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Bell Atlantic Corp. v. Twombly: Mere Adjustment or Stringent New Requirement in Pleading?

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Bell Atlantic Corp. v. Twombly: Mere Adjustment or Stringent New Requirement in Pleading?

I. INTRODUCTION

In *Bell Atlantic Corp. v. Twombly*,[1] the United States Supreme Court seemingly tightened general federal pleading requirements, expressly abrogating a much-cited linguistic formula from *Conley v. Gibson*[2] and making the avoidance of early dismissals more difficult for plaintiffs. To avoid dismissal for failure to state a claim, plaintiffs filing antitrust suits alleging conspiracy must set forth enough facts in the pleadings to suggest a preceding agreement, as distinct from parallel, independent action—at least where the parallel conduct is readily explained by lawful business motivations.[3] The Court further declared that to withstand a motion to dismiss for legal insufficiency, a complaint must contain enough allegations of fact to make it "plausible," rather than merely conceivable, that discovery will disclose grounds for each required

1. 127 S. Ct. 1955 (2007).

2. 355 U.S. 41 (1957), *superseded by rule as stated in* Berry v. Budget Rent A Car Sys., Inc., 497 F. Supp. 2d 1361 (S.D. Fla. 2007).

3. *Bell Atl. Corp.*, 127 S. Ct. at 1961.

element of a plaintiff's particular claim.[4] Applied generally, this test will make the lenient "notice pleading" regime exemplified by *Conley* significantly more stringent.[5]

II. FACTUAL BACKGROUND

William Twombly and Lawrence Marcus filed a putative class action suit on behalf of local telephone and Internet service subscribers.[6] The complaint claimed that major telecommunications providers created from the divestiture of AT&T (called Incumbent Local Exchange Carriers ("ILECs")) had violated § 1 of the Sherman Act,[7] "which prohibits '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.'"[8]

Twombly and Marcus's complaint alleged that the ILECs conspired to restrain trade in two ways, each of which they claimed inflated charges for local telephone and high-speed Internet services. First, the complaint alleged that the ILECs conspired to prevent competitive entry into their respective markets by engaging in parallel conduct aimed at inhibiting the growth of potential upstart carriers so that such carriers would be discouraged from breaking into the business. Twombly and Marcus claimed that to prevent competitive entry, the ILECs made unfair agreements with the upstart carriers by providing them with inferior connections, overcharging them, and using billing methods designed to sabotage the relationship between the upstart carriers and their customers. Second, the complaint alleged that the ILECs made agreements to refrain from competing against one another by allocating customers and markets to one another and that such agreements should be inferred from the ILECs' common failures to pursue advantageous business opportunities in competitive markets. Twombly and Marcus claimed that the agreements were also evidenced by the statement of ILEC's chief executive officer that it was not "right" to compete in the territory of another ILEC.[9]

The United States District Court for the Southern District of New York dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)").[10] The district court held that the plaintiffs

4. *Id.* at 1965.
5. *Id.* at 1959-60.
6. *Id.* at 1962.
7. 15 U.S.C. § 1 (2000).
8. *Bell Atl. Corp.*, 127 S. Ct. at 1961-62 (brackets in original) (quoting 15 U.S.C. § 1).
9. *Id.* at 1962.
10. *Id.* at 1963; FED. R. CIV. P. 12(b)(6).

must allege additional facts that exclude independent, self-interested conduct as an explanation for the parallel actions. The district court further found that the allegations of parallel conduct were inadequate because the ILECs had possible business justifications for defending their individual territories.[11]

The United States Court of Appeals for the Second Circuit reversed, holding that under Federal Rule of Civil Procedure 8(a)(2) ("Rule 8(a)(2)"),[12] the district court used the wrong standard to test the complaint for factual sufficiency.[13] The court of appeals ruled that "'plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal.'"[14] Further, the court of appeals held the plaintiffs' parallel conduct allegations to be sufficient because the ILECs failed to show, under the much-cited linguistic formula from *Conley v. Gibson*,[15] that "no set of facts" existed that would permit the plaintiffs to demonstrate collusion.[16]

Because the district court and the court of appeals disputed the proper standard for pleading antitrust conspiracy through allegations of parallel conduct, the United States Supreme Court granted certiorari and reversed the Second Circuit's holding in a 7-2 decision.[17] The Court held that stating a conspiracy claim under § 1 of the Sherman Act requires allegations of enough factual matter to suggest that a preceding agreement was made; allegations of parallel conduct coupled with "bare" assertions of conspiracy will not suffice.[18]

III. LEGAL BACKGROUND

David Dudley Field developed the influential New York Code of Procedure,[19] deemed the "Field Code," which was adopted in 1848.[20] This code "required '[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

11. *Bell Atl. Corp.*, 127 S. Ct. at 1963.
12. FED. R. CIV. P. 8(a)(2).
13. *Bell Atl. Corp.*, 127 S. Ct. at 1963.
14. *Id.* (quoting Twombly v. Bell Atl. Corp., 425 F.3d 99, 114 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007)).
15. 355 U.S. 41 (1957).
16. *Bell Atl. Corp.*, 127 S. Ct. at 1963.
17. *Id.*
18. *Id.* at 1966.
19. 1848 N.Y. LAWS 497.
20. *Id.*; *Bell Atl. Corp.*, 127 S. Ct. at 1976 (Stevens, J., dissenting).

is intended.'"[21] However, the Field Code did not specify whether evidentiary facts or legal facts were required to be pleaded or whether "ultimate facts" could satisfy its test.[22] Similar language also appeared in the Federal Equity Rules,[23] adopted in 1912, as well as in English practices.[24] The Field Code, Federal Equity Rules, and English practices all required plaintiffs to plead "facts" rather than "conclusions," but the distinction between these requirements was unclear.[25] Field Code pleadings were required to fulfill four functions: (1) to put the opposing party on notice of the pleadings; (2) to state relevant facts; (3) to narrow the issues to be litigated; and (4) to provide a means for quick disposition of frivolous claims and insufficient defenses.[26] Accordingly, courts dismissed many claims for deficient pleadings without reaching the merits of their respective controversies.[27] Thus, before the era of modern pleading began with the adoption of the Federal Rules of Civil Procedure ("Federal Rules") in 1938, a plaintiff could only survive a motion to dismiss if pleaded facts that, if true, showed the plaintiff's legal rights had been violated.[28] However, without pretrial discovery, ordinarily conducted only after the filing of initial pleadings,[29] the plaintiff lacked the ability to plead sufficient facts.[30]

In response to the confusion regarding which pleaded facts or conclusions were sufficient and to enable courts to reach the merits of controversies more frequently, Federal Rule of Civil Procedure 8 ("Rule 8")[31] substituted "notice" pleading for fact pleading.[32] Rule 8 replaced the dominant pleading standard that existed before the adoption of the Federal Rules—the formula requiring "'facts' constituting a 'cause of action,'"—with the requirement of a "'claim showing that the pleader is entitled to relief.'"[33] Rule 8(a)(2) requires the complaint to indicate "the nature of the plaintiff's claim with only enough specificity to enable

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21. *Bell Atl. Corp.*, 127 S. Ct. at 1976 (brackets in original) (quoting 1848 N.Y. LAWS at 521).

22. *Id.*

23. FED. EQUITY R. 25 (1912) (repealed 1938).

24. *Bell Atlantic Corp.*, 127 S. Ct. at 1975-76 (Stevens, J., dissenting) (citing 9 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 324-27 (3d ed. 1926)).

25. *Id.* at 1976.

26. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004).

27. *Id.*

28. Am. Nurses' Ass'n v. Illinois, 783 F.2d 716, 723 (7th Cir. 1986).

29. *But see* FED. R. CIV. P. 27(a)(1).

30. WRIGHT & MILLER, *supra* note 26, at § 1202; *Am. Nurses' Ass'n*, 783 F.2d at 723.

31. FED. R. CIV. P. 8.

32. *Bell Atl. Corp.*, 127 S. Ct. at 1976 (Stevens, J., dissenting).

33. Id. (quoting WRIGHT & MILLER, *supra* note 25, at § 1216).

the parties to determine the preclusive effect of a judgment disposing of the claim."[34] In promulgating Rule 8, the drafters intentionally did not refer to "facts" or "conclusions," and thus the "'liberal notice pleading of Rule 8(a) [was] the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.'"[35]

Rule 8 provides the foundation of pleading requirements under the Federal Rules, particularly subsections (a)(2), (e), and (f), which indicate that pleadings are to be construed liberally as justice requires.[36] Further, the Federal Rules limit the purpose of pleadings to putting opposing parties on notice of the transaction giving rise to the claim and one or more recognized—or even emerging or imaginable—legal theories warranting relief.[37] Therefore, the Federal Rules leave factual elaboration of claims and defenses to the period of discovery and other pretrial processes.[38]

Rule 8 has been amended in minor ways twice. Despite these revisions, Rule 8 has been the subject of a fair amount of controversy since its promulgation regarding what must be included in pleadings.[39] Judge Charles E. Clark, the principal draftsman of the Federal Rules, proposed amendments to Rule 8 to make it clear that facts were not required in pleadings, but such proposals were never enacted.[40] Additionally, the 1955 Advisory Committee prepared a note to Rule 8(a)(2) that definitively rejected contentions that the rule required pleadings of facts and causes of action, yet the note was never officially approved.[41] However, all of these proposals evince the strong convictions of the Advisory Committee, Judge Clark, and others, which are that factual pleading should not be required under Rule 8.[42] Thus, the notice requirement of Rule 8 has not been applied to measure the legal sufficiency of complaints by the "evidentiary" or "conclusory" nature of their constituent allegations; instead, Rule 8 measures whether the totality of the allegations, if temporarily accepted as true, puts opposing parties on notice of the transaction and also contains one or more

34. *Am. Nurses' Ass'n*, 783 F.2d at 723.

35. *Bell Atl. Corp.*, 127 S. Ct. at 1976 (Stevens, J., dissenting) (quoting Swierkiewicz v. Sorema N. A., 534 U.S. 506, 514 (2002)).

36. FED. R. CIV. P. 8; WRIGHT & MILLER, *supra* note 25, at § 1201.

37. *See, e.g.*, Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).

38. WRIGHT & MILLER, *supra* note 26, at § 1202; *see, e.g.*, *Am. Nurses' Ass'n*, 783 F.2d at 723.

39. WRIGHT & MILLER, *supra* note 26, at § 1201.

40. *Id.*

41. *Id.*

42. *Id.*

arguable relief-worthy theories.[43] As a result, courts have upheld complaints that gave opposing parties such notice, regardless of whether that was accomplished by allegations of "fact" or conclusions of "law."[44]

Further, Judge Clark stated that pleadings do not require proof to be set forth; rather, all that can be expected from pleadings is "'a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result.'"[45] By drafting Rule 8 in a manner that eliminates the necessity of pleading facts, Judge Clark intended to relieve courts of the previous time-consuming role of analyzing which of the facts provided, if any, were sufficient.[46] Sometimes conclusory allegations were considered sufficient because the new system restricted "'the pleadings to the task of general notice-giving and invest[ed] the deposition-discovery process with a vital role in the preparation for trial.'"[47] A striking example of a sufficient "bare" allegation is illustrated by Form 9[48] in the appendix of the Federal Rules, which was considered adequate, despite its brevity.[49] This example provides the defendant with no notice of what acts or omissions a plaintiff using Form 9 contends constitute negligence, but it permits a plaintiff using the form to proceed merely by alleging that the defendant "'negligently drove.'"[50]

In addition, Rule 12(b)(6)[51] tests the sufficiency of a claim.[52] Under Rule 12(b)(6), a party may move to dismiss a case for "failure to state a claim upon which relief can be granted."[53] The objective of Rule 12 is generally to "expedite and simplify the pretrial procedures of federal litigation."[54] Additionally, Rule 12(b)(6) serves as a procedural vehicle by which a defendant can test, throughout trial,[55] the complaint's

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43. WRIGHT & MILLER, *supra* note 26, at § 1202, at 87.

44. *Id.*

45. *Bell Atl. Corp.*, 127 S. Ct. at 1976 (Stevens, J., dissenting) (quoting Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A.J. 976, 977 (1937)).

46. *Id.*

47. *Id.* at 1977 (quoting Hickman v. Taylor, 329 U.S. 495, 501 (1947)).

48. FED. R. CIV. P. Form 9.

49. *Id.*

50. *Id.* (quoting FED. R. CIV. P. Form 9).

51. FED. R. CIV. P. 12(b)(6).

52. Yoichiro Hamabe, *Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure: A Categorization Approach*, 15 CAMPBELL L. REV. 119, 121 (1993).

53. FED. R. CIV. P. 12(b)(6).

54. Hamabe, *supra* note 50, at 122.

55. FED. R. CIV. P. 12(h)(2).

compliance with Rule 8.[56] Rule 8 further allows a court to dismiss a complaint before a proceeding develops.[57]

In 1957, the same year Judge Clark asserted that factual pleadings were not required under Rule 8, the United States Supreme Court in *Conley v. Gibson*[58] clarified the pleading requirements as they relate to motions to dismiss.[59] A unanimous Supreme Court held that "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."[60] The Court's "no set of facts" language in *Conley* permitted dismissal only when proceeding to discovery would be futile.[61] Further, the language has been cited by federal courts over 10,000 times since the decision.[62]

In *Conley* the Supreme Court cited three court of appeals cases which explain the meaning and scope of the holding.[63] First, in *Leimer v. State Mutual Life Assurance Co. of Worcester, Massachusetts*,[64] the United States Court of Appeals for the Eighth Circuit noted that to warrant dismissal without granting leave to amend,[65] "'it should appear from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated.'"[66] Further, the court in *Leimer* held that there was no justification for dismissing a complaint because of the insufficiency of statements, unless it was clear that the plaintiff would not be entitled to relief.[67] Second, in *Continental Collieries, Inc. v. Shober*,[68] the United States Court of Appeals for the Third Circuit concluded that facts were in dispute so that "[n]o matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it."[69] Finally, in *Dioguardi v. Durning*,[70] Judge Clark,

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56. Hamabe, *supra* note 52, at 121.
57. *Id.*
58. 355 U.S. 41 (1957).
59. *See id.* at 44-48.
60. *Id.* at 45-46.
61. *Bell Atl. Corp.*, 127 S. Ct. at 1977 (Stevens, J., dissenting).
62. Iqbal v. Hasty, 490 F.3d 143, 157 n.7 (2d Cir. 2007).
63. *See Dioguardi*, 139 F.2d 774; Cont'l Collieries, Inc. v. Shober, 130 F.2d 631 (3d Cir. 1942); Leimer v. State Mut. Life Assurance Co. of Worcester, Mass., 108 F.2d 302 (8th Cir. 1940).
64. 108 F.2d 302 (8th Cir. 1940).
65. *See* FED. R. CIV. P. 15(a).
66. *Leimer*, 108 F.2d at 305 (quoting Winget v. Rockwood, 69 F.2d 326, 329 (8th Cir. 1934)).
67. *Id.* at 305-06.
68. 130 F.2d 631 (3d Cir. 1942).
69. *Id.* at 635.

writing for the United States Court of Appeals for the Second Circuit, emphasized the importance of giving each plaintiff "his day in court."[71]

Dismissal under the Federal Rules was further discussed in *American Nurses' Ass'n v. Illinois*,[72] in which Judge Posner, writing for the United States Court of Appeals for the Seventh Circuit summarized decades of pleading practice under *Conley*.[73] The court observed that the "no set of facts" language in *Conley* should not be interpreted literally because otherwise, dismissal would be permitted only in frivolous cases.[74] A complaint should only be dismissed when a plaintiff chooses to plead facts which counteract his or her entitlement to relief by negating an element of his or her claim.[75] In that rare situation, it would be illogical to permit further factual development of the claim because the allegations constitute binding admissions that make recovery legally impossible.[76] Judge Posner further stated that a complaint could not be dismissed merely because one of its central theories—and the facts alleged in support of that theory—does not make out a sufficient claim for relief.[77]

Moreover, in 1993 the Supreme Court held in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*[78] that motions to dismiss were not the proper mechanism for combating potential discovery abuse, stating, "In the absence of [an amendment to Federal Rule of Civil Procedure 9(b)[79]], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."[80] Additionally, in the recent unanimous opinion of *Swierkiewicz v. Sorema N.A.*,[81] the Court held that Rule 8(a)(2) does not allow courts to pass on the merits of claims at the pleading stage; instead, the Federal Rules encourage a relaxed pleading standard that "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."[82]

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70. 139 F.2d 774 (2d Cir. 1944).
71. *Id.* at 775.
72. 783 F.2d 716 (7th Cir. 1986).
73. *Id.* at 727.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. 507 U.S. 163 (1993).
79. FED. R. CIV. P. 9(b).
80. *Leatherman*, 507 U.S. at 168-69.
81. 534 U.S. 506 (2002).
82. *Id.* at 512.

The courts in *Leatherman* and *Swierkiewicz* promoted liberal interpretations of the pleading rules, but several cases have described the pleading standard set forth in *Conley* more restrictively.[83] For example, in *Car Carriers, Inc. v. Ford Motor Co.*,[84] the Supreme Court asserted that the holding in *Conley* had never been interpreted literally and that "[i]n practice, 'a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory.'"[85]

The Federal Rules *do* require "particularity" or "heightened"[86] pleading of facts when pleading specially delineated matters, such as averments of fraud or mistake, capacity, special damages, or admiralty and maritime claims, as set forth in Federal Rule of Civil Procedure 9 ("Rule 9").[87] These provisions demand that particular facts be pleaded in detail.[88] Further, although not associated with Rule 9, heightened pleading is also required in securities cases pursuant to the Private Securities Litigation Reform Act ("PSLRA"),[89] which requires plaintiffs to set forth "with particularity both the facts constituting the alleged violation, and the facts evidencing scienter," such as the defendant's intention "'to deceive, manipulate, or defraud.'"[90] However, with the exception of the heightened pleading requirements in Rule 9 or as required by the PSLRA of 1995, the Supreme Court has insisted,[91] and still maintains in *Bell Atlantic Corp.*, that the more forgiving standard of pleading Rule 8(a)(2) is to apply transsubstantively to all other types of claims.[92]

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83. *See, e.g.*, Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101 (7th Cir. 1984).

84. 745 F.2d 1101 (7th Cir. 1984).

85. *Id.* at 1106 (alteration in original) (quoting Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984)).

86. "Heightened" pleading refers to the detailed pleading of facts as compared to the minimal pleading of facts; the Court in *Bell Atlantic Corp.* did not require heightened pleading. 127 S. Ct. at 173 n.14.

87. FED. R. CIV. P. 9.

88. *Id.*

89. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.).

90. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2504 (2007) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 188 (1976)) (holding that plaintiffs in securities cases must "'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind'" (quoting 15 U.S.C. § 78u-4(b)(2) (2000))).

91. *Leatherman*, 507 U.S. at 168-69; *Swierkiewicz*, 534 U.S. at 511-12.

92. 127 S. Ct. at 1973-74. The United States Court of Appeals for the Second Circuit rejected special pleading requirements in *Nagler v. Admiral Corp.*, where it noted that courts "naturally shrink from the injustice of denying legal rights to a litigant for the mistakes in technical form of his attorney." 248 F.2d 319, 322 (2d Cir. 1957). The court also stated that although antitrust litigation is commonly wide in scope and costly, the law

Finally, plaintiffs filing claims under § 1 of the Sherman Act,[93] like the plaintiff in *Bell Atlantic Corp.*, must meet special requirements.[94] Liability under § 1 requires a "contract, combination . . ., or conspiracy, in restraint of trade or commerce."[95] Because § 1 of the Sherman Act requires a contract, combination, or conspiracy, the court must determine whether the "challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'"[96] Further, "'conscious parallelism' . . . 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.'"[97] Therefore, at the summary judgment stage, a § 1 plaintiff must present evidence of a conspiracy that "tend[s] to rule out the possibility that the defendants were acting independently."[98]

IV. COURT'S RATIONALE

A. *The Majority Opinion*

In accepting the ILECs' arguments challenging the sufficiency of Twombly and Marcus's putative class action complaint, the Supreme Court in *Bell Atlantic Corp. v. Twombly*[99] authored a multi-faceted opinion in which the Court ultimately declared that it would not require

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is quite clear that particularity pleading does not apply to antitrust cases because the Federal Rules of Procedure do not contain any special exceptions for such cases; thus, Rule 8 applies to all other types of cases transsubstantively, including antitrust litigation. *Id.* at 322-23.

In *Leatherman* the majority held pleading requirements could not be expanded beyond their appointed limits and that potential discovery abuse should not be combated in motions to dismiss. 507 U.S. at 168-69. Further, in *Swierkiewicz* the Court unanimously held that "under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case." 534 U.S. at 511. Instead, the Court held that the simplified notice pleading standard of the Federal Rules "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* at 512. The dissent in *Bell Atlantic Corp.* thus asserted that even if the majority's speculation about the strength of Twombly's and Marcus's claims was accurate, the majority's "plausibility" standard was inappropriate and irreconcilable with these cases and the Federal Rules. 127 S. Ct. at 1983 (Stevens, J., dissenting).

93. 15 U.S.C. § 1 (2000).

94. *Id.*

95. *Id.*

96. *Bell Atl. Corp.*, 127 S. Ct. at 1964 (brackets in original) (quoting Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954)).

97. *Id.* (brackets in original) (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993)).

98. *Id.*

99. 127 S. Ct. 1955 (2007).

specific factual pleadings for antitrust cases alleging conspiracy.[100] However, the Court did require a plaintiff to include enough facts to state a claim for relief that was plausible, rather than conceivable, on its face.[101] The Supreme Court disagreed with the court of appeals and held that the complaint was not sufficient to state a claim.[102]

Writing for the 7-2 majority, Justice Souter overturned the decision of the court of appeals by first examining what did *not* constitute a showing of an unlawful agreement under the Sherman Act.[103] The Court determined that because parallel business activity and conscious parallelism, while consistent with conspiracy, could be justified by reference to legitimate business strategies, simply alleging parallel conduct was not sufficient to state a claim.[104]

Next, the Court noted that the purpose of Rule 8(a)(2),[105] which requires only "'a short and plain statement of the claim showing that the pleader is entitled to relief,'"[106] is to put a defendant on notice of the substance of the plaintiff's claim as well as the grounds upon which that claim rests.[107] The Court asserted that detailed factual allegations are not required for a plaintiff's complaint to survive a Rule 12(b)(6)[108] motion, but the plaintiff must set forth *some* facts.[109] If the plaintiff fails to allege more than labels, conclusions, blanket assertions of entitlement to relief, speculative factual allegations, and elements of a cause of action, the defendant may not receive sufficient notice.[110]

The Court then applied its discussion of Rule 8(a)(2) to a § 1 Sherman Act claim, stating that a § 1 claim "requires a complaint with enough factual matter ([when] taken as true) to suggest" and make it "plausible" that the plaintiff could ultimately prove that an agreement was actually made.[111] The majority provided several examples of when pleadings would satisfy this standard, including: when the plaintiff provides (1) "facts that are suggestive enough to render a § 1 conspiracy plausible";[112] (2) a "'plain statement' [as specified in Rule 8(a)(2)] pos-

100. *Id.* at 1974.
101. *Id.*
102. *Id.* at 1963.
103. *Id.* at 1964; 15 U.S.C. § 1 (2000).
104. *Bell Atl. Corp.*, 127 S. Ct. at 1964.
105. FED. R. CIV. P. 8(a)(2).
106. *Bell Atl. Corp.*, 127 S. Ct. at 1964 (quoting FED. R. CIV. P. 8(a)(2)).
107. *Id.* (citing Conley v. Gibson, 355 U.S. 41, 47 (1957)).
108. FED. R. CIV. P. 12(b)(6).
109. *Bell Atl. Corp.*, 127 S. Ct. at 1964-65.
110. *Id.*
111. *Id.* at 1965.
112. *Id.*

sess[ing] enough heft to 'sho[w] that the pleader is entitled to relief'";[113] or (3) "enough facts to state a claim to relief that is plausible on its face."[114] The Court again asserted that it was not imposing heightened pleading requirements; instead, it claimed to be tightening factual pleadings to raise all parties' expectation that discovery would reveal evidence of the alleged preceding illegal agreement, even if proving the existence of such an agreement seemed improbable to a judge.[115] Therefore, in an antitrust conspiracy allegation, the Court interpreted Rule 8(a)(2) to require that the plaintiff's complaint contain enough "factual enhancement" to cross the "line between possibility and plausibility of 'entitle[ment] to relief.'"[116]

The Court next turned to policy arguments in support of its tightened pleading requirements. First, the Court discussed the benefits—to all parties—of the early dismissal of claims that do not raise an entitlement to relief.[117] The Court stated that while it is important to be cautious when dismissing an antitrust complaint before discovery, it is also important to remember the great expense involved in antitrust discovery; therefore, courts must require some specificity in pleadings before allowing such a massive factual controversy to proceed.[118] Additionally, the Court noted that the potential expense of discovery in this case was extremely large.[119] Although the plaintiffs' counsel reassured the Court that discovery would be limited, the Court concluded that too much uncertainty existed.[120] As a result, the Court held that allegations under § 1 of the Sherman Act must suggest conspiracy to survive a motion to dismiss.[121]

The plaintiffs' main argument against the Court's plausibility standard at the pleading stage was that the standard conflicted with *Conley v. Gibson*,[122] which stated that "'a complaint should not be dismissed for failure to state a claim unless . . . the plaintiff can prove no set of facts in support of his claim.'"[123] However, the Court rejected that argument, noting that otherwise, a wholly conclusory claim would

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113. *Id.* at 1966 (third brackets in original) (quoting FED. R. CIV. P. 8(a)(2)).
114. *Id.* at 1974.
115. *Id.* at 1965.
116. *Id.* at 1966 (brackets in original) (quoting DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 55 (1999)).
117. *Id.*
118. *Id.* at 1966-67.
119. *Id.* at 1967.
120. *Id.*
121. *Id.*
122. 355 U.S. 41 (1957).
123. *Bell Atl. Corp.*, 127 S. Ct. at 1968 (quoting *Conley*, 355 U.S. at 45-46).

survive so long as direct evidence of conspiracy could possibly be unearthed.[124] After giving several examples of when courts have refused to accept the *Conley* standard, the Court retired the renowned "no set of facts" language from *Conley*, even as it reaffirmed the Court's view in *Conley* that the complaint in that case was sufficient.[125]

Finally, the Court applied its discussion to Twombly and Marcus's complaint by examining it for plausibility, concluding that the allegations of conspiracy were insufficient.[126] Also, because the protection of economic self-interests by the ILECs served as a natural explanation for their behavior, the Court concluded that it had a duty to require more than mere allegations of parallel decisions in pleadings; otherwise, pleading a § 1 Sherman Act violation against any group of competing defendants "would be a sure thing."[127]

Therefore, while the Court eschewed reliance on any heightened pleading standards, it concluded that antitrust conspiracy was not suggested or made "plausible" by the facts adduced in the complaint.[128] Thus, the complaint did not state a claim upon which relief could be granted.[129] Because Twombly and Marcus did not nudge the claims "across the line from conceivable to plausible," the Court dismissed the complaint.[130]

B. Justice Stevens's Dissent

Justice Stevens's dissent, joined in part by Justice Ginsburg, questioned the majority's decision, arguing that it effectually relieves defendants of having to file an answer.[131] According to the dissent, the majority's conclusion that the complaint was not plausible did not stand as a legally acceptable reason to dismiss Twombly and Marcus's complaint.[132] For the dissent, although the ILECs' actions were consistent with natural business behavior, it was enough that those actions were equally consistent with the presence of an illegal agreement as alleged in the complaint.[133] The dissent therefore concluded that

124. *Id.* at 1968-69.
125. *Id.* at 1969.
126. *Id.* at 1970.
127. *Id.* at 1971.
128. *Id.* at 1974.
129. *Id.*
130. *Id.*
131. *Id.* at 1975 (Stevens, J., dissenting).
132. *Id.*
133. *Id.*

depositions or limited discovery should have been permitted before dismissal.[134]

Further, because the complaint alleged unlawful conduct, Justice Stevens noted that the Federal Rules of Civil Procedure, as longstanding precedent, required a response from the ILECs before the case was dismissed.[135] Justice Stevens then set forth two possible explanations for the majority's "dramatic departure" from settled procedural law: (1) the expensive nature of private antitrust litigation and (2) the risk that jurors might mistakenly conclude that evidence of parallel conduct proved the parties acted under agreement rather than under independent decisions.[136] However, Justice Stevens asserted that these explanations for the majority's decision were not sufficient to justify the dismissal of an adequately pleaded complaint without first requiring the ILECs to answer.[137] Further, the explanations did not justify an interpretation of the Federal Rules that turns more on the majority's assessment of the plausibility of factual allegations rather than the legal sufficiency of the allegations.[138] Justice Stevens also concluded that the purpose of the relaxed pleading standards of Rule 8(a)(2) was to keep litigants in court rather than out of court and that the merits of a claim would be sorted out during pretrial processes.[139]

Justice Stevens argued that the majority inappropriately applied a heightened pleading standard; despite the majority's disclaimers, Justice Stevens could find no other explanation for why the majority identified the failure in Twombly and Marcus's complaint not as a failure of notice but rather a failure to show that the agreement between the ILECs may have actually and plausibly occurred.[140] Justice Stevens viewed the majority's decision as effectively requiring plaintiffs to plead with particularity for issues not covered by Rule 9.[141] Nonfactual allegations, such as those in the complaint in *Bell Atlantic Corp.*, should suffice if the purpose of pleadings is simply to give general notice as the majority opinion stated.[142] Additionally, Justice Stevens questioned the majority's statement that other courts had failed to support the "no set of facts" language from *Conley* as shown in his decision to eulogize *Conley* by recognizing citations to the case in sixteen opinions by the

134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 1976.
140. *Id.* at 1984.
141. *Id.* at 1983-84; FED. R. CIV. P. 9.
142. 127 S. Ct. at 1977 (Stevens, J., dissenting).

Supreme Court, none of which had expressed any doubt about the rule in *Conley* or "criticized" or "explained away" that language.[143] Finally, Justice Stevens noted that the majority in *Conley* never mentioned a plausibility appraisal like that focused on by the majority in *Bell Atlantic Corp.*[144]

V. IMPLICATIONS

The decision in *Bell Atlantic Corp. v. Twombly*[145] leaves many unanswered questions about whether the United States Supreme Court has heightened pleading requirements for federal civil complaints. Although the Supreme Court granted certiorari with the goal of clarifying an area of law that had been the subject of controversy, the Court's opinion has led to even more of a procedural morass through which lower courts and litigants must now wade in applying this rule. Real doubt exists regarding the scope of the Court's decision. For example, does this holding require fact pleading only for antitrust cases? Does it require fact pleading only for antitrust cases alleging conspiracy or parallel behavior? Or, as exemplified by the majority opinion's conspicuously extensive dictum and underscored by Justice Stevens's dissent, does the opinion insist on a more exacting pleading under Rule 8(a)(2)[146] transsubstantively for all federal civil claims? The Court repeatedly denied that it was requiring heightened pleading, yet it (1) specifically overruled the key "no set of facts" language from the seminal case of *Conley v. Gibson*;[147] (2) discussed a new "plausibility" standard; and (3) avowed—for the first time since *Conley*—that it does, at least in some contexts, require the pleading of facts.[148]

Throughout the majority opinion, the Court indicated, despite its recurrent assertions otherwise, that it intended to make some alteration in the pure notice pleading regime that has prevailed for the half-century since *Conley*.[149] However, the full extent of this alteration remains uncertain because the Court's reasoning contains several inconsistent signals.[150] Several signals suggest that the Court has heightened pleading requirements across the full spectrum of federal

143. *Id.* at 1978.
144. *Id.* at 1979-80.
145. 127 S. Ct. 1955 (2007).
146. FED. R. CIV. P. 8(a)(2).
147. 355 U.S. 41 (1957).
148. *Bell Atl. Corp.*, 127 S. Ct. at 1964-66.
149. *Id.* at 1964-65.
150. Iqbal v. Hasty, 490 F.3d 143, 155-57 (2d Cir. 2007).

civil litigation.[151] First, the Court explicitly disavowed the "no set of facts" language from *Conley* as having "earned its retirement" and as "best forgotten as an incomplete, negative gloss on an accepted pleading standard."[152] Second, the Court indicated that in the setting of § 1 of the Sherman Act,[153] a pleading must do more than put the opposing party on general notice.[154] For example, the Court requires a plaintiff to plead enough facts to raise the inference that discovery would reveal evidence of an illegal agreement, allegations plausibly suggesting an agreement,[155] and enough alleged facts to push a plaintiff's legally required claim elements across the line from conceivable to plausible.[156] The Court combined these various formulations into a new "plausibility" standard.[157] Third, although it did not consider the possible utility of Federal Rule of Civil Procedure 12(e) ("Rule 12(e)")[158] motions for more definite statements, the Court expressed its doubts that careful case management of discovery would reliably relieve defendants of unwarranted, burdensome discovery.[159] Fourth, the majority's language indicates that the Court was looking anew at pleading requirements generally and establishing a new standard to be applied henceforth ("it is time for a fresh look at adequacy of pleading").[160]

At several points throughout *Bell Atlantic Corp.*, the majority candidly acknowledged that it will require the pleading of facts. For example, the Court stated that the Federal Rules were never intended to dispense with fact pleading altogether.[161] While the Federal Rules eliminated any general requirement for plaintiffs to set forth in detail the facts upon which a claim rests (heightened pleading), the Federal Rules still required a "'showing,' rather than a blanket assertion, of entitlement to

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151. *Id.* at 155-56.
152. *Bell Atl. Corp.*, 127 S. Ct. at 1969.
153. 15 U.S.C. § 1 (2000).
154. *Bell Atl. Corp.*, 127 S. Ct. at 1965.
155. *Id.*
156. *Id.* at 1974.
157. *Id.* at 1968.
158. FED. R. CIV. P. 12(e); *Iqbal*, 490 F.3d at 158 (noting that the Supreme Court in *Bell Atlantic Corp.* overlooked Rule 12(e)); *see also* Crawford-El v. Britton, 523 U.S. 574, 598 (1998) (noting that a court could, after the filing of a complaint and before discovery, require a plaintiff to "'put forward specific, nonconclusory factual allegations' . . . in order to survive a prediscovery motion for dismissal or summary judgment" (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring))).
159. *Bell Atl. Corp.*, 127 S. Ct. at 1967.
160. *Id.* at 1968 n.7.
161. *Id.* at 1965 n.3.

relief."[162] Further, the Court stated that "[o]n certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires."[163] Additionally, the Court rejected Twombly and Marcus's complaint because, when viewing their allegations as a whole, the claimed conspiracy was merely "conceivable," not "plausible."[164] The extensiveness of the majority's dictum, coupled with the critical light that the dissenting opinion shed on the majority's opinion, suggests that the Court did heighten the standard used to judge the sufficiency of pleadings at the complaint stage.

On the other hand, additional signals could be read to suggest that the Court is either (1) not changing pleading requirements generally or (2) is changing requirements only as they apply to § 1 allegations under the Sherman Act.[165] First, the Court on several occasions disclaimed that it was making pleading requirements more rigid but insisted it was not requiring particularized pleadings.[166] According to Justice Souter, "[W]e 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.'"[167] However, the disclaimer that the Court was not requiring "heightened" or detailed fact pleading is still consistent with its new requirement of pleading some facts. Second, the Court often cited to *Swierkiewicz v. Sorema N.A.*,[168] a case that explicitly rejected heightened pleading standards. Third, the Court approvingly noted Form 9 of the Complaint for Negligence,[169] which is a plain and short statement of a generalized allegation of negligence.[170] Fourth, the Court possibly limited its holding to § 1 Sherman Act claims and claim-specific policies, as supported by its focus on the large costs and the amount of time that would be incurred if cases like this were to proceed to full discovery upon bare allegations in a complaint.[171] This rationale further suggests that the Court's adjustment of pleading standards may be limited to cases involving massive discovery costs and

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162. *Id.* at 1965 (quoting FED. R. CIV. P. 8(a)(2)).
163. *Id.* at 1973 n.14 (citing FED. R. CIV. P. 8(a)(2)).
164. *Id.* at 1974.
165. *Iqbal*, 490 F.3d at 156-57.
166. *Bell Atl. Corp.*, 127 S. Ct. at 1973-74.
167. *Id.* at 1973 n.14 (internal quotation marks omitted) (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002)).
168. 534 U.S. 506 (2002).
169. FED. R. CIV. P. Form 9.
170. *Bell Atl. Corp.*, 127 S. Ct. at 1970 n.10.
171. *Id.* at 1966-67.

time pressures, such as § 1 claims. Fifth, because the Court left the rules from *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*[172] and *Swierkiewicz* undisturbed, it is likely that detailed or heightened fact pleading will usually be confined to the few Federal Rules or statutory provisions that require such a pleading.[173]

Finally, only one month after issuing its opinion in *Bell Atlantic Corp.*, the Supreme Court in *Erickson v. Pardus*[174] stated that "[s]pecific facts are not necessary" in pleading as long as the complaint gives the defendant fair notice, peculiarly citing *Bell Atlantic Corp.* as the authority for this point.[175] However, it is also possible that this particular reference to *Bell Atlantic Corp.* is simply the Court distinguishing between detailed or heightened fact pleading, which is very seldom required, and the pleading of some facts, which may become more generally required after *Bell Atlantic Corp.* Nevertheless, when taken as a whole, these signals may indicate that the Court in *Bell Atlantic Corp.* was limiting its stricter pleading requirements to antitrust cases and perhaps only to antitrust cases alleging parallel conduct.

Recently, the United States Court of Appeals for the Second Circuit in *Iqbal v. Hasty*[176] attempted to reconcile these conflicting signals by concluding that whether a plaintiff is required to plead factual allegations depends on the context of the case.[177] In addressing *Bell Atlantic Corp.*, the court of appeals in *Iqbal* stated, "the Court . . . is instead requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."[178] Additionally, the court of appeals discussed the considerable uncertainty regarding the standard for assessing the adequacy of pleadings that resulted from *Bell Atlantic Corp.*[179] The court of appeals stated, "If we were to consider only a narrow view of the holding of that decision, we would not make any adjustment in our view of the applicable pleading standard."[180]

Although the Supreme Court, at points throughout *Bell Atlantic Corp.*, asserted that its decision only applies to antitrust cases alleging

172. 507 U.S. 163 (1993).
173. *Bell Atl. Corp.*, 127 S. Ct. at 1973 n.14.
174. 127 S. Ct. 2197 (2007).
175. *Id.* at 2200 (citing *Bell Atl. Corp.*, 127 S. Ct. at 1959).
176. 490 F.3d 143 (2d Cir. 2007).
177. *Id.* at 157-58.
178. *Id.*
179. *Id.* at 155.
180. *Id.*

conspiracy,[181] the Court went out of its way to support that holding by referencing much broader, transsubstantive pleading requirements, such as its discussion of *Conley* and countless post-*Conley* applications by the lower federal courts, all drawn from multiple areas of civil litigation. This extensive discussion of pleading requirements supports a prediction that the Court's decision may not create a general requirement of "heightened" fact pleading; instead, it will require the pleading of some facts in a potentially broad but uncertain subset of civil claims whenever a district judge concludes that fact pleading is necessary to establish a legally required element in view of the surrounding legal or factual landscape.

Several courts have already attempted to apply *Bell Atlantic Corp.*, but have done so inconsistently, showing the uncertainty remaining after *Bell Atlantic Corp.*[182] Additionally, if the Court's decision has tightened pleading requirements transsubstantively, it has effectively reintroduced fact pleading from the pre-Federal Rules era. That, in turn, would rekindle an ongoing judicial debate about which types of facts are required—evidentiary or legal ("ultimate") facts. Further, the judicial discretion inherent in a transsubstantive application of a new plausibility standard that is dependent on context would invite district judges to dismiss cases under Rule 12(b)(6)[183] before discovery if they are ideologically hostile to a claim; or if the case would otherwise likely entail a great deal of complexity, time, or money. Such judges could look at the allegations in plaintiffs' complaints, compare them to mandatory statutory or case law claim elements, and subjectively decide whether the allegations put defendants on "sufficient" notice. Accordingly, for many cases, plaintiffs may be required to plead facts they have little chance of learning before discovery, resulting in a potentially beneficial interpretation for defendants.

The Supreme Court in *Bell Atlantic Corp.* repeatedly denied that its decision required heightened pleading or detailed pleading of facts at the complaint stage, outside of the very few situations in which such pleading is required by statute or by Rule 9[184] (the *expressio unius*

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181. *See, e.g.*, 127 S. Ct. at 1965, 1974.

182. *See, e.g.*, Hyland v. Homeservices of Am., No. 3:05-CV-612-R, 2007 WL 2407233 at *3 (W.D. Ky. Aug. 17, 2007). The court in *Hyland* held that the plaintiffs met the "plausibility standard" from *Bell Atlantic Corp.* because the plaintiffs alleged more than parallel conduct, combined with bare references to agreement. *Id.* at *3. Further, the court denied that the rule from *Bell Atlantic Corp.* required heightened pleading standards, asserting that *Bell Atlantic Corp.* simply requires a closer look at *what* information the plaintiff has provided, not the *amount* of information provided. *Id.*

183. FED. R. CIV. P. 12(b)(6).

184. FED. R. CIV. P. 9.

point made in *Leatherman* regarding civil rights claims against government defendants[185] and in *Swierkiewicz* regarding employment discrimination claims[186]). However, by occasionally requiring the pleading of any facts, the Court may have resurrected the Field Code pleading distinction between conclusions of law and statements of evidentiary fact.

While the Court seemingly intended to limit its holding to § 1 Sherman Act claims, it reached that result by explicitly relying on—but restrictively reformulating—general notice pleading standards under Rule 8(a)(2), including an express abrogation of the widely used "no set of facts" language from *Conley*. Additionally, pro-plaintiff policies underlie § 1 of the Sherman Act (treble damages are granted).[187] Therefore, although this decision may have been motivated by the prospect of generating huge cost savings for the defendants and the courts in major antitrust cases, it may have also restored certain Field Code pleading principles transsubstantively in an amorphous category of other federal civil cases.

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185. 507 U.S. at 166-67.
186. 534 U.S. at 510-11.
187. *Bell Atl. Corp.*, 127 S. Ct. at 1983 (Stevens, J., dissenting).