

## The Law of Unintended Consequences: Shockwaves in the Lower Courts After *Bell Atlantic Corp. v. Twombly*<sup>1</sup>

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When I was trying to come up with a topic for the Donahue Lecture and Essay, my law clerks suggested that I focus on the unintended complications that appellate courts sometimes impose on district judges. From guest sittings on the Court of Appeals, I have learned that appellate judges approach cases and legal issues differently from trial court judges. Trial level judges have busy civil and criminal dockets to move, so we tend to favor practical—rather than elegantly theoretical—solutions to the problems we face. The practical considerations of case management, however, are not always taken into account in appellate decisions. When the rules that are handed down are difficult or time-consuming to implement, they can adversely affect the administration of justice at the *nisi prius* level.

We have all heard of the law of unintended consequences. More than a few recent appellate decisions have brought in their wake unanticipated (and, I am sure, unintended) consequences for the management of cases in trial courts, to the prejudice of litigants and the consternation of the judges who must put the decisions into practice.

A few recent Supreme Court decisions, which are causing no end of practical problems for district judges, illustrate my point. For example, most legal observers thought the Supreme Court took the case of *Rita v. United States*<sup>3</sup> to resolve a circuit split over whether a sentence within the United States Sentencing Guidelines is or is not presumptively reasonable. Instead, the Court enshrined the split into law, holding that a court of appeals “may” presume that a Guidelines sentence is reasonable, but not that it “must” do so.<sup>4</sup> As a result, in some circuits, courts presume Guidelines sentences are reasonable and defense counsel seeking below-Guidelines sentences must try to

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1. A lecture version of this essay was presented at Suffolk University Law School on November 8, 2007, as part of the Donahue Lecture Series. I thank those who invited me to participate in the Donahue Lecture Series: the Editorial Board of the *Suffolk University Law Review* and especially Professor Karen Blum, with whom I have enjoyed a lively e-mail correspondence for the past year, mostly about qualified immunity—not a subject that ordinarily inspires lively correspondence, but it is quite amazing what we have done with it.

2. Judge Colleen McMahon is a District Judge in the United States District Court for the Southern District of New York.

3. 127 S. Ct. 2456 (2007).

4. *Id.* at 2462 (concluding court of appeals may apply presumption of reasonableness).

rebut that presumption; while in other circuits, defense counsel argue at sentencing that a proposed sentence would be reasonable without having to worry about any presumption.<sup>5</sup> These are two entirely different exercises.

Another decision that gives rise to tremendous practical implementation issues is *Saucier v. Katz*.<sup>6</sup> In *Saucier*, the Supreme Court announced the procedure that district courts should follow to determine whether a public officer defendant is entitled to qualified immunity.<sup>7</sup> But the procedure the Court selected is cumbersome and inherently contradictory, as well as difficult and extremely time-consuming to apply in practice.

Finally, one of the most controversial decisions that illustrates my thesis is last term's decision in the case of *Bell Atlantic v. Twombly*.<sup>8</sup> In this essay, I will discuss the *Twombly* decision, identify its unintended consequences, and suggest one possible reason why the Supreme Court continues to confound district judges by unwittingly erecting barriers to effective case management.

### I. *BELL ATLANTIC CORP. v. TWOMBLY*

*Bell Atlantic Corp. v. Twombly* was probably the least anticipated decision to come out of the 2007 Supreme Court. It also happens to be one of the Court's most important procedural decisions of the last decade, with massive implications for civil litigation. *Twombly*'s seismic impact is apparent when one considers that in the first six months after the decision was handed down, it was cited in more than 2,000 district court opinions and 150 circuit court opinions.<sup>9</sup>

Because *Twombly* is so widely cited, it is particularly unfortunate that no one quite understands what the case holds. Depending on how one reads it, the *Twombly* decision might have radically changed one of the iconic rules of civil procedure, while overturning or modifying one of the most often cited cases in the United States Reports.<sup>10</sup> As both district court and appellate court judges

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5. Compare *United States v. Dorcelly*, 454 F.3d 366, 376 (D.C. Cir. 2006) (affording rebuttable presumption of reasonableness to sentences falling within guidelines), *United States v. Kristl*, 437 F.3d 1050, 1053-54 (10th Cir. 2006) (per curiam) (same), *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006) (same), *United States v. Williams*, 436 F.3d 706, 708 (6th Cir. 2006) (same), *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006) (same), *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) (same), and *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005) (same), with *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) (holding sentence within guidelines range not presumed reasonable), *United States v. Cooper*, 437 F.3d 324, 331 (3d Cir. 2006) (same), *United States v. Cantrell*, 433 F.3d 1269, 1277-78 (9th Cir. 2006) (same), *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005) (per curiam) (same), and *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005) (same).

6. 533 U.S. 194 (2001).

7. See *id.* at 202 (establishing qualified immunity inquiry).

8. 127 S. Ct. 1955 (2007).

9. As of November 21, 2007, a Westlaw search indicated that *Twombly* had been cited in 168 decisions by circuit courts and 2,159 decisions by district courts.

10. See *Twombly*, 127 S. Ct. at 1966 (noting that plaintiffs' allegations must satisfy a "plausibility" standard at the pleading stage); *id.* at 1969 (retiring the language from *Conley v. Gibson* that had provided the

try to parse the meaning of a few key phrases in the *Twombly* decision, what was once uniform dogma about the pleading standard for most causes of action is being fragmented on a circuit-by-circuit—or sometimes a judge-by-judge—basis. We district court judges suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim.

## II. PLEADING UNDER THE FEDERAL RULES

Rule 8 of the Federal Rules of Civil Procedure sets forth a simple pleading standard for the average complaint: “A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . .”<sup>11</sup> This rule is short and to the point, like the “notice pleading” standard it advocates. The rule’s requirements are few in number and easy to satisfy.

Rule 8 does not require a short and plain statement of the *facts* underlying a claim; it says only that the plaintiff must draft a short and plain statement of the *claim*.<sup>12</sup> Under the “notice pleading” system, a complaint need only give the defendant notice of the nature of the plaintiff’s claim so he can begin to prepare a defense.<sup>13</sup> The facts undergirding the claim do not generally need to be pleaded; they will be fleshed out later through discovery.<sup>14</sup>

Twelve examples of the sort of “short, plain statement” necessary to plead a claim are appended to the Federal Rules of Civil Procedure. Rule 84 states that these appended forms are intended to “illustrate the simplicity and brevity” that Rule 8 contemplates.<sup>15</sup> The model pleadings are indeed brief and to the point. My personal favorite is the model complaint for an accounting, which states, in its entirety: “Defendant owes plaintiff \_\_\_\_\_ dollars according to the account hereto annexed as Exhibit A.”<sup>16</sup> It does not get any shorter or plainer than that.

The drafters of the Federal Rules of Civil Procedure adopted notice pleading because they wanted to get away from the old common-law pleading rules that had bedeviled courts and litigants in England and the United States for

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framework for interpreting the pleading standard of Rule 8).

11. FED. R. CIV. P. 8(a)(2).

12. *Twombly*, 127 S. Ct. at 1977 (noting simple notice pleading standard illustrated in Federal Rules); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (acknowledging liberal nature of Federal Rules’ pleading standard). In *Swierkiewicz*, the Court noted that under the “Federal Rules’ simplified standard for pleading, [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.” 534 U.S. at 514 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

13. *Walker v. Thompson*, 288 F.3d 1005, 1008 (7th Cir. 2002) (noting that one role of notice pleading is to enable preparation of defense).

14. See *Swierkiewicz*, 534 U.S. at 512-13 (noting simplified notice pleading relies on liberal discovery rules for laying out of facts).

15. FED. R. CIV. P. 84.

16. FED. R. CIV. P. app. Form 4.

centuries.<sup>17</sup> Rule 8 reflects a preference for having cases decided on their merits.<sup>18</sup> It eschews the old practice of forcing a plaintiff to jump through procedural hoops in order to survive a motion to dismiss (formerly known as a “demurrer”).<sup>19</sup> Particularity (i.e., more allegations of fact) is only required in a complaint alleging mistake or where the allegations directed to a defendant are thought to be particularly offensive—such as allegations of fraud or deceit.<sup>20</sup>

Any doubt about the ease with which a plaintiff could satisfy Rule 8 was put to rest in 1957, when the Supreme Court decided *Conley v. Gibson*,<sup>21</sup> a case that is often taught on the first day of Civil Procedure class. In *Conley*, the Court explained that Rule 8(a)(2) relieved a plaintiff of the burdensome common-law requirement to “set out in detail the facts upon which he bases his claim.”<sup>22</sup> The Court said that as long as the complaint provides fair notice of the grounds for entitlement to relief, “[t]he accepted rule [is] 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.”<sup>23</sup>

Let me illustrate what I have always understood to be the *Conley* rule, using the sort of pleading that I commonly see as a district court judge: A plaintiff files a complaint alleging that (1) she is a woman, (2) she was fired from her job, (3) for which she was qualified, (4) because of her gender. A complaint such as this could not be dismissed for failure to state a claim. Of course, much more is needed to *prove* a claim like this, but proof is for a later day.

Rule 8, as generously interpreted by *Conley*, is unquestionably slanted in favor of the pleading plaintiff. The downside of the “no set of facts” formulation is the ease with which an utterly meritless case can proceed through discovery, consuming scarce judicial resources and burdening defendants financially. As Congress has created more and more rights and remedies, and Americans have become more and more inclined to “make a federal case” out of circumstances that aggrieve them, the economic and public

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17. As Professor Lawrence Friedman noted,

English common-law pleading was an elaborate contest of lawyerly arts, and winning a case did not always depend on who was in the right or who had the law on their side. The winner might be the better pleader. There were too many rules, and they were too tricky and inconsistent.

LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 96 (3d ed. 2005).

18. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (stating Rule 8 was adopted to focus litigation on merits of claim); *Conley v. Gibson*, 355 U.S. 41, 48 (1957) (stating “purpose of pleading is to facilitate a proper decision on the merits”).

19. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1975-76 (2007) (stating notice pleading adopted to simplify pleading, departing from complex and technical English rules).

20. See FED. R. CIV. P. 9 (providing rule for pleading special matters).

21. 355 U.S. 41 (1957).

22. *Id.* at 47.

23. *Id.* at 45-46.

policy consequences of a liberal pleading rule have become increasingly apparent.

Nonetheless, prior to the *Twombly* decision, neither Congress nor the Federal Rules Advisory Committee saw any need to tighten the extremely liberal notice pleading standard that was applied pretty uniformly across the country.<sup>24</sup> Indeed, in a new appendix to the Federal Rules of Civil Procedure, effective as of December 1, 2007, the sample form complaints are largely verbatim copies of the form complaints appended to the 1963 revision to the Rules.<sup>25</sup> Whatever its consequences, the *Conley* standard was clear and well-settled. There was certainly no groundswell to reexamine *Conley*, and no one thought that it was in danger of being altered.

### III. THE *TWOMBLY* DECISION

In *Twombly*, a putative class of telephone and/or internet subscribers sued a group of local telephone companies.<sup>26</sup> Plaintiffs alleged that the companies had conspired to restrain trade and had agreed to refrain from competing with each other in their respective markets, all in violation of Section 1 of the Sherman Act.<sup>27</sup> They alleged that Incumbent Local Exchange Carriers (ILECs) engaged in parallel conduct and made agreements with each other that discouraged competition.<sup>28</sup> The complaint, however, did not allege facts “suggesting that refraining from competing in other territories as [Competitive Local Exchange Carriers] was contrary to defendants’ apparent economic interests.”<sup>29</sup>

The district court granted defendants’ motion to dismiss the complaint under Rule 12(b)(6) of the Federal Rules.<sup>30</sup> Judge Lynch, a fine scholar who came to the bench from a tenured professorship at Columbia Law School, held that allegations of parallel business conduct, without more, failed to state a claim under Section 1 of the Sherman Act.<sup>31</sup>

On appeal, the Second Circuit reinstated the complaint.<sup>32</sup> It concluded that

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24. Congress’s reluctance to modify the liberal notice pleading standard is not completely without exception. Following an explosion in class action securities lawsuits, Congress passed legislation with heightened requirements for complaints in such suits, requiring that a plaintiff “sets forth all of the transactions . . . in the security that is the subject of the complaint.” Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

25. Compare FED. R. CIV. P. app. Forms 10-15, with FED. R. CIV. P. app. Forms 10-15 (1963) (amended 1966).

26. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1962 (2007).

27. *Id.* Section 1 of the Sherman Act 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 . . .” 15 U.S.C. § 1 (2001).

28. *Twombly*, 127 S. Ct. at 1962 (setting forth allegations from plaintiffs’ complaint).

29. *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 188 (S.D.N.Y. 2003), *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev’d*, 127 S. Ct. 1955 (2007).

30. *Twombly*, 313 F. Supp. 2d at 189.

31. *Id.* at 188-89.

32. *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 119 (2d Cir. 2005), *rev’d*, 127 S. Ct. 1955 (2007) (vacating

plaintiffs' allegations were sufficient to withstand a motion to dismiss under the liberal federal pleading standard of Rule 8.<sup>33</sup> Employing the oft-quoted language of *Conley v. Gibson*, the Second Circuit held that defendants did not demonstrate that plaintiffs could "prove no set of facts in support of [their] claim which would entitle [them] to relief."<sup>34</sup>

The Supreme Court granted certiorari "to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct."<sup>35</sup> Noting that Section 1 of the Sherman Act does not prohibit parallel independent conduct that results in a restraint of trade, the Supreme Court reasoned that plaintiffs' complaint did not state a claim because it lacked allegations of fact suggesting that the defendants had entered into an unlawful agreement.<sup>36</sup> In other words, the Supreme Court agreed with Judge Lynch's conclusion that a complaint alleging no more than parallel business conduct does not sufficiently state a claim for relief under the Sherman Act.<sup>37</sup>

While one might have expected that to be the end of the matter, it was not. In *Twombly*, the Supreme Court, by a vote of seven to two, went far beyond what was necessary to answer the very precise and narrow question posed by the case.<sup>38</sup> The Court made the wholly unanticipated announcement that the famous "no set of facts" language from *Conley v. Gibson* had puzzled the profession for too long and so had "earned its retirement."<sup>39</sup> The Supreme Court acknowledged that "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," but the Court also suggested that the "no set of facts" idiom—on the books for more than half a century—was inconsistent with the language of Rule 8.<sup>40</sup> Seizing on the word "grounds" in Rule 8, the Court held that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."<sup>41</sup> In other words, although detailed factual allegations may not be necessary in a notice pleading system, *some* factual allegations must be included. Without factual

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district court judgment and remanding case for further proceedings).

33. *Twombly*, 425 F.3d at 118-19 (holding allegations sufficient).

34. *Id.* at 106, 114-19.

35. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1963 (2007).

36. *Id.* at 1970 (noting allegations of parallel conduct but no allegations of actual agreement).

37. *See id.* at 1974 (holding plaintiff did not provide enough facts for plausible claim).

38. Some believe that the Supreme Court consistently goes beyond what is necessary to decide the case before it by announcing unnecessary and potentially confusing new points in what are essentially dicta. *See generally* Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249 (2006) (discussing increasing failure of courts to distinguish between dictum and holding).

39. *Twombly*, 127 S. Ct. at 1969.

40. *Id.* at 1964-65; *see id.* at 1966 (suggesting factual enhancement needed to show plausibility of entitlement to relief).

41. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Rule 8(a)(2) requires that a complaint "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 1964 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

allegations to support them, mere conclusions are not sufficient to provide “grounds” for entitlement to relief.<sup>42</sup>

Despite “retiring” the famous formulation from *Conley*, the majority opinion in *Twombly* insisted that it was not overturning the iconic decision itself. The Court maintained that the “no set of facts” phrase was “an incomplete, negative gloss on an accepted pleading standard,” and said the phrase really meant that “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”<sup>43</sup> *Conley*, the Court said, did no more than “describe[] the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s survival.”<sup>44</sup>

The Court replaced the “no set of facts” language with a new standard grounded in the “plausibility” of the complaint’s allegations.<sup>45</sup> According to the Court, the *Twombly* plaintiffs were required to allege facts that “plausibly” suggest the existence of an agreement not to compete, as opposed to independent parallel conduct.<sup>46</sup> In what appears to be an effort to clarify that pronouncement, the Court stated that “[f]actual allegations [in a complaint] must be enough to raise a right to relief above the speculative level . . . .”<sup>47</sup>

Although it made these statements, the Court eschewed any notion that it was imposing a heightened pleading requirement—such as the one contained in Rule 9(b)—on plaintiffs whose claims were governed by Rule 8.<sup>48</sup> In the context of *Twombly* itself, the majority reasoned, “Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”<sup>49</sup> More generally, the Court insisted, “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. Because

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42. *Id.* at 1964-65 (stating plaintiff’s obligation requires more than labels and conclusions).

43. *Id.* at 1969.

44. *Id.* In other words, according to the *Twombly* Court, the famous phrase from *Conley* simply means that a plaintiff’s claims can rely on facts not stated in the complaint. As the District Court for the District of Delaware noted, “The Court understands *Twombly* to primarily be a decision aimed at bringing the standard of dismissal back to its ‘roots’ by undoing the literal reading of *Conley v. Gibson* . . . .” *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 408 n.2 (D. Del. 2007). From my own experience, I cannot say that attorneys I encounter on a regular basis have been “puzzled” by the *Conley* formulation. While a few decisions during the past fifty years have interpreted *Conley* as Justice Souter does in writing for the *Twombly* majority, those decisions are a distinct minority.

45. See *Twombly*, 127 S. Ct. at 1970 (examining plausibility of plaintiffs’ claims).

46. *Id.* at 1966 (stating plaintiffs failed to show that agreement between defendants was consciously undertaken).

47. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007).

48. *Id.* at 1973 n.14 (refusing to apply heightened pleading standard or broaden scope of Rule 9). Rule 9(b) of the Federal Rules of Civil Procedure states, “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” FED. R. CIV. P. 9(b).

49. *Twombly*, 127 S. Ct. at 1965.

the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”<sup>50</sup>

#### IV. INTERPRETING *TWOMBLY*

The district courts face thousands of Rule 12(b)(6) motions every year, and while I assume the Supreme Court did not intend to throw those courts into disarray with its *Twombly* decision, that is, in fact, what is happening. Left with little guidance on how broadly *Twombly* should be applied, district courts and courts of appeal have reached every conceivable answer. Immediately after the *Twombly* decision came down, commentators began suggesting that it could be interpreted three ways. They surmised that *Twombly* had effectively overruled *Conley* and imposed a new, more-stringent pleading standard for (1) all cases not already subject to “heightened” pleading under Rule 9(b) and the Private Securities Litigation Reform Act (PSLRA);<sup>51</sup> (2) all conspiracy cases; or (3) antitrust conspiracy cases only.<sup>52</sup> The commentators did not believe for a minute that *Twombly* wrought no change in *Conley*, no matter what the Supreme Court said. Those more than 2,000 post-*Twombly* decisions have gone all three ways.

The “antitrust conspiracy only” interpretation of *Twombly* is the most restrictive view of the decision. This interpretation derives from the fact that the Supreme Court granted certiorari to answer a very limited question about the proper standard of pleading in an antitrust conspiracy case.<sup>53</sup> A few district courts, seizing on the Supreme Court’s disclaimer about not changing pleading standards and concerned about the implications of overturning *Conley*, have interpreted *Twombly* in light of the precise question taken on certiorari. These courts limit the “plausibility” pronouncement to antitrust conspiracy cases.<sup>54</sup>

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50. *Id.* at 1974.

51. *See supra* note 48 (providing Rule 9(b) pleading standard); *see also supra* note 24 (discussing PSLRA). The PSLRA requires plaintiffs to state with particularity both the facts constituting the alleged violation and “facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2) (2006). The Supreme Court announced this heightened pleading standard requires that “an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504-05 (2007).

52. *See Leading Case*, 121 HARV. L. REV. 305, 310-11 n.51 (2007) (collecting sources and discussing the views of several commentators).

53. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1963 (2007) (declaring Court granted certiorari to address proper standard for pleading antitrust conspiracy allegations).

54. *See Kersenbrock v. Stoneman Cattle Co.*, No. 07-1044-MLB, 2007 WL 2219288, at \*2 n.2 (D. Kan. July 30, 2007) (“[*Twombly*] deals *only* with pleading requirements in the highly complex context of an antitrust conspiracy case. It does not announce a general retreat from the notice pleading requirement of [Federal Rule of Civil Procedure 8(a)].”); *United States v. Harchar*, No. 1:06-cv-2927, 2007 WL 1876510, at \*2 (N.D. Ohio June 28, 2007) (“*Twombly* merely held that a complaint that alleged only parallel conduct did not state a claim for an antitrust conspiracy. The Supreme Court did not purport to change the applicable 12(b)(6) standards . . .”).

However, the Supreme Court could have decided the narrow question it purported to address in *Twombly* without simultaneously taking on *Conley v. Gibson*. By “retiring” language that had been applied to all Rule 8 cases for a half century, the Court made it difficult for district courts to conclude that it intended so narrow a result.

It is also possible, in light of certain broad language in *Twombly*, that the decision was meant to apply to all conspiracy cases, not just to antitrust conspiracy. According to the Court, plausibility is necessary because “a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.”<sup>55</sup> *Twombly* has been applied to a number of non-antitrust conspiracy claims since it came down.<sup>56</sup>

Most courts and commentators, however, have concluded that *Twombly* applies to every complaint heretofore governed by Rule 8. District courts have applied *Twombly* to every conceivable type of claim found on their dockets, including patent and trademark infringement claims,<sup>57</sup> Section 1983 actions,<sup>58</sup> free exercise claims,<sup>59</sup> housing discrimination actions,<sup>60</sup> Individuals with Disabilities Education Act and ERISA claims,<sup>61</sup> and immigration matters.<sup>62</sup> Some judges have even applied *Twombly* to cases indistinguishable from the types of lawsuits that are generally commenced using the form complaints specifically endorsed by Rule 84. For example, in *Shirk v. Garrow*,<sup>63</sup> the District Court for the District of Columbia applied *Twombly* to garden variety

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55. *Twombly*, 127 S. Ct. at 1966.

56. See, e.g., *Green v. Bartek*, No. 3:05CV1851, 2007 WL 4322780, at \*3 (D. Conn. Dec. 7, 2007) (applying *Twombly* to conspiracy allegations outside the antitrust context); *IRN Payment Sys. v. Direct Furniture, LLC*, No. 07 C 0141, 2007 WL 2713366, at \*6 (N.D. Ill. Sept. 12, 2007) (same); *In re Adelphia Commc'ns Corp.*, No. 02-41729, 2007 WL 2403553, at \*18 (Bankr. S.D.N.Y. Aug. 17, 2007) (same).

57. See *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356-57 (Fed. Cir. 2007) (applying *Twombly* in patent infringement action); *Fitzpatrick v. Sony-BMG Music Entm't, Inc.*, No. 07 Civ. 2933 (SAS), 2007 WL 2398801, at \*2 (S.D.N.Y. Aug. 15, 2007) (applying *Twombly*'s plausibility standard in trademark infringement case).

58. *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007) (applying *Twombly*'s plausibility standard in § 1983 case); *Holloway v. Ameristar Casino St. Charles, Inc.*, No. 4:07-CV-218-DDN, 2007 WL 2199566, at \*2 (E.D. Mo. July 27, 2007) (reviewing Section 1983 claim under *Twombly* analysis).

59. *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1296 (11th Cir. 2007) (requiring, under *Twombly*, that plaintiff plead specific facts suggesting his firing due to religious belief).

60. *Lindsay v. Yates*, 498 F.3d 434, 440 n.6 (6th Cir. 2007) (holding plaintiff pleaded sufficient facts under *Twombly*). The Sixth Circuit concluded that “the [plaintiffs] have pleaded sufficient facts giving rise to a ‘reasonably founded hope that the discovery process will reveal relevant evidence’ to support their claims.” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007)).

61. *Robinson v. D.C.*, No. 06-1253 (RCL), 2007 WL 2257326, at \*3 (D.D.C. Aug. 2, 2007) (requiring pleadings to show plaintiffs prevailing parties in administrative hearing to recover under IDEA); *Steelman v. Prudential Ins. Co. of Am.*, No. CIV. S-06-2746 LKK/GGH, 2007 WL 2009805, at \*4 (E.D. Cal. July 6, 2007) (declaring plaintiffs must plead how facts support ERISA action).

62. *Motino v. Toys “R” Us, Inc.*, No. 06-370 (SRC), 2007 WL 2123698, at \*1 (D.N.J. July 19, 2007) (stating more than conclusory statements were needed in immigration case complaint under *Twombly*).

63. 505 F. Supp. 2d 169 (D.D.C. 2007).

breach of contract claims.<sup>64</sup>

Ironically, one court that has—at least arguably—taken a restrictive view of *Twombly* is the Supreme Court itself. Just two weeks after its *Twombly* decision, the Supreme Court issued a decision that appears to conflict with the broad gloss most courts have placed on *Twombly*. In *Erickson v. Pardus*,<sup>65</sup> the Supreme Court reversed the dismissal of a pro se prisoner's complaint for failure to state a claim.<sup>66</sup> The prisoner had filed a complaint alleging that prison officials violated his Eighth Amendment rights and caused him harm by terminating his hepatitis C treatment.<sup>67</sup> The Supreme Court held the petitioner's complaint was sufficient despite its lack of detailed allegations of fact.<sup>68</sup>

The district court in *Erickson* had dismissed plaintiff's claims because he did not allege that the harm he suffered was the result of the discontinuance of treatment, rather than a result of the disease.<sup>69</sup> The Tenth Circuit affirmed, noting that "plaintiff's conclusory allegations are insufficient to state a claim for an Eighth Amendment violation."<sup>70</sup> In reversing the Tenth Circuit, the Supreme Court not only schizophrenically cited *Conley* and its liberal pleading standard with approval, but also rebuked the lower courts for "depart[ing] in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure."<sup>71</sup> The Supreme Court observed that Rule 8(a)(2) "requires only a short and plain statement of the claim showing that the pleader is entitled to relief," and—in a twist worthy of Bleak House—cited *Twombly* (quoting *Conley*) for the proposition that "[s]pecific 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.'"<sup>72</sup> Noting that the plaintiff had alleged that prison officials endangered his life by discontinuing his treatment, the Supreme Court held "[i]t was error for the Court of Appeals to conclude that the allegations in question . . . were too conclusory . . . for pleading purposes."<sup>73</sup>

Some commentators hypothesize that the Court strategically issued *Erickson* shortly after *Twombly* to prevent lower courts from reading too much into *Twombly*, and to reinforce the Court's disclaimer that notice pleading under

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64. See *id.* at 172 (applying *Twombly* pleading standard in third party breach of contract case); see also *Fastrip, Inc. v. CSX Corp.*, No. 3:07CV-66-S, 2007 WL 2254357, at \*2 (W.D. Ky. Aug. 2, 2007) (allowing amended complaint in property damage case in response to *Twombly*'s more stringent pleading requirements).

65. 127 S. Ct. 2197 (2007).

66. *Id.* at 2200 (noting claim cannot be dismissed on ground petitioner's allegations of harm too conclusory).

67. *Id.* at 2199 (providing allegations from plaintiff's complaint).

68. *Id.* at 2200 (noting Rule 8(a)(2) satisfied).

69. *Erickson v. Pardus*, No. 05-CV-00405-LTB-MJW, 2006 WL 650131, at \*7 (D. Colo. Mar. 13, 2006).

70. *Erickson v. Pardus*, 198 F. App'x 694, 698 (10th Cir. 2006).

71. *Erickson v. Pardus*, 127 S. Ct. 2197, 2198 (2007).

72. *Id.* at 2200.

73. *Id.*

*Conley* still survives.<sup>74</sup> In fact, some courts have already cited *Erickson* for the proposition that *Twombly* did not alter the basic tenets of notice pleading.<sup>75</sup> Other courts have distinguished *Erickson*, however, because the plaintiff there was a pro se litigant, as to whom ordinary pleading rules are already leniently applied. The Supreme Court actually emphasized this fact in *Erickson*, stating, “The Court of Appeals’ departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding . . . without counsel.”<sup>76</sup> The Court further noted that “a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.”<sup>77</sup> Perhaps *Erickson* simply means that *Twombly*’s “plausibility” standard, like all pleading standards, is to be applied less stringently to pro se plaintiffs.

#### V. THE SECOND CIRCUIT’S REACTION TO *TWOMBLY*

For the past few years, the Second Circuit—the circuit in which I sit—has dealt with bombshell pronouncements from the Supreme Court by immediately deciding a case that allows it to announce its own interpretation of the Supreme Court’s ruling. For example, almost before the ink was dry on the landmark sentencing decisions *United States v. Booker* and *United States v. Fanfan*,<sup>78</sup> the Second Circuit handed down *United States v. Crosby*,<sup>79</sup> in which it announced how it expected district courts to put *Booker* and *Fanfan* into practice in New York, Connecticut, and Vermont.<sup>80</sup> This practice stifles creativity at the district court level but has the virtue of imposing uniformity throughout the circuit before contradictory interpretations emerge. It therefore was not a surprise that the Second Circuit addressed *Twombly* promptly. In *Iqbal v. Hasty*,<sup>81</sup> it came

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74. See *Leading Case*, 121 HARV. L. REV. 305, 310-11 n.51 (2007) (collecting sources and discussing the views of several commentators).

75. See *Lindsay v. Yates*, 498 F.3d 434, 440 n.6 (6th Cir. 2007) (discussing effect of *Twombly* on Rule 8(a) in light of *Erickson*). In *Lindsay*, the Sixth Circuit stated:

[A]lthough this case does not present the question of if, or exactly how, *Twombly* has changed the pleading requirements of [Rule 8(a)(2)], we note that in *Erickson v. Pardus*, decided after *Twombly*, the Supreme Court reaffirmed that Rule 8(a) “requires only a short and plain statement of the claims showing that the pleader is entitled to relief.”

*Id.* (citations omitted).

76. *Erickson*, 127 S. Ct. at 2200.

77. *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

78. 543 U.S. 220 (2005).

79. 397 F.3d 103 (2d Cir. 2005).

80. See *id.* at 113-14 (noting *Booker* and *FanFan* decisions do not make Sentencing Guidelines merely advisory). The Second Circuit noted, “[T]he Supreme Court expects sentencing judges faithfully to discharge their statutory obligation to ‘consider’ the Guidelines and . . . [w]e have every confidence that the judges of this Circuit will do so . . . .” *Id.* at 114.

81. 490 F.3d 143 (2d Cir. 2007).

up with an interpretation that has been cited with approval by many courts, including courts within the Third, Sixth, Ninth, Tenth, and Federal Circuits.<sup>82</sup>

In *Iqbal*, the plaintiff was a Muslim Pakistani detainee who brought statutory and constitutional tort claims against U.S. officials, alleging violations of his civil rights.<sup>83</sup> The complaint asserted twenty-one causes of action. As to most of the claims, the district court denied defendants' motions to dismiss.<sup>84</sup> Ordinarily, such a decision is not immediately appealable, but the defendants had moved to dismiss on the ground of qualified immunity, so interlocutory appeal was available from the denial of that aspect of the motion.<sup>85</sup> The case was on appeal when the *Twombly* decision came down, so the district court's decision was subjected to review under the new standard.<sup>86</sup>

The Second Circuit, analyzing the *Iqbal* complaint with *Twombly* in mind, affirmed in part, reversed in part, and remanded the case.<sup>87</sup> The court of appeals did not agree with the Supreme Court that *Twombly* changed nothing in Rule 8 jurisprudence; it concluded that, in *Twombly*, the Supreme Court "intended to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since *Conley v. Gibson*."<sup>88</sup> The Second Circuit admitted that "[t]he nature and extent of that alteration is not clear because the Court's explanation contains several, not entirely consistent, signals . . . ."<sup>89</sup> Nevertheless, the court of appeals was "reluctant to assume that all of the language of [*Twombly*] applies only to [Sherman Act] section 1 allegations based on competitors' parallel conduct or, slightly more broadly, only to antitrust cases," because "[s]ome of the language relating generally to Rule 8 pleading standards seems to be so integral to the rationale of the Court's

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82. See *id.* at 155 (noting "considerable uncertainty" created by *Twombly* and need to consider Supreme Court's "signals"); see also, e.g., *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1362 n.7 (Fed. Cir. 2007) (Dyk, J., concurring) (citing Second Circuit's opinion and applying *Twombly* outside antitrust context); *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 541-42 (6th Cir. 2007) (supporting Second Circuit's use of flexible plausibility standard); *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1215 n.2 (10th Cir. 2007) (approving plausibility standard as interpreted by Second Circuit); *Savokinas v. Pittston Twp.*, No. 3:06-CV-00121, 2007 WL 2688729, at \*2 (M.D. Pa. Sept. 11, 2007) (taking guidance from Second Circuit on apparent conflict between *Twombly* and *Erickson*); *Anticancer Inc. v. Xenogen Corp.*, No. 05-CV-0448-B(AJB), 2007 WL 2345025, at \*2 (S.D. Cal. Aug. 13, 2007) (articulating pleading obligation as pronounced by Second Circuit); *Collins v. Marva Collins Preparatory Sch.*, No. 1:05cv614, 2007 WL 1989828, at \*3 n.1 (S.D. Ohio July 9, 2007) (citing Second Circuit decision in deciding how to interpret *Twombly*).

83. *Iqbal*, 490 F.3d at 147-49 (providing plaintiff's allegations and list of claims). The complaint in *Iqbal* asserted twenty-one separate causes of action under various statutory and constitutional provisions. See *id.* at 149 n.3.

84. See *id.* at 150-51 (outlining motions to dismiss denied and granted by district court).

85. See *id.* at 151 (noting interlocutory appeal of denial of motions to dismiss on ground of qualified immunity).

86. See *id.* at 155-60 (analyzing and applying new *Twombly* standard).

87. *Iqbal v. Hasty*, 490 F.3d 143, 177-78 (2d Cir. 2007) (affirming denial of motion to dismiss as to all but procedural due process claim).

88. *Id.* at 155.

89. *Id.*

parallel conduct holding as to constitute a necessary part of that holding.”<sup>90</sup>

The Second Circuit then described what it thought the *Twombly* majority intended. The court opined, “[W]e believe the [Supreme] Court is not requiring a *universal* standard of heightened fact pleading, but 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*.”<sup>91</sup> In other words, *Twombly* requires more factual detail in complaints that allege more complex theories of liability, so as to render the plaintiff’s allegations “plausible” rather than simply speculative. Because the Second Circuit concluded that a heightened pleading rule was not imposed, most of the plaintiff’s claims in *Iqbal* survived the motion to dismiss.<sup>92</sup>

*Iqbal*’s flexible approach to the quantum of fact pleading needed to render a complaint “plausible” makes sense. Although the Supreme Court contended that *Twombly* did not impose “*any* ‘heightened’ pleading standard,”<sup>93</sup> this strikes me as sheer sophistry. But there are enough clues in the Supreme Court’s opinion for astute observers to conclude that the Court did not intend to throw notice pleading on the trash heap. For example, the Supreme Court explicitly noted that for a simple negligence case, the “simple fact pattern laid out in Form 9” of the Federal Rules would be sufficient to state a claim.<sup>94</sup> This statement is understandable, as Rule 84 of the Federal Rules states, “The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”<sup>95</sup> When one looks at the forms of complaint endorsed by Rule 84, it seems clear that *Twombly* changed nothing, at least in regard to run-of-the-mill cases at common law. Either the form complaints are sufficiently “plausible” in a relatively simple case or “plausibility” is not required for such pleadings.

The problem is that only a small fraction of the cases seen in U.S. District Courts involve the sort of disputes these decades-old forms contemplate. Today’s federal docket includes dozens of causes of action that did not exist when the Rules were originally drafted, or when the committee radically revamped them in 1963. Trying to figure out which of today’s complaints require additional fact pleading to survive a post-*Twombly* “plausibility” motion to dismiss presents the district court judge with a conundrum. If, as *Iqbal* and its progeny suggest, the quantum of facts required in a pleading depends on the nature and complexity of the case, then the determination of

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90. *Id.* at 157.

91. *Iqbal*, 490 F.3d at 157-58 (emphasis added).

92. *Id.* at 158 (noting heightened pleading requirements only enforced when called for by Federal Rules of Civil Procedure).

93. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1973 n.14 (2007) (emphasis added).

94. *Id.* at 1970 n.10.

95. FED. R. CIV. P. 84.

where “plausible” falls between “conceivable” and “probable” will inevitably vary by jurisdiction and cause of action. After all, deciding what constitutes “enough facts” to render a claim plausible on its face is an inherently subjective endeavor.<sup>96</sup> Different judges have different ideas about what constitutes a complex case, and inconsistent results are inevitable.<sup>97</sup>

## VI. ANALYZING PLAUSIBILITY

Unfortunately, the Supreme Court did not include a definition of “plausible” in the *Twombly* decision. Perhaps the Court believed district judges would know a plausible complaint when they saw one, just as Justice Stewart knew pornography when he saw it.<sup>98</sup> In reality, however, the definition of plausibility is far from self-evident.

At the same time the Supreme Court was developing its “plausibility” standard for Rule 8 complaints, it was also dealing with the issue of plausibility in a heightened pleading context. Under the PSLRA, complaints alleging securities fraud claims must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.”<sup>99</sup> In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,<sup>100</sup> a case brought under the PSLRA and decided just one month after *Twombly*, the Supreme Court explained the PSLRA pleading requirement. A securities fraud complaint can only survive a motion to dismiss “if a reasonable person would deem the inference of scienter cogent and at least as compelling as any *plausible* opposing inference one could draw from the facts alleged.”<sup>101</sup> In this context, “plausible” obviously means “believable” as opposed to “conceivable.” The first definition of “plausible” in the dictionary is “[s]eemingly or apparently valid, likely, or acceptable; credible,” and the word’s primary synonym is “believable.”<sup>102</sup> In other words, under the PSLRA’s heightened pleading standard, a complaint must allege specific facts that make the inference of scienter at least as “believable” as any other inference. There is no doubt that this “comparative believability” standard is more stringent than the “plausibility” standard announced in *Twombly*; remember, the Court said that plaintiffs need only “nudge[] their claims across the line from conceivable to plausible.”<sup>103</sup> However, there is no reason to think that “plausible” means

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96. See *Twombly*, 127 S. Ct. at 1974 (requiring pleading of enough facts to state plausible claim of relief).

97. One thing is clear. Whether the Supreme Court so intended or not, many of the 2,000 plus motions to dismiss decided by district courts in the six months following *Twombly* would have come out differently before the decision.

98. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“trying to define what may be undefinable” with regard to pornography).

99. 15 U.S.C. § 78u-4(b)(2) (2006).

100. 127 S. Ct. 2499 (2007).

101. *Id.* at 2510 (emphasis added).

102. AMERICAN HERITAGE COLLEGE DICTIONARY 1067 (4th ed. 2002).

103. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).

anything different in *Twombly* than it does in *Tellabs*.

If *Twombly* indeed instructs district court judges to assess at the pleading stage whether facts pleaded in a complaint give rise to a “believable” (or “credible”) claim, we are inching perilously close to the line drawn by the Seventh Amendment, which provides, “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .”<sup>104</sup> Historically, district court judges have not been permitted to decide whether allegations are “believable.” Instead, judges are limited to ascertaining whether allegations are obviously frivolous or the product of delusion and fantasy. The believability of allegations that are not inherently irrational has ever been the province of juries, not judges. Requiring district judges to decide whether a plaintiff’s factual allegations are sufficiently “believable” to survive a motion to dismiss invites the type of constitutional attack that scholars are increasingly mounting on summary judgment motions—namely, that they deprive plaintiffs of their Seventh Amendment right to a jury trial in too many cases.<sup>105</sup>

This problem would be exacerbated if a district court, confronted with a Rule 12(b)(6) motion to dismiss, were to follow a surprising—and from my district court perspective, wholly unwelcome—suggestion made by the Second Circuit in *Iqbal v. Hasty*. As every first-year law student knows, a court confronted with a Rule 12(b)(6) motion to dismiss may consider only the text of the complaint and any document that is referred to and relied upon in the pleading.<sup>106</sup> In *Iqbal*, however, the Second Circuit said, “In order to survive a motion to dismiss under the plausibility standard of [*Twombly*], a conclusory allegation concerning some elements of a plaintiff’s claims might need to be fleshed out by a plaintiff’s response to a defendant’s motion for a more definite statement.”<sup>107</sup> The court went on to announce that the district court might, in its discretion, “permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff’s claims and a plaintiff may probe such matters as a defendant’s knowledge of relevant facts and personal involvement in challenged conduct.”<sup>108</sup> This suggestion from the

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104. U.S. CONST. amend. VII.

105. See Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 145-60 (2007) (arguing summary judgment unconstitutional under Seventh Amendment). Professor Thomas notes that Rule 12(b)(6) motions to dismiss—in contrast to motions for summary judgment—do not give rise to any Seventh Amendment concerns because Rule 12(b)(6) is based on the common-law demurrer, in which the defendant accepts plaintiff’s allegations as true but denies that they state any legally viable claim. *Id.* at 148-51. Of course, if some of the trends suggested by *Twombly* and its progeny play out, the Rule 12(b)(6) motion will cease to be anything like a demurrer (as that pleading was known at common law).

106. See 2 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE—CIVIL § 12.34 (3d ed. 1999) (providing list of sources courts may consider in deciding whether to grant dismissal under Rule 12(b)(6)). A court may only consider facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters of which the judge may take judicial notice. *Id.*

107. *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007).

108. *Id.*

Second Circuit is curious, as judges have long been forbidden to consider material outside the complaint on a motion to dismiss. Indeed, district judges are routinely cautioned to decide whether a motion should be treated as one to dismiss or one for summary judgment and to give both sides the opportunity to amplify the record if the court intends to consider material that is not specifically pleaded or referenced in the complaint.<sup>109</sup> The Second Circuit's casual suggestion that a district court might wish to order some discovery before considering a motion addressed to a pleading fundamentally misconceives the nature of the demurrer and undermines the procedural jurisprudence of Rule 12(b)(6) motions—jurisprudence that was as well settled as the “no set of facts” rule until *Twombly*.<sup>110</sup>

The Supreme Court addressed these Seventh Amendment concerns in its *Tellabs* decision. The Court explained that the PSLRA's “comparative plausibility” pleading standard did not violate the Seventh Amendment because “Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be proved to prevail on the merits.”<sup>111</sup> In essence, as Justices Scalia and Breyer suggested during oral argument, a congressionally mandated heightened pleading requirement is no different than a congressionally mandated amount-in-controversy requirement in diversity cases.<sup>112</sup> It surely lies within Congress's legislative power to shape pleading requirements for statutory claims, as the PSLRA did for securities fraud actions. And it is equally within Congress's power to amend the Federal Rules of Civil Procedure to impose heightened pleading requirements for certain common-law actions, as Rule 9(b) does for fraud claims.<sup>113</sup> As a result, if Congress sets a high bar that requires a

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109. See *First Fin. Ins. Co. v. Allstate Interior Demolition Corp.*, 193 F.3d 109, 114-16, 119-20 (2d Cir. 1999) (acknowledging courts' power to grant summary judgment sua sponte limited until all evidence presented).

110. The fact that *Iqbal* was a qualified immunity decision complicates any effort to extend its reasoning to other contexts. In the qualified immunity context, the idea of limited discovery before deciding a Rule 12(b)(6) motion actually makes sense. Several years ago, I devised a rule for handling qualified immunity motions at the outset of the case, as the Supreme Court said was appropriate in *Saucier v. Katz*. See 533 U.S. 194, 201, 207 (2001) (calling for early determination of whether constitutional right violated). My rule provided for some “limited and tightly controlled . . . discovery,” but not reciprocal discovery because the issue of qualified immunity should be decided on the basis of the plaintiff's allegations before discovery is conducted. See Individual Practices of Hon. Colleen McMahon, Rule 3.C, available at [http://www1.nysd.uscourts.gov/cases/show.php?db=judge\\_info&id=295](http://www1.nysd.uscourts.gov/cases/show.php?db=judge_info&id=295) (providing special rule for assertions of qualified immunity). I allow only a deposition of the plaintiff in order to flesh out his or her allegations. *Id.* I do not pretend, however, that a motion to dismiss on qualified immunity grounds is like a normal Rule 12(b)(6) motion because it goes beyond the four corners of the complaint, even if only on behalf of the plaintiff.

111. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2512 (2007).

112. Transcript of Oral Argument at 30-32, *Tellabs*, 127 S. Ct. 2499 (No. 06-484).

113. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002) (applying heightened pleading requirements of Rule 9(b)); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (noting Rule 9(b) requires greater particularity in pleading certain actions).

district court to assess the believability of allegations of fact, there may not be any Seventh Amendment issue.

Congress, however, has not tinkered with Rule 8 and its pleading requirements. In the absence of such congressional action, it is questionable whether the Supreme Court can, by judicial fiat, force district courts into factfinding-like exercises at the pleading stage. This is the constitutional concern that exists for non-PSLRA claims after *Twombly*. Authorizing limited discovery to accrete the record on motions to dismiss meddles with such motions in a particularly troublesome way, not just because of constitutional concerns, but because it seems to start a regression back toward common-law fact-based pleading—the very sort of pleading that was largely eschewed when Rule 8 was adopted. Perhaps there are cogent policy reasons for such a change, but Congress should endorse such an alteration to the Federal Rules.

## VII. OTHER CONCERNS

Several other unidentified consequences flow from the Supreme Court's *Twombly* decision.

First, different courts will inevitably exhibit different levels of tolerance for complaints that do not include a plethora of detailed factual allegations. As a result, it may be easier for a plaintiff to survive a motion to dismiss in one court than in another. This undermines the uniformity that underlies our federal judicial system and could encourage forum shopping.

Second, there are claims where important factual information is particularly within the control of the defendant.<sup>114</sup> This makes it harder for the plaintiff to allege enough facts to meet the plausibility standard. To assess the issue of “plausibility” in such cases, it is probably useful for district judges to invoke Rule 8(e) of the Federal Rules, which states, “Pleadings must be construed so as to do justice.”<sup>115</sup>

Third, the Supreme Court's decision in *Erickson v. Pardus* does more than send mixed signals about the reach of *Twombly*.<sup>116</sup> While some pro se claims have merit, many more do not. In non-prisoner cases, which I exclude because prisoners have virtually no opportunity to search for counsel, the fact that no lawyer is willing to take on an action for damages suggests that someone knowledgeable about the law has looked at the matter and concluded that the plaintiff is unlikely to prevail. If *Erickson* stands for the proposition that the “plausibility” standard should be applied less stringently to pro se litigants'

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114. Employment discrimination claims come to mind as an example of such claims. Few employees have access to anything except anecdotal information about the treatment of fellow employees who appear to be—but who may not actually be—similarly situated to themselves, or to their employer's justification for treating two employees differently.

115. FED. R. CIV. P. 8(f).

116. See *supra* note 65-73 and accompanying text (discussing *Erickson* and the Supreme Court's citation to *Twombly* in upholding pro se complaint).

claims than to the claims of represented plaintiffs, the peculiar result is that meritless pro se claims will more likely be litigated than marginal, or even “cutting edge,” claims brought by counsel. Pro se filings constitute twenty to twenty-five percent of the civil caseload of a district judge on active duty in the Southern District of New York; I do not believe the statistics are significantly different elsewhere in the country. Pro se litigation imposes a tremendous burden on district courts, which must ensure that an appropriate record is made, even in the least “plausible” cases, while dealing with untutored litigants who are sometimes not rational when it comes to their lawsuits. If the Supreme Court truly intended to relieve pro se litigants from meeting the same “plausibility” standard that is applied to the complaints of represented litigants, that would be an unfortunate outcome.

Fourth, as noted earlier, the *Twombly* decision created a lack of uniformity among lower courts in deciding what types of cases are subject to a heightened “plausibility” standard.<sup>117</sup> While open questions of law often remain unresolved for a long time, the uncertainty about this particular issue could linger even longer because the denial of a motion to dismiss is rarely appealable on an interlocutory basis.

Fifth, *Twombly* has serious implications for trial court case management. The Supreme Court may have thought it was providing relief to the federal docket by making it easier to dismiss complaints, but that will not be the result. Instead, district courts will have to entertain more motions to dismiss from defendants emboldened by *Twombly*, and they will spend more time deciding those motions. Further, if some of the more radical post-*Twombly* ideas become common practice—such as the Second Circuit’s suggestion in *Iqbal* that district judges permit “controlled” discovery before deciding motions to dismiss<sup>118</sup>—the disposition of Rule 12(b)(6) motions will be complicated in ways that I do not wish to imagine. The Supreme Court’s effort to weed out “implausible” cases will ultimately result in significant delay in the final disposition of every case—a very Dickensian result indeed.

#### VIII. FINAL THOUGHTS

How did this situation arise? It is possible—indeed, it is highly probable—that economic and policy considerations, such as the explosion of litigation in federal courts and the mounting cost of those lawsuits, led the Supreme Court to rethink Rule 8 of the Federal Rules of Civil Procedure in light of the common understanding of *Conley v. Gibson*. Because the rule was so old, well-settled, and uniformly interpreted, the logical way to rethink it would have been for the Judicial Conference to start the process of amending Rule 8. But

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117. See *supra* Part IV (discussing competing interpretations in application of *Twombly*).

118. See *supra* notes 107-110 and accompanying text (discussing *Iqbal* decision and Second Circuit’s suggestion of limited discovery).

amending the rules is cumbersome and time consuming, and ultimate power in that sphere lies with Congress, not the Court. As *Conley* had provided a judge-made gloss on Rule 8, perhaps the current Court felt comfortable putting its own gloss on the Rule. However, the majority's protestation that it had not changed the rule suggests some discomfort with the decision by the Court.

Nevertheless, the Court seemed to be concerned about the costs forced on defendants by lawsuits that were surviving the initial filters under the pro-plaintiff, "no set of facts" regime. In fact, the Court's majority justified the plausibility standard because unless "implausible" cases could be weeded out at the earliest moment, the "threat of discovery expense [would] push cost-conscious defendants to settle even anemic cases before reaching [summary judgment] proceedings."<sup>119</sup> It was precisely this concern that led Congress to pass the PSLRA, in order to discourage quick settlement of anemic securities fraud "strike" suits. Congress could certainly do the same thing for other sorts of lawsuits, but it has neither done so nor, as far as I know, given any indication that it intends to do so. Until Congress weighs in, the proper protection for cost-conscious defendants—as Justice Stevens said in his dissent—is conscientious case management by district judges.<sup>120</sup> It is unfortunate that the *Twombly* majority views the efforts of district judges in this regard to be less than adequate, commenting that "the success of judicial supervision in checking discovery abuse has been on the modest side."<sup>121</sup> But with hundreds of civil cases on their dockets, district court judges do their best. Moreover, criticism about case management from a Court that collectively lacks much experience with trial-level civil litigation is difficult to digest.

I submit that it is this very lack of experience as trial lawyers or judges that leads the Supreme Court to issue problematic decisions like *Twombly*. None of the Supreme Court's members has been a federal district judge,<sup>122</sup> and the members of the Court do not have appreciable federal civil trial experience.<sup>123</sup> Anyone with substantial experience in federal civil trials would understand the managerial burdens and inequities that can result when a long-settled rule of civil procedure is unsettled in the wake of a vague, confusing, and inherently contradictory opinion like *Twombly*.

The standard for pleading a claim must be clear, and it must be the same for everyone. The pleading standard should not have to be discerned from clues left in various decisions; reading tea leaves and entrails does not lead to clear thinking or consistent results. Finally, given the volume and variety of

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119. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007).

120. *Id.* at 1987 n.13 (Stevens, J., dissenting) (arguing district courts can control discovery costs through case management and citing effective Rules).

121. *Id.* at 1967.

122. Justice Souter was a state court trial judge, which makes his authorship of the *Twombly* majority opinion utterly mystifying.

123. Justice Alito has federal trial experience, but only on the criminal side.

litigation, the pleading standard should not be complicated or cumbersome to apply. If the Supreme Court felt that the “no set of facts” formulation was not working in particular contexts, it should have identified exactly when a “short, plain statement of the claim” would require factual amplification. Not knowing how a particular court will understand or interpret *Twombly* actually works to the prejudice of those cost-conscious defendants about which the Court was concerned and to the prejudice of every other litigant as well. Until the ramifications of *Twombly* are better understood, we can expect to see more and more pleadings that read like the formalistic pleadings of yore, bedeviling litigants and courts alike.