withstand a mere formal motion, directed only to the face of the complaint, and that here is another instance of judicial haste which in the long run makes waste.”); Marcus, *supra* note 6, at 440.

53. AMERICAN BAR ASSOCIATION, PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 54 (Edward H. Hammond ed., 1938).

54. 2A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 8.03 (2d ed. 1996); *see also Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (“The new rules, however, restrict the pleadings to the task of general notice-giving . . .”).

55. Fairman, *supra* note 6, at 557.

56. *See* Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1127–28 (1994) (explaining that drafters sought to resolve disputes by elevating substance over form); Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil*

The notice in mind is rather that of the general nature of the case and the circumstances or events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or transaction to be litigated—but not of details which he should ascertain for himself in preparing his defense—and to tell the court of the broad outlines of the case.<sup>57</sup>

Since pleadings were intended primarily to provide notice to litigants, the drafters included additional methods for addressing such functions as fact-finding and issue narrowing.<sup>58</sup> The Rules' expanded discovery methods allowed litigants to get to the merits of a case in several ways, such as by developing facts through discovery,<sup>59</sup> narrowing issues through discovery or partial summary judgment,<sup>60</sup> and eliminating meritless claims through summary judgment.<sup>61</sup> When considered alongside the other Rules, it becomes evident that Rule 8's notice function "operates as a keystone to an entire procedural system . . . ."<sup>62</sup>

## II. Rule 8's Misapplication and the Return to Sensibility

### A. Reaffirming Rule 8's Liberal Application

Rule 8 was not universally accepted.<sup>63</sup> The question was whether the requirement that a pleader allege his or her entitlement to relief also meant he or she must allege a prima facie case.<sup>64</sup> Believing so, the Ninth Circuit Judicial Conference adopted a resolution supporting an amendment to Rule 8(a)(2) to require a pleader's short, plain statement also to "contain the facts constituting a cause of action."<sup>65</sup> The primary decision fueling this effort was now-Judge Clark's own opinion in *Dioguardi v. Durning*.<sup>66</sup>

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*Procedure and Erie*, 54 BROOK. L. REV. 1, 2-3 (1988) (noting that drafters intended Rules to allow litigants to resolve disputes based on facts not form).

57. Clark, *supra* note 7, at 460-61.

58. Fairman, *supra* note 6, at 557.

59. See Fed. R. Civ. P. 26-37.

60. See *id.*; Fed. R. Civ. P. 56.

61. See Fed. R. Civ. P. 56.

62. Fairman, *supra* note 6, at 556-57; see also WRIGHT & MILLER, *supra* note 7, § 1202 ("The only function left to be performed by the pleadings alone is that of notice.").

63. See WRIGHT, *supra* note 10, at 476 (positing that lawyers skilled in old pleading style may have fueled criticism of Rule 8); Fairman, *supra* note 6, at 558.

64. See WRIGHT & MILLER, *supra* note 7, § 1202 (discussing difficulty in establishing what constituted a claim showing an entitlement to relief).

65. Claim or Cause of Action—A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure, 13 F.R.D. 253, 253-54 (1953) (committee reports that there should "be a pleading requirement in civil actions in the Federal Courts that a complaint must allege facts sufficient to constitute a cause of action").

66. 139 F.2d 774 (2d Cir. 1944).

*Dioguardi* involved a payment dispute that resulted in the Collector of Customs' delay in releasing John Dioguardi's medicinal tonics.<sup>67</sup> After holding Dioguardi's tonics for a year, the Collector finally sold them at auction.<sup>68</sup> Dioguardi filed a *pro se* complaint alleging that the Collector had "sold [his] merchandise to another bidder with [Dioguardi's] price of \$110, and not of [the Collector's] price of \$120,"<sup>69</sup> and "that three weeks before the sale, two cases, of 19 bottles each case, disappeared."<sup>70</sup>

The United States moved to dismiss Dioguardi's complaint for failure to allege facts sufficient to state a cause of action.<sup>71</sup> Following the district court's order granting Dioguardi leave to amend, he filed a second complaint conveying "obviously heightened conviction that he was being unjustly treated[,]"<sup>72</sup> but the district court again dismissed it.<sup>73</sup> On appeal, Judge Clark, writing for the Second Circuit, reversed: "[H]owever inartistically they may be stated, the plaintiff has disclosed his claims that the collector has converted or otherwise done away with two of his cases of medicinal tonics and has sold the rest in a manner incompatible with the public auction . . . ."<sup>74</sup> Judge Clark added that "[u]nder the new rules of civil procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief . . . .'"<sup>75</sup>

Given Rule 8's purpose, the Second Circuit's decision stood to reason. Had the court affirmed the district court's dismissal, Dioguardi never would have had the chance to demonstrate his claim's merits, which may well have proven true. Because the United States moved to dismiss rather than for summary judgment, the district court's decision short-circuited any possibility of honest factual resolution. But the Second Circuit's reversal eventually generated tremendous controversy because on remand Dioguardi failed to prove his claim, and the district court entered judgment for the United States.<sup>76</sup> Given the Second Circuit's affirmance, *Dioguardi* became a flashpoint

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67. *Id.* at 774–75.

68. *Id.* at 774.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 775.

73. *Id.*

74. *Id.*

75. *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

76. *Dioguardi v. Durning*, 151 F.2d 501, 501–02 (2d Cir. 1945).

for critics who supported strict pleading rules as a way to conserve judicial resources.<sup>77</sup>

Nevertheless, after *Dioguardi* the Federal Rules Advisory Committee rejected the Ninth Circuit's proposed amendment and instead drafted an extensive note rebuffing Rule 8's criticism.<sup>78</sup> The Committee's note explained that, contrary to any criticism, "Rule 8 envisages a statement of circumstances, occurrences, and events in support of the claim . . . ."<sup>79</sup> The Committee further rejected the idea that *Dioguardi* had approved filing a complaint alleging insufficient information to disclose a basis for relief.<sup>80</sup> Instead, the Committee indicated that Dioguardi's amended complaint stated sufficient facts, which the court properly construed as sufficient, as pleaded, to sustain his cause of action.<sup>81</sup> As a result—and contrary to critics' insistence—the Committee declared that Rule 8 required no amendment:

[T]he rule adequately sets forth the characteristics of good pleading; does away with the confusion resulting from the use of "facts" and "causes of action"; and requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.<sup>82</sup>

In this manner, the Committee reaffirmed its goal of Rule 8's liberal application and articulated the level of detail (or not) necessary for pleading a sustainable complaint.

## B. Reaffirmation at the Highest Level

Although the Supreme Court never adopted the Committee's proposed final report,<sup>83</sup> in 1957 the Court quelled any uncertainty regarding Rule 8's liberal application when it decided *Conley v. Gibson*.<sup>84</sup>

*Conley* involved a class-action lawsuit brought by African-American railway workers against their union because their union had allegedly breached its duty to represent them and other members fairly.<sup>85</sup> According to the plaintiffs' complaint, the railroad claimed to abolish

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77. Fairman, *supra* note 6, at 559.

78. *Id.* at 560.

79. 12A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: APPENDICES, app. F (2009).

80. Fairman, *supra* note 6, at 560 (citing WRIGHT ET AL., *supra* note 79, at app. F).

81. *Id.*

82. *Id.* (citing WRIGHT ET AL., *supra* note 79, at app. F).

83. *Id.*

84. 355 U.S. 41 (1957).

85. *Id.* at 42.

forty-five African-American union members' jobs, only to refill them with white workers.<sup>86</sup> Despite the plaintiffs' insistence, the union had failed to protect them against the railroad's discrimination or to provide them protection comparable to the union's white members.<sup>87</sup> Among other responses to the plaintiffs' complaint, the union moved to dismiss for failure to state a claim upon which relief could be granted because it did not describe specific facts of the union's alleged discrimination.<sup>88</sup> The district court granted the union's motion, and the Fifth Circuit affirmed.<sup>89</sup>

The Supreme Court unanimously reversed, explaining that the plaintiffs' complaint complied with Rule 8's liberal pleading standard.<sup>90</sup> The Court first declared that a court cannot dismiss a complaint "for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>91</sup> And because the allegations in the plaintiffs' complaint, if true, would have constituted a breach of the union's duty of fair representation owed to its members, the Court ruled that the district court should not have dismissed the complaint.<sup>92</sup>

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

The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.<sup>93</sup>

The Court noted that the Rules' illustrative forms easily demonstrate this liberal standard and that "simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules . . . ."<sup>94</sup> The Court rejected the notion that the Rules considered pleading as a skillful game where the slightest mistake could doom a plaintiff's complaint and instead embraced Rule 8's approach to facilitate decisions on the mer-

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86. *Id.* at 43.

87. *Id.*

88. *Id.* at 47.

89. *Id.* at 44.

90. *Id.* at 48.

91. *Id.* at 45–46.

92. *Id.* at 46.

93. *Id.* at 47.

94. *Id.* at 47–48.

its.<sup>95</sup> With the Court's holding, the common law and Field Code's rigorous symmetry and fact-intensive requirements became a thing of the past—or so it seemed.

### C. The Expansion of Rule 9's Particularity Requirement and the Reaffirmation of Rule 8's Forgiving Standard

Rule 8 does not contemplate situations requiring enhanced pleading particularity because that is addressed by Rule 9, which states, "a party must state with particularity the circumstances constituting fraud or mistake."<sup>96</sup> This heightened pleading requirement is based on the belief that allegations of fraud and moral turpitude can cause inordinate damage to a defendant's reputation, so plaintiffs should not be permitted to plead such allegations generally. Rather, plaintiffs must describe specific facts constituting a defendant's alleged fraud.<sup>97</sup>

Despite *Conley's* apparent clarity, lower courts began raising the pleadings bar by imposing Rule 9's heightened standard on cases involving securities fraud, conspiracy, and civil rights violations.<sup>98</sup> For instance, in *Elliot v. Perez*,<sup>99</sup> the Fifth Circuit adopted a heightened pleading standard for cases involving government actors serving in their individual capacity, reasoning that immunity from liability also provided protection against burdensome discovery and litigation.<sup>100</sup> To ensure this protection, the Fifth Circuit required a plaintiff's complaint to "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity."<sup>101</sup> The Fifth Circuit extended this holding in *Palmer v. City of San Antonio*<sup>102</sup> where it explained that its heightened pleading standard applied not only to

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95. *Id.* at 48.

96. Fed. R. Civ. P. 9(b). Despite Rule 9's application to situations involving "mistake," scant cases exist invoking this basis.

97. *See Segal v. Gordon*, 467 F.2d 602, 607 (2d Cir. 1972) (noting Rule 9(b) evolves from interest in protecting defendants from harm to reputation or goodwill when charged with serious misconduct); *see also* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE, at 288 (3d ed. 1999) (explaining common law disfavored fraud claims because they involved allegations of immorality).

98. Marcus, *supra* note 6, at 447.

99. *Elliot v. Perez*, 751 F.2d 1472 (5th Cir. 1985).

100. *See id.* at 1479.

101. *Id.* at 1473.

102. *Palmer v. City of San Antonio*, 810 F.2d 514 (5th Cir. 1987).

cases involving immunity to public officials but to all civil rights cases filed under 28 U.S.C. § 1983.<sup>103</sup>

The Supreme Court seemed to have the Fifth Circuit's retrenchment in mind when it accepted *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*.<sup>104</sup> *Leatherman* involved two episodes of police misconduct in executing search warrants.<sup>105</sup> In the first case, Charlene Leatherman and her son Travis were driving in Fort Worth, Texas when they were stopped by police.<sup>106</sup> Officers surrounded Leatherman's vehicle and informed her that her residence was being searched.<sup>107</sup> Leatherman and Travis returned home to find that officers had ruthlessly shot and killed their two dogs, Shakespeare and Ninja.<sup>108</sup> Although the search of the home yielded absolutely nothing inculpatory, officers stood on the Leatherman's front lawn "for over an hour, drinking, smoking, talking, and laughing, apparently celebrating their seemingly unbridled power."<sup>109</sup>

In the second incident, police obtained a warrant to search Gerald Andert's home after detecting odors associated with the manufacture of amphetamines.<sup>110</sup> At the time of the search, Andert was a sixty-four-year-old grandfather mourning his wife's death from cancer.<sup>111</sup> Officers burst into his home without knocking or otherwise announcing themselves.<sup>112</sup> And although Andert did nothing to provoke the officers, they pushed him backwards and issued two blows to his head with a club.<sup>113</sup> The officers also forced Andert's family, who remained unaware of the officers' identity, to lie face down on the floor and subjected them to a torrent of threats and obscenities.<sup>114</sup> After an extensive yet completely fruitless hour-and-a-half search, officers left the residence.<sup>115</sup>

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103. *Id.* at 516–17.

104. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

105. *Id.* at 164–65.

106. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054, 1055 (5th Cir. 1992).

107. *Id.*

108. *Id.* at 1055–56.

109. *Id.* at 1056.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

The Leatherman and Andert plaintiffs sued several municipalities, alleging failure to train officers properly in executing search warrants and confronting dogs.<sup>116</sup> Three defendants argued the plaintiffs' complaint failed to plead facts adequately under the Fifth Circuit's heightened pleading standard as expressed in *Elliot* and *Palmer*, and the district court dismissed the plaintiffs' claims against all defendants.<sup>117</sup>

On appeal to the Fifth Circuit, the plaintiffs did not argue that their complaints met the circuit's heightened standard; rather, they encouraged the court to abolish it.<sup>118</sup> Constrained by *Elliot* and *Palmer*, and considering that even the plaintiffs admitted that their complaint fell short of this standard, the Fifth Circuit declined:

[W]e, as a panel of this court, must politely decline [plaintiffs'] invitation to reexamine the wisdom of this circuit's heightened pleading requirement. Until such a time as the en banc court sees fit to reconsider *Elliot* or, more specifically, *Palmer*, and in the absence of an intervening Supreme Court decision undermining our settled precedent, I find myself constrained to obey the command of the heightened pleading requirement.<sup>119</sup>

The Supreme Court accepted the Fifth Circuit's invitation to consider its heightened pleading standard. In a five-page opinion, the Court unanimously struck down the Fifth Circuit's restrictive interpretation, explaining that "it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules."<sup>120</sup> The Court added that the Rules required more particularized pleading in two discrete instances—fraud and mistake—and that Rule 8(a)(2) required merely that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>121</sup> Accordingly, the Court reversed the order dismissing plaintiffs' complaint, with Chief Justice Rehnquist adding this final admonition:

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

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116. *Id.*

117. *Id.* at 1058.

118. *Id.*

119. *Id.* at 1061 (Goldberg, J., concurring).

120. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

121. *Id.*

discovery to weed out unmeritorious claims sooner rather than later.<sup>122</sup>

The Court's unequivocal reaffirmation seemed to suggest an end to lower courts' heightened-pleading efforts, but more challenges lay ahead.

#### D. Déjà Vu All Over Again

Since history tends to repeat itself, perhaps it is not surprising that lower courts continued applying heightened pleading standards even after *Leatherman*.<sup>123</sup> This intransigence caused the Supreme Court—again—to reaffirm Rule 8's liberal application unanimously in *Swierkiewicz v. Sorema N.A.*<sup>124</sup>

*Swierkiewicz* was an employment case involving Akos Swierkiewicz, a fifty-three-year-old Hungarian native.<sup>125</sup> Swierkiewicz was a senior vice president and chief underwriting officer for Sorema N.A., a reinsurance company.<sup>126</sup> After the company demoted and eventually fired him, Swierkiewicz sued, alleging national origin and age discrimination.<sup>127</sup>

The district court dismissed Swierkiewicz's complaint, believing he "ha[d] not adequately alleged a prima facie case, in that he ha[d] not adequately alleged circumstances that support[ed] an inference of discrimination."<sup>128</sup> In a four-page, unpublished opinion, the Second Circuit affirmed the dismissal, insisting, "[i]t is well settled in this Circuit that a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule

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122. *Id.* at 168–69.

123. *See, e.g.*, *Rippy v. Hattaway*, 270 F.3d 416, 424–25 (6th Cir. 2001) (heightened pleading standard applied in qualified immunity case); *Dill v. City of Edmond*, 155 F.3d 1193, 1204 (10th Cir. 1998) (heightened pleading standard applied in immunity case); *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995) (en banc) ("When a public official pleads the affirmative defense of qualified immunity in his answer, the district court may, on the official's motion or on its own, require the plaintiff to reply to that defense in detail."); *Edgington v. Mo. Dep't of Corr.*, 52 F.3d 777, 779 n.3 (8th Cir. 1995) (heightened pleading standard applied in case against government officials for money damages); *Dunbar Corp. v. Lindsey*, 905 F.3d 754, 764 (4th Cir. 1990) (same).

124. 534 U.S. 506 (2002).

125. *Id.* at 508.

126. *Id.*

127. *Id.* at 509.

128. *Id.*

12(b)(6).<sup>129</sup> The Supreme Court accepted Swierkiewicz's request to elucidate Rule 8's requirements.<sup>130</sup>

Consistent with *Conley* and *Leatherman*, the Court reversed the Circuit Court's dismissal,<sup>131</sup> holding that employment discrimination complaints need not contain specific facts establishing a prima facie claim; rather, these complaints must merely allege a "short and plain statement of the claim . . ."<sup>132</sup> The Court added that while its holding in *McDonnell Douglas Corp. v. Green*<sup>133</sup> required a private, non-class plaintiff to prove his or her discrimination case by a preponderance of the evidence,<sup>134</sup> this evidentiary burden did *not* create a pleading standard.<sup>135</sup> Having already "rejected the argument that a Title VII complaint requires greater 'particularity,' because greater particularity would 'too narrowly constrict the role of the pleadings,'"<sup>136</sup> the Court reiterated that "the ordinary rules for assessing the sufficiency of a complaint apply."<sup>137</sup>

The Court went further to add that "under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case."<sup>138</sup> For example, "if a plaintiff is able to produce direct evidence of discrimination, he [or she] may prevail without proving all the elements of a prima facie case."<sup>139</sup> But under the Second Circuit's heightened pleading standard, a plaintiff lacking direct evidence of discrimination when filing his or her complaint would nevertheless have to plead a prima facie case of discrimination, even though discovery might uncover direct

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129. *Swierkiewicz v. Sorema, N.A.*, 5 Fed. App'x 63, 64 (2d Cir. 2001) (quoting *Martin v. N.Y. State Dep't of Mental Hygiene*, 588 F.2d 371, 372 (2d Cir. 1978)).

130. *Swierkiewicz*, 534 U.S. at 509–10.

131. *Id.* at 515.

132. *Id.* at 508 (quoting Fed. R. Civ. P. 8(a)(2)).

133. 411 U.S. 792 (1973). *McDonnell Douglas* involved a plaintiff's civil-rights claim against his employer, alleging his employer's refusal to rehire him as an aircraft mechanic because of his race and involvement in the civil rights movement. The Court sustained plaintiff's complaint, explaining that an EEOC finding of reasonable cause was not a jurisdictional prerequisite to plaintiff's civil-rights claim.

134. *Id.* at 802.

135. *Swierkiewicz*, 534 U.S. at 511.

136. *Id.* (quoting *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976)).

137. *Id.*

138. *Id.*

139. *Id.* (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)) ("The *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination.").

evidence.<sup>140</sup> “It thus seem[ed] incongruous,” the Court believed, “to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he [or she] may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.”<sup>141</sup>

But the Court’s ruling was not grounded so much in substantive employment-law doctrine as it was in the Federal Rules. Revisiting *Leatherman*, the Court re-emphasized that Rule 8’s exceptions appear in Rule 9(b): “The Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983.”<sup>142</sup>

Just as Rule 9(b) makes no mention of municipal liability, neither does it refer to employment discrimination. As such, employment complaints, like most others, “must satisfy only the simple requirements of Rule 8(a).”<sup>143</sup> If a defendant believes a complaint fails to provide sufficient notice, then the defendant can move for a more definite statement under Rule 12(e),<sup>144</sup> while the court can deal with meritless claims through Rule 56’s summary-judgment mechanism.<sup>145</sup> And continually mindful that greater specificity for pleading particular claims must come through amending the Federal Rules—not by judicial intervention—the Court stated, “[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.”<sup>146</sup>

Considering *Conley*, *Leatherman*, and *Swierkiewicz* together, then, adduces the following observations.<sup>147</sup> First, a plaintiff’s complaint serves a notice function and informs the defendant of the claim and its basis.<sup>148</sup> Factual detail is not necessary at the pleading stage<sup>149</sup> be-

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140. *Id.*

141. *Id.* at 511–12.

142. *Id.* at 513 (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)).

143. *Id.*

144. *Id.* at 514.

145. *Id.*

146. *Id.*

147. Spencer, *supra* note 3, at 438–39.

148. *Id.*; see also *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (“Under Rule 8(a), applicable to ordinary civil proceedings, a complaint need only provide ‘fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’” (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957))).

149. Spencer, *supra* note 3, at 439; see also *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 568 n.15 (1987) (“Under the Federal Rules of Civil Procedure, respondent had no duty to set out all of the relevant facts in his complaint.”); *Conley*, 355 U.S. at 47 (“[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the

cause the Rules provide later opportunities to develop these facts.<sup>150</sup> Next, dismissal is inappropriate when it remains possible for a plaintiff to adduce facts supporting his or her claim.<sup>151</sup> Finally, the pretrial process, which includes broad discovery,<sup>152</sup> is the appropriate mechanism for weeding out improper or unmeritorious claims.<sup>153</sup>

Then, along came *Twombly*.

### III. Understanding *Twombly*

As of March 2008, lower courts had cited *Twombly* more than 9400 times,<sup>154</sup> many concluding that *Twombly* had established a new pleading standard under Rule 8.<sup>155</sup> But examining *Twombly* actually indicates nothing of the sort.

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facts upon which he bases his claim.”); *see also* Spencer, *supra* note 3, at 438 (“[F]actual detail was unnecessary at the pleading stage . . .”).

150. Spencer, *supra* note 3, at 439; *see also* Conley, 355 U.S. at 47–48 (“[S]implified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”); Spencer, *supra* note 3, at 438 (“[S]ubsequent phases of the litigation would elicit such details and frame the issues in the case.”).

151. Spencer, *supra* note 3, at 439; *see also* Conley, 355 U.S. at 45–46 (“[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (“A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”) (citing Conley, 355 U.S. at 45–46); Spencer, *supra* note 3, at 438–39 (“[O]nly certainty of the absence of a claim warranted dismissal; when one could say that it remained possible for the plaintiff to adduce facts that could prove liability, dismissal was inappropriate.”) (citing Conley, 355 U.S. at 45–46).

152. Spencer, *supra* note 3, at 439; *see also* *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) *superseded in part by statute*, Fed. R. Civ. P. 26(b)(3) (“We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.”) (citation omitted); Spencer, *supra* note 3, at 439 (“[T]he pleadings were not the proper vehicle for screening out unmeritorious claims. Rather, other pretrial procedures—namely broad discovery and summary judgment—were the proper vehicles for ferreting out claims lacking merit.”) (citations omitted).

153. Spencer, *supra* note 3, at 439; *see also* *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2001) (“[C]laims lacking merit may be dealt with through summary judgment under Rule 56.”); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993). (“[F]ederal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.”).

154. Ward, *supra* note 9, at 893.

155. *See, e.g.,* *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (“The Court replaced the *Conley* standard with a new standard in *Twombly*, which prescribed a new inquiry for [courts] to use in reviewing a dismissal: whether the complaint contains enough facts to state a claim to relief that is plausible on its face.”) (quoting *The Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)) (internal quotation

The Telecommunications Act of 1996 was designed to open up competition in the local telephone markets by requiring local-exchange carriers (“ILECs”), like the *Twombly* defendants, to facilitate the entry of new competitors.<sup>156</sup> The Act requires ILECs to sell access to parts of their networks at wholesale rates, thereby allowing competing-local-exchange carriers (“CLECs”) to circumvent the high cost of building their own infrastructure.<sup>157</sup>

*Twombly* involved a group of purchasers of local telephone or high-speed internet services who filed a class-action antitrust lawsuit against four ILECs who “together controlled over ninety percent of the market for local telephone and high-speed internet services in the continental United States.”<sup>158</sup> Plaintiffs alleged that the ILECs had thwarted the CLECs’ efforts to enter the ILECs’ local-service markets by conspiring “(1) to collectively keep CLECs from successfully entering [the ILECs’] markets, and (2) to refrain from attempting to enter each other’s markets as CLECs.”<sup>159</sup> Plaintiffs added that defendants’

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marks omitted); *VanZandt v. Okla. Dep’t of Hum. Servs.*, 276 Fed. App’x 843, 846 (10th Cir. 2008) (“In order for a complaint to satisfy this new standard, a plaintiff must do more than generally allege a wide swath of conduct.”); *Boykin v. KeyCorp*, 521 F.3d 202, 213 (2d Cir. 2008) (“We need not locate the outer bounds of *Twombly*’s new standard for assessing pleadings under Rule 8(a) here, because no amplification was necessary in this case.”); *McKinley v. Omaha Police Dep’t*, No. 8:09CV222, 2009 U.S. Dist. LEXIS 71993, at \*2 (D. Neb. Aug. 14, 2009) (describing *Twombly* as “setting [a] new standard for failure to state a claim upon which relief may be granted”); *Smith v. McNeil*, No. 4:08-CV-321, 2009 U.S. Dist. LEXIS 69802, at \*1 (N.D. Fla. Aug. 10, 2009) (“The Supreme Court recently expressed a new standard in [*Twombly*].”); *Covert v. Stryker Corp.*, No. 1:08CV447, 2009 U.S. Dist. LEXIS 68962, at \*39 (M.D.N.C. Aug. 5, 2009) (“*Twombly* abrogated the no set of facts standard set forth in *Conley* for construing Rule 8, and heralded a new standard for resolving motions to dismiss, which was based on the plausibility of a plaintiff’s claims.”) (internal quotation marks omitted); *Mills v. Williams*, No. 2:09CV00045, 2009 U.S. Dist. LEXIS 68823, at \*3 (E.D. Ark. July 15, 2009) (“*Twombly* . . . heralded a new standard for resolving motions to dismiss, which was based on the ‘plausibility’ of a plaintiff’s claims.”); *United States v. Goertz*, No. A-09-CV-179, 2009 U.S. Dist. LEXIS 49213, at \*4 (W.D. Tex. June 11, 2009) (“[T]he Supreme Court made it plain that this new standard applies to all cases.”); *Tustin v. Jayaraj*, No. 3:08-cv-01034, 2009 U.S. Dist. LEXIS 46451, at \*11 (D. Conn. June 2, 2009) (“[T]he Supreme Court announced the new standard in . . . *Twombly*.”); *Evans v. Maui Cup-Letica Corp.*, No. 3:CV-07-01446, 2009 U.S. Dist. LEXIS 32435, at \*8 (M.D. Pa. Apr. 16, 2009) (“The Court retired this ‘no set of facts’ language in favor of a new standard . . . .”); *Rivera v. Hosp. Episcopal Cristo Redentor*, 613 F. Supp. 2d 192, 196 (D.P.R. 2009) (“[T]he new standard under *Twombly* is that a claim for relief must contain allegations that are plausible on its face.”) (internal quotation marks omitted); *Yai v. Progressive Bayside Ins. Co.*, No. 1:08-CV-1369, 2009 U.S. Dist. LEXIS 10504, at \*20 (N.D. Ga. Feb. 12, 2009) (describing “the new standards set forth in *Twombly*”).

156. *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174, 177 (S.D.N.Y. 2003), *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev’d*, 550 U.S. 544 (2007).

157. *Id.*

158. *Id.* at 176.

159. *Id.* at 182.

refusal to compete as CLECs in each others' territories constituted parallel conduct that plaintiffs' considered probative of a conspiracy, and that competition would have occurred had defendants not conspired to avoid it.<sup>160</sup>

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

[W]hile plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement, courts must be cognizant of the fact that, while "[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy[. . .] 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." . . . [P]arallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions.<sup>161</sup>

Based on the plaintiffs' allegations of conscious parallelism, the district court dismissed their complaint for failure to state a claim under Section 1 of the Sherman Act.<sup>162</sup> The court explained that "Plaintiffs ha[d] . . . not alleged facts that suggest[ed] that refraining from competing in other territories as CLECs was contrary to defendants' apparent economic interests, and consequently ha[d] not raised an inference that their actions were the result of a conspiracy."<sup>163</sup>

But the Second Circuit Court of Appeals reversed, concluding that the district court had applied an unfairly restrictive pleading standard.<sup>164</sup> Rightly observing that no heightened pleading standard applies in antitrust cases,<sup>165</sup> the Second Circuit believed that plaintiffs'

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160. *Id.* at 178.

161. *Id.* at 179.

162. *Id.* at 188.

163. *Id.*

164. *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 119 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007).

165. *Id.* at 108; *see also* *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553-54 (2d Cir. 1977) (rejecting argument that "antitrust claims, because of their complexity, must be pleaded with greater specificity than other claims"); *Nagler v. Admiral Corp.*, 248 F.2d 319, 322-23 (2d Cir. 1957) ("[M]any defense lawyers have strongly advocated more particularized pleading in this area of litigation. . . . But it is quite clear that the federal rules contain no special exceptions for antitrust cases."). Some courts have even explained that antitrust cases are *less* suitable candidates for dismissal at the pleading stage than other kinds of litigation because evidence of the claimed illegality frequently rests in defendants' exclusive control. *See Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976) ("[I]n antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.") (quoting *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)).

allegations of solely conscious parallelism provided more than “a bare bones statement of conspiracy or of injury under the antitrust laws.”<sup>166</sup>

The court expressed that to survive a motion to dismiss an anti-trust case, the claimant “must allege only the existence of a conspiracy and a sufficient supporting factual predicate on which that allegation is based,”<sup>167</sup> adding that “pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy.”<sup>168</sup> Believing it reasonable to infer collusion from the plaintiffs’ conscious parallelism allegations, the court invoked *Conley* as its basis for concluding that plaintiffs’ “allegations [were] sufficient ‘to give the defendant fair notice of what the . . . claim [was] and the grounds upon which it rest[ed] . . . .’”<sup>169</sup>

Not dissimilar from its motivation for considering the lower courts’ rulings in *Conley*, *Leatherman*, and *Swierkiewicz*, the Supreme Court granted certiorari in *Twombly* “to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct . . . .”<sup>170</sup> The Court first explained that conscious parallelism without more “falls short of ‘conclusively establish[ing] an agreement or . . . itself constitut[ing] a Sherman Act offense,’”<sup>171</sup> because such conduct is no less consistent “with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”<sup>172</sup> Justice Souter, writing for the Court, then dove directly into considering plaintiffs’ complaint against *Conley*’s pleading standard.

The Court began its analysis by repeating *Conley*’s instruction that not only does Rule 8(a)(2) require a “short and plain statement of the claim showing that the pleader is entitled to relief,” but this statement must also “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”<sup>173</sup> These “grounds,” explained the Court, require more than “mere labels and conclusions”;<sup>174</sup> they “must be enough to raise a right to relief above the speculative level.”<sup>175</sup>

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166. *Twombly*, 425 F.3d at 109 (quoting *Heart Disease Research Found. v. Gen. Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972)).

167. *Id.* at 114.

168. *Id.* (citing *Nagler v. Admiral Corp.*, 248 F.2d 319, 325 (2d Cir. 1957)).

169. *Id.* at 118–19 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

170. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007).

171. *Id.*

172. *Id.* at 554.

173. *Id.* at 555 (quoting *Conley*, 355 U.S. at 47).

174. *Id.*

175. *Id.*

Applying these standards to the plaintiffs' antitrust complaint, the Court held that properly pleading such a complaint requires including enough factual allegations to suggest the defendants made an illegal agreement.<sup>176</sup> The Court added that this plausibility (or believability) at the pleadings "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement . . . even if it strikes a savvy judge that actual proof of the facts is improbable . . ." <sup>177</sup> Accordingly, the Court directed that the plaintiffs' allegations of conscious parallelism and conspiracy as the grounds upon which the plaintiffs' antitrust complaint rested were insufficient to suggest conspiracy with any believability,<sup>178</sup> and instead the plaintiffs' complaint needed facts raising at least "a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."<sup>179</sup>

After so ruling, the Court went to great lengths to explain that it did not intend to upset its historical interpretation and application of Rule 8. "The need at the pleading stage," the Court instructed, "for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"<sup>180</sup> Plaintiffs' allegations of conscious parallelism without "further circumstances pointing toward a meeting of the minds"<sup>181</sup> (i.e., the grounds upon which such an allegation rested<sup>182</sup>) failed to comply with Rule 8's standard.

Turning next to *Conley's* "no set of facts" language, the Court noted a literal reading of this language would allow a court to sustain a complaint based on "wholly conclusory statement . . ." <sup>183</sup> Believing this literal reading and extension was inconsistent with Rule 8's historical application, the Court—while not upending Rule 8's fact-pleading requirement—retired *Conley's* "no set of facts" phrase, describing it as an "incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by show-

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176. *Id.* at 556.

177. *Id.*

178. *Id.* at 556–57.

179. *Id.* at 557.

180. *Id.*

181. *Id.*

182. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957).

183. *Twombly*, 550 U.S. at 561.

ing any set of facts consistent with the allegations in the complaint.”<sup>184</sup> The Court explained that its adoption of this phrase in *Conley* was intended to “describe[ ] the breadth of opportunity to prove what an adequate complaint claims, not [to establish] the minimum standard of adequate pleading to govern a complaint’s survival.”<sup>185</sup>

The Court believed nothing contained in the plaintiffs’ complaint plausibly, realistically, or believably suggested a conspiracy.<sup>186</sup> Therefore, it reversed the Second Circuit’s order sustaining plaintiffs’ complaint.<sup>187</sup> Immediately before so ruling, the Court *again* emphasized that it did not intend to raise Rule 8’s historical notice-pleading standard: “[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”<sup>188</sup>

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

In reaching this conclusion, we do not apply any “heightened” pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished “by the process of amending the Federal Rules, and not by judicial interpretation.” On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. Here, our concern is not that the allegations in the complaint were insufficiently “particular[ized]”; rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs’ entitlement to relief plausible.<sup>189</sup>

The reason for the Court’s extensive pacifying language was its critical evaluation of *Conley*’s interpretation and application of Rule 8. On this basis, some judges and commentators have concluded that because the Court used the adjective “plausible,” which simply meaning “having an appearance of truth or reason,”<sup>190</sup> when describing the grounds upon which a complaint’s factual allegations must rest, *Twombly* spawned a new and more restrictive pleading standard. But

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184. *Id.* at 563.

185. *Id.*

186. *Id.* 566.

187. *Id.* at 570.

188. *Id.*

189. *Id.* at 569 n.14 (citations omitted).

190. THE RANDOM HOUSE COLLEGE DICTIONARY 1018 (1982).

the rumors of the death of Rule 8's age-old pleading standard have been greatly exaggerated.<sup>191</sup>

#### IV. *Twombly* Did Not Change Rule 8's Historical Pleading Standard

The *Twombly* Court's instruction that "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face,"<sup>192</sup> should have surprised no one, as it mirrored the Court's longstanding precedent refusing to impose heightened pleading requirements extending beyond simple notice pleading. This directive makes perfect sense because insisting on anything more at the pleading stage requires a plaintiff to prove his or her case to a summary-judgment standard absent discovery—nearly always an impossible task—which of course is why such allegations are not required.

The Court instructed that a complaint's factual allegations must make some practical sense. But this believability requirement has *always* been implicit in and an integral part of Rule 8, and the *Twombly* Court merely expressed what has *always* been the case. Indeed, even the Second Circuit, when sustaining the plaintiffs' complaint, instructed that the complaint must "include conspiracy among the realm of plausible possibilities,"<sup>193</sup> believing like the Court that this plausibility consideration did not raise plaintiffs' pleading requirement. That the Court's ultimate opinion differed from the Second Circuit's as to whether plaintiffs' parallel-conduct allegations actually *constituted* the requisite short-and-plain statement can hardly be taken as suggesting that the Court invoked some sort of elevated pleading standard, especially when the Court insisted that it had not.

Indeed, to suppress any confusion, less than two weeks after *Twombly*, the Court repeated that Rule 8(a)(2)'s simple short-and-plain-statement requirement provides central guidance for federal courts. In *Erickson v. Pardus*,<sup>194</sup> a prisoner filed a *pro se* Section 1983

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191. See MARK TWAIN, THE WIT AND WISDOM OF MARK TWAIN: A BOOK OF QUOTATIONS 46 (Paul Negri ed., 1999) ("The reports of my death are greatly exaggerated.")

192. *Twombly*, 550 U.S. at 570.

193. *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 111 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007).

194. 551 U.S. 89 (2007). After *Erickson*, the Court decided *Ashcroft v. Iqbal*, No. 07-1015 U.S. 1 (May 18, 2009), where the Court dismissed a complaint alleging high-level government officials had "adopted an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin." *Id.* at 1. But while the *Iqbal* Court drew heavily on *Twombly* as its basis for dismissal, *Iqbal* is meaningful

action alleging that prison medical officials had diagnosed him as requiring treatment for hepatitis C but had discontinued his treatment because they suspected he had taken illicit drugs.<sup>195</sup> The prisoner claimed he was suffering liver damage due to his untreated disease, and that its progression could cause irreversible liver damage and possibly death.<sup>196</sup> The prisoner's complaint added that he was in imminent danger as hepatitis C had already killed other inmates.<sup>197</sup> Although the prisoner's complaint alleged the defendants' conduct had violated his Eighth Amendment rights, the Tenth Circuit affirmed the district court's order dismissing his complaint, explaining he had made "only conclusory allegations to the effect that he ha[d] suffered a cognizable independent harm . . . ."<sup>198</sup>

This dismissal visibly troubled the Court. "The holding," the Court explained, "departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure that we grant review."<sup>199</sup> The Court ruled that the lower courts had erred by concluding the prisoner's allegations of a cognizable independent harm were "too conclusory,"<sup>200</sup> and in doing so invoked *Twombly* and its reiteration of Rule 8(a)(2)'s core pleading requirement:

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.<sup>201</sup>

The Court even highlighted Rule 8(f)'s mandate that "[a]ll pleadings shall be construed as to do substantial justice" and concluded that "[t]he case cannot . . . be dismissed on the ground that petitioner's allegations of harm were too conclusory to put these matters in issue."<sup>202</sup>

Thus, within two weeks after *Twombly*, the Court reaffirmed *Twombly*'s simple message and again validated what federal courts

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insofar as it confirms, like *Erickson*, that *Twombly*'s Rule 8 affirmation concerns all types of litigation not just antitrust claims. Restriction would have made little sense as the Federal Rules (including Rule 8) necessarily apply to all civil litigation.

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

196. *Id.* at 92.

197. *Id.*

198. *Id.* at 93 (internal quotation marks omitted).

199. *Id.* at 90.

200. *Id.* at 93.

201. *Id.* at 93–94 (citations omitted).

202. *Id.* at 94 (citation omitted).

have held for decades: Our civil pleading system, as encompassed in Rule 8(a)(2), has always required and still requires a short-and-plain statement of the claim showing the pleader is entitled to relief.<sup>203</sup> To this end, multiple lower courts have cited *Twombly* as a basis for sustaining complaints pleaded consistent with this venerable standard.<sup>204</sup> And concomitantly, where complaints *lack* minimal facts, courts have continued granting motions to dismiss after invoking *Twombly*.<sup>205</sup> For as Justice Souter even more recently explained in *Ashcroft v. Iqbal*,<sup>206</sup> where the very believability of a complaint's allegations are suspect, such as where plaintiff alleges "claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel,"<sup>207</sup> the complaint continues—as always—to fall short of satisfying Rule 8's liberal standard.

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203. *Id.* at 93.

204. *See, e.g.*, Phillips v. County of Allegheny, 515 F.3d 224, 231 (3rd Cir. 2008) (*Twombly* does not require "detailed factual allegations" or "pleading with particularity"; rather, it "requires only a short and plain statement that the pleader is entitled to relief in order to give the defendant fair notice of what the . . . claim is the grounds upon which it rests."); Airborne Beepers & Video, Inc. v. AT&T Mobility, LLC, 499 F.3d 663, 667 (7th Cir. 2007) ("[T]aking *Erickson* and *Twombly* together, we understand the Court to be saying only at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim that the defendant is entitled to under Rule 8."); *In re* Pressure Sensitive Labelstock Antitrust Litig., 566 F. Supp. 2d 363, 370 (M.D. Pa. 2008) ("[T]he claims presented need not be alleged with particularity, but there must be sufficient factual averments that place the defendants on notice of the bases for the claims; and plaintiff's entitlement to relief on the bases for the claim presented against a particular defendant must be plausible."); Hiltabidel v. Herald Standard Newspaper, No. 2:08-cv-409, 2008 U.S. Dist. LEXIS 49668, at \*4 (W.D. Pa. June 26, 2008) (denying defendant's motion to dismiss because complaint's allegations rendered plaintiff's claims plausible); Behrend v. Comcast Corp., 532 F. Supp. 2d 735, 741 (E.D. Pa. 2007) (citing *Twombly* as basis for denying defendants' motion to dismiss because federal courts should evaluate such motions based on reasonable, pre-discovery inferences drawn from the facts alleged and in the proper context, such as where antitrust plaintiffs can only necessarily know so much before committing to take full discovery, including depositions); Walker v. S.W.I.F.T. SCRL, 491 F. Supp. 2d 781, 788 (N.D. Ill. 2007) (noting *Twombly*'s confirmation that a complaint "does not need detailed factual allegations" and finding the complaint sufficient under Rule 8(a)(2) to put defendant on notice and establish plaintiff's standing); Castaneda v. City of Williams, No. CV07-00129, 2007 U.S. Dist. LEXIS 42980, at \*5 (D. Ariz. June 12, 2007) (applying *Twombly* and refusing to dismiss plaintiffs' Section 1983 claim since plaintiffs "satisfied these minimum pleading requirements").

205. *See, e.g.*, Goldstein v. Pataki, 488 F. Supp. 2d 254, 288 (E.D.N.Y. 2007) (invoking *Twombly* to dismiss complaint in eminent domain case, explaining that "Plaintiffs have not set forth facts supporting a plausible claim of an unconstitutional taking"); Aktieselskabet AF 21 v. Fame Jeans, Inc., 511 F. Supp. 2d 1, 17 (D.D.C. June 7, 2007) (referencing *Twombly* to dismiss patent litigation complaint "support[ed] . . . only with conclusory assertions," which the court considered analogous to *Twombly*'s mere parallel-conduct allegations).

206. No. 07-1015 U.S. 1 (May 18, 2009).

207. *Id.* at 10 (Souter, J., dissenting).

But if *Twombly* did not affect Rule 8's pleading standard, why did the Court see fit to accept review, this time *dismissing* plaintiffs' complaint rather than sustaining it as had occurred in *Conley*, *Leatherman*, and *Swierkiewicz*? Was it merely "to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct . . . ."?<sup>208</sup> Or might a more looming issue have also affected the Court, one that dovetailed conveniently into its articulated issue?

Recall the atmosphere that preceded *Conley*, *Leatherman*, and *Swierkiewicz*. Despite contrary congressional and Supreme Court mandates, lower courts had continued to elevate Rule 8's pleading standard. Each time these unauthorized efforts reached a critical point and the Court was presented with an opportunity to correct things, the Court did so by entering the fray and sounding a seemingly enduring call to lower courts to refrain from improperly changing the law.

Not unlike the atmosphere that preceded *Conley*, *Leatherman*, and *Swierkiewicz* (and in keeping with the reality that history has a way of re-repeating itself), the *Twombly* Court seemed mindful that "federal courts [were] continu[ing] to require heightened pleading in a variety of contexts,"<sup>209</sup> despite the Court's constant and contrary admonitions:

Despite strong words from the Supreme Court expressing its continued commitment to this rubric, heightened pleading thrives post-*Leatherman*. Courts cling to it in civil rights cases. Congress imposes it with the PSLRA<sup>210</sup> and the Y2K Act.<sup>211</sup> Both ignore the

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208. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553 (2007).

209. Elizabeth Roseman, Comment, *A Phoenix from the Ashes? Heightened Pleading Requirements in Disparate Impact Cases*, 36 SETON HALL L. REV. 1043, 1043 (2006); see also Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1064 (2003) ("A uniform pleading standard with notice as the touchstone remains illusory. Yet the intentions of the drafters are clear. . . . [T]he Supreme Court reinforces notice pleading as the only choice.").

210. Private Securities Litigation Reform Act of 1995, 109 Stat. 37 (codified at 15 U.S.C. §§ 77z-1 and § 78u-4 (2006)). The PSLRA imposes heightened pleading requirements in actions brought pursuant to Section 10(b) and Rule 10b-5 of the securities laws and "insists that securities fraud complaints 'specify' each misleading statement; that they set forth the facts 'on which [a] belief' that a statement is misleading was 'formed'; and that they 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" *Merrill Lynch v. Dabit*, 547 U.S. 71, 81-82 (2006) (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005)).

211. Pub. L. No. 106-37, 113 Stat. 185 (1999) (codified at 15 U.S.C. §§ 6601-6617 (2006)).

The Y2K Act requires that the complaint contain "specific information as to the nature and amount of each element of damages and the factual basis for the damages calculation." The purpose of this and other related provisions is to provide for an early detailed disclosure of the plaintiffs' claims to allow quick informal resolution by the parties, thereby avoiding costly litigation.

drafters' vision, with predictable consequences. The simple notice pleading standard is replaced with an uncertain one. Uniform application of pleading practice is eroded by splits in the courts of appeals applying heightened pleading. Transsubstantivity gives way to different pleading standards for different substantive claims. In essence, the result is common-law pleading revisited. The consequences are not surprising. Whole categories of cases are deemed frivolous. Plaintiffs suffer pre-discovery dismissal, often for failure to plead facts relating to the defendant's state of mind. The Court has not once, but twice, tried to establish limits to heightened pleading in civil rights cases. In this context, two rights don't make a wrong. However, given the post-*Leatherman* experience, it is unlikely that those courts that embrace heightened pleading will abandon it on the strength of *Swierkiewicz*.<sup>212</sup>

Given this defiant environment, it is not surprising that the Court reinvolved itself in the pleading-standard discussion. But this time the Court saw fit to dismiss rather than sustain the plaintiffs' complaint based on the complaint's *allegations*, not on Rule 8 and its accompanying standard. After reaffirming Rule 8's pleading standard, the Court described its belief that the *Twombly* plaintiffs had failed to plead facts sufficient to *satisfy* this enduring standard. As the Court expressed repeatedly (and reiterated in *Erickson*), it never intended to raise Rule 8's longstanding requirements. The Court's similar reaffirmations in *Conley*, *Leatherman*, and *Swierkiewicz* resulted—on the facts of *those*

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Medimatch, Inc. v. Lucent Techs. Inc., 120 F. Supp. 2d 842, 849 (N.D. Cal. 2000) (quoting 15 U.S.C. § 6607(b) (2006)).

212. Fairman, *supra* note 6, at 625. The retention of heightened pleading post-*Swierkiewicz* was most prevalent in the context of claims involving qualified immunity defenses. See, e.g., Passmore Swann v. S. Health Partners, Inc., 388 F.3d 834, 838 (11th Cir. 2004) (explaining that the heightened pleading standard in civil rights cases applies to defendants who claim qualified immunity); Gonzalez v. Reno, 325 F.3d 1228, 1235 (11th Cir. 2003) ("In examining the factual allegations in the complaint, we must keep in mind the heightened pleading requirements for civil rights cases, especially those involving the defense of qualified immunity."); Gorski v. N.H. Dep't of Corr., 290 F.3d 466, 473 (1st Cir. 2002) (despite *Swierkiewicz*, First Circuit cases suggest heightened pleading in certain civil rights cases); Baxter v. Rose, 305 F.3d 486, 489–90 (6th Cir. 2002) (targeted heightened pleading in Section 1983 prisoner litigation requiring the complaint to specifically allege exhaustion of administrative remedies not affected by *Swierkiewicz* because standard derives from the Prison Litigation Reform Act not the Federal Rules); Strobe v. Pettis, No. 03-3383, 2004 U.S. Dist. LEXIS 24332, at \*17 (D. Kan. Nov. 23, 2004) ("Where a qualified immunity defense is asserted in a Rule 12(b)(6) motion, the court must apply a heightened pleading standard . . ."); see also Hamrick v. Farmers Alliance Mut. Ins. Co., No. 03-4202, 2004 U.S. Dist. LEXIS 7767, at \*32 (D. Kan. 2004); Safford v. St. Tammany Parish Fire Protection Dist. No. 1, No. 02-0055, 2004 U.S. Dist. LEXIS 5111, at \*5 (E.D. La. Mar. 26, 2004); J.V. v. Seminole County Sch. Bd., No. 6:04-CV-1889, 2005 U.S. Dist. LEXIS 46474, at \*9–10 (M.D. Fla. Dec. 2, 2005) ("Eleventh Circuit precedent makes clear that heightened pleading requirements apply in civil rights cases asserted against defendants who may avail themselves of the defense of qualified immunity.").

cases—in orders sustaining the plaintiffs’ complaints because those complaints were *properly* pleaded according to the prevailing and still-current standard. Yet, the complaint in *Twombly*, when considered according to this same standard—a standard that was at all times available to plaintiffs—simply did not.

Considering the *Twombly* complaint against the example described in Form 9 only amplifies the Court’s declaration that it did not adjust Rule 8’s pleading standard. Form 9 has always provided plaintiffs guidance because it considers a controversy that can just as easily be attributed to negligence as not. As such, based on Form 9’s facts the discovery process may properly commence, so the parties can reach a just resolution on the merits. But the *Twombly* complaint struck the Court as entirely conjectural (if not fabricated) in that no *facts* demonstrating an illegal agreement appeared to exist. The plaintiffs had *alleged* an illegal agreement that caused them damage, but they pleaded no *facts* (i.e., who, what, where, when, why) to support this conclusion as demonstrated in Form 9 (i.e., who—defendant; what—drove into plaintiff; where—Boylston Street; when—June 1, 1936; why—because defendant was negligent). Contrasting the *Twombly* plaintiffs’ “factual” allegations with Form 9’s factual allegations further confirms the Court’s objective to remain true to Rule 8’s longstanding ideals.

So the Court got it right when it said, “the complaint warranted dismissal because it failed *in toto* to render plaintiffs’ entitlement to relief plausible.”<sup>213</sup> The majority believed, based on the notice the plaintiffs provided, that proceeding to discovery or beyond would have been both futile and unfair—circumstances that even Justice Stevens’ dissent admitted justify dismissal.<sup>214</sup> In this manner, and on account of the Court’s reasoned interpretation of the complaint’s factual allegations, *Twombly* did not change the pleading standard on account of merely invoking the adjective “plausible” when describing plaintiff’s entitlement to relief. Rather, it reaffirmed this standard in the face of lower courts’ continued and unjustified restriction of it and did so while explaining this time that the complaint’s factual allegations failed to comply with the Court’s long-embraced standard.

As demonstrated then, *Twombly* marks no departure from Rule 8’s pleading standard. Rather, *Twombly* affirms it, simply re-expressing

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213. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 569 n.14 (2007).

214. See *id.* at 577 (“Consistent with the design of the Federal Rules, *Conley*’s ‘no set of facts’ formulation permits outright dismissal only when proceeding to discovery or beyond would be futile.”) (Stevens, J., dissenting).

that a complaint containing *implausible* (if not far-fetched or even fabricated) allegations supported by *no* facts—such as solely parallel conduct to plead antitrust-conspiracy allegations as opposed to conspiratorial facts subject to naturally differing inferences—requires dismissal. When considered this way, *Twombly*'s holding was not that significant, after all.

### Conclusion

Things are no different today than they were before *Twombly*, as *Twombly* merely reaffirmed Rule 8's liberal pleading standard. Because the Court acted consistently with its multiple earlier efforts to educate the bench and bar on proper pleading practice, *Twombly* cannot fairly be understood to have enhanced Rule 8's pleading standard. An honest reading of *Twombly* commands otherwise.

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

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