

THE TOLL OF *BELL ATLANTIC CORP. V. TWOMBLY*: AN ARGUMENT FOR TAKING THE EDGE OFF THE ADVANTAGE GIVEN DEFENDANTS

INTRODUCTION

Federal Rule of Civil Procedure 8 is the “keystone” of federal civil procedure.¹ According to Rule 8(a)(2), pleadings must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”² The interpretation accepted for decades was that a claim could survive a motion to dismiss—and thus proceed to a hearing on the merits—so long as there were any chance of judgment in the plaintiff’s favor.³

In May 2007, the Supreme Court disturbed this long-held understanding of Rule 8(a)(2) with its decision in *Bell Atlantic Corp. v. Twombly*.⁴ The plaintiff, William Twombly, filed suit on behalf of a class of telephone and Internet users, alleging that several telecommunications companies had violated federal antitrust laws.⁵ On the basis of the pleadings alone, the Court dismissed the case, saying that it was “conceivable”—but not “plausible”—that the companies had conspired with each other.⁶ The sometimes self-contradicting decision has caused widespread disagreement among both courts and commentators. Whether or not the Court meant it to happen, many lower courts have interpreted *Bell Atlantic* as heightening pleading standards.

Bell Atlantic has been applied in a way that unfairly burdens plaintiffs and protects defendants. Raising the standard of Rule 8 makes it easier for defendants to escape liability by making it harder for plaintiffs to have their day in court. Under *Bell Atlantic*, a claim that is “conceivable” but not “plausible” is subject to summary dismissal.⁷ If a judge looks at the pleadings and thinks the defendant is as likely as not to be liability-free, then the plaintiff’s claim is deemed meritless and thrown out.⁸

1. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 1202, at 87 (3d ed. 2004) (1969) [hereinafter WRIGHT & MILLER VOL. 5]. Terms of subsequent reference to the Federal Rules of Civil Procedure, or its constituent rules, are “Federal Rule(s)” or “Rule(s).”

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

3. *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (“[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim . . .”).

4. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1973–74 (2007).

5. *Id.* at 1962.

6. *Id.* at 1974.

7. *Id.*

8. *See id.* at 1964 (portraying parallel conduct as “consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy”); *see id.* at 1966 (explaining that “[a] statement of parallel conduct,” without more, “stays in neutral territory”); *id.* at 1971 (quoting

Tinkering with Rule 8 is dangerous because of its central role in federal procedure. By defining pleading standards, Rule 8 acts as the gatekeeper to the federal court system. A higher pleading standard increases the likelihood of dismissal before a trial on the merits; a dismissal is a denial of access to the entire system of federal civil justice. The privilege of having a claim of right heard and judged under the laws of the United States should not casually be eroded.

I. HISTORY OF PLEADING PRACTICE

Reviewing the history of civil pleading accomplishes three purposes. First, history provides the context of the *Bell Atlantic* decision. Second, history traces the long-evolving understanding of what civil pleading should accomplish. Third, it informs an appropriate response to *Bell Atlantic*.

American civil law has its roots in English common-law practice. Over the course of hundreds of years, English civil pleading follows a trend that begins with procedural technicality and unfairness in the courts. Defects in systems of procedure frequently drew judges' attention away from the claims and rights of the parties. Instead of addressing the substantive issues, judges were preoccupied with the "correctness" of the pleadings. Jurists slowly realized that this preoccupation with formal pleading standards made it easier for defendants to escape liability. This realization led to a preference for allowing claims to proceed to the merits.

A. Pleading During the Middle Ages

Those seeking legal redress in England in the Middle Ages were faced with two choices: the burdensomely technical route through the courts of law or the burdensomely factual route through the courts of equity.⁹ Making things worse, the rules for choice of forum were confusing; it was common for litigants to be sent out of one court and into another because they had made their claims in the wrong forum.¹⁰

In A.D. 1178, King Henry II established the Court of the Common Bench (later "Common Pleas") to "hear all the complaints of the kingdom,

Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 256 (S.D.N.Y. 1995) ("[T]he defendants' allegedly conspiratorial actions could equally have been prompted by lawful, independent goals which do not constitute a conspiracy.").

9. See EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW 163–64, 168–73 (1913) (detailing the excessively complicated dichotomy between the English courts of law and equity).

10. FREDERICK POLLOCK, GENIUS OF THE COMMON LAW 27 (1912). Pollock called the forms of action "not even logical," and noted that "it was often difficult to be sure what the proper form of action was." *Id.*

and do right.”¹¹ History betrays the irony of this statement of purpose: would-be plaintiffs had to deal with a system that seemed designed to keep litigants out of court.

The Common Bench never came close to hearing “all the complaints of the kingdom.” From an early time, inflexible formal procedures clogged the road to judicial relief.¹² Regardless of the merits of the claim, no action could proceed without having both parties before the court, and securing the defendant’s presence was particularly troublesome.¹³ The only way that the Common Bench could compel a defendant’s appearance was through the “laborious and costly” process of “outlawing” the defendant.¹⁴

The “rival” Courts of the Exchequer and King’s Bench had easier methods of getting a defendant into court.¹⁵ These courts were specifically concerned with the king’s business.¹⁶ The strength of the royal interest allowed these courts to issue writs ordering a defendant’s arrest. Once arrested, a defendant would be compelled to answer the king’s charge.¹⁷

The availability of pretrial arrest led to a practice of securing a defendant’s appearance in a civil matter—a dispute between citizens—on the pretext of a complaint of trespass, which was an offense against the king.¹⁸ Fictitious legal claims, unrelated to the plaintiff’s real complaint, became a standard trick for triggering a court’s jurisdiction. For example, a plaintiff who wanted to collect on a debt would file a trespass complaint in the Court of King’s Bench, and the court would direct a sheriff to arrest the defendant on mesne process.¹⁹ Once the defendant (and the proceedings)

11. JENKS, *supra* note 9, at 168–69. Some authors caution against regarding the establishment of “the Bench” as “a sudden creation of a new court”—that it was rather “the culmination of a number of earlier experiments.” ALISON REPPY, INTRODUCTION TO CIVIL PROCEDURE: ACTIONS AND PLEADING AT COMMON LAW 5 n.8 (1954) (quoting THEODORE F. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 141 (4th ed. 1948)).

12. See 9 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 8 (Methuen & Co., Ltd. & Sweet & Maxwell 1966) (1926) (“[T]he procedure of the courts in those days, and especially the procedure in the real actions, was noted for its technicality and its dilatoriness . . .”).

13. JENKS, *supra* note 9, at 169.

14. *Id.* at 170.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* Trespass was considered “a breach of the King’s peace,” and thus of direct interest to the king. *Id.*

19. *Id.* “Arrest on mesne process” is an historic term referring to arrest before trial in a civil case. BLACK’S LAW DICTIONARY 116 (8th ed. 2004). The early British courts battled each other over jurisdictional boundaries, and in response to the encroachment of the King’s Bench into civil-law territory, the Court of Common Bench “claimed original jurisdiction in Trespass from a very early date.” JENKS, *supra* note 9, at 172. This had, at least, the effect of increasing the likelihood that civil cases would remain within the court in which such claims were originally intended to be brought.

The use of arrest on mesne process, originally limited to trespass, was extended by statute

came before the court, the trespass charge would be “quietly dropped” and replaced with the actual complaint of debt.²⁰ The Court of the Exchequer acquired jurisdiction in ordinary civil cases by entertaining similar sleights of hand.²¹ Labyrinthine procedures for simple civil matters were a defining feature of the arbitrary and counterintuitive medieval British system.

Complications and dogmatic technicalities pervaded the process. Before filing a complaint, a claimant had to get a writ from the clerks of chancery.²² Writs were “strictly limited to cases where precedents existed.”²³ If a plaintiff could not fit a claim into “the arbitrary units comprising the forms of action,” courts of law had no jurisdiction over the claim.²⁴ The common-law forms of action had “great differences” in procedure, once but no longer meaningful, which “remained as a mere oppression of the suitor.”²⁵ The plaintiff found himself “beset with various traps” hidden within these procedural variances, which might either cut his action short or embroil him in further expense.²⁶ Pursuing a suit at common law had come to “resemble an obscure game of chance.”²⁷

Alongside the courts of law, the courts of equity developed, growing out of the realization that rigid legal rules were not sufficiently prescient to ensure justice in all cases.²⁸ The greater flexibility of equity courts forestalled

in 1352 to “actions of Debt, Detinue, and Replevin.” *Id.* A statute of 1444 was intended to limit the impact on defendants of the use of arrest in civil actions by providing for “reasonable” bail for the defendants, but its effectiveness was slight and short lived. *Id.* at 173. A provision for “special bail” became the norm rather than the exception, and in 1503, arrest on mesne process was again extended to the action of Case, which included contract actions and many tort actions. *Id.* at 172–73. Battles between the legislature and the courts over the use of arrest on mesne process continued into the eighteenth century. *Id.* at 348. It was not until 1838 that the practice was abolished, with the exception of cases in which the defendant was preparing to leave the country to avoid the dispute in court. *Id.*

20. JENKS, *supra* note 9, at 170.

21. A “Writ of Quominus” created the legal fiction that the plaintiff owed money to the King, and the defendant to the plaintiff, so the defendant’s delay in paying the plaintiff put the plaintiff in default to the King. *Id.* at 172. As did a claim of trespass, the claim on behalf of the royal revenue allowed arrest “as a matter of course.” *Id.*

22. Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 527 (1925).

23. *Id.*

24. *Id.* at 528; see FREDRIC WILLIAM MAITLAND, *EQUITY: ALSO THE FORMS OF ACTION AT COMMON LAW* 5 (1929) (noting that fourteenth-century courts were “very conservative” and routinely quashed writs “differ[ing] in material points from those already in use”).

25. JENKS, *supra* note 9, at 349.

26. *Id.* at 350.

27. *Id.*

28. See MAITLAND, *supra* note 24, at 4–5 (describing early equity powers in the Courts of Chancery as often arising from cases where a petitioner pleads for relief “for the love of God and in the way of charity,” even though the law provides no specific remedy for his complaint). Maitland depicted equity jurisdiction as addressing ordinary cases that “escaped the meshes” of the courts of law, the implication being that equity was not so much a complement to law as an ad hoc fix to systemic

the need for reform in the courts of law.²⁹ Most significantly, equity was free of the forms of action;³⁰ chancellors could issue new writs³¹ and courts of equity could hear claims that courts of law would not recognize.³²

Pleadings in equity carried other burdens. Equitable pleadings were detailed and lengthy since they alone provided the factual basis for the court's decision.³³ Contrary to the practice in courts of law, equity courts had no juries; the presiding judge made findings of both law and fact.³⁴ This emphasis on the pleadings' contents made pursuing an equitable claim a risky maneuver. Plaintiffs were bound by their averments, so new evidence revealed during the course of a trial could not salvage a suit doomed by the pleading of incorrect or insufficient facts.

B. Pleading Under English Practice

1. Common-Law Pleading

The civil practice that had crystallized in England by the end of the fourteenth century remained largely unchanged for the next several hundred years.³⁵ The law continued to develop in other areas, but evolution of pleading practice stagnated.³⁶ Pleading in the courts of law revolved around the few forms of action that courts recognized. Although the courts of equity helped to address the limitations of the law courts, they did not solve the problems of the early British legal system.³⁷

During the eighteenth century, courts relaxed the strict pleading standards somewhat, increasing their willingness to allow parties to amend pleadings.³⁸ A plaintiff could claim factual details under a "videlicet,"

problems. *Id.* at 6. In the eighteenth century, Blackstone took a similar view of equity powers, saying that courts of law and equity both "are equally bound, and equally profess, to interpret statutes according to the true intent of the legislature." 3 WILLIAM BLACKSTONE, COMMENTARIES *430.

29. Clark, *supra* note 22, at 528.

30. *Id.*

31. See MAITLAND, *supra* note 24, at 5 (explaining that new writs would enable a petitioner to bring a legal action rather than a suit in equity).

32. *Id.* at 4–5.

33. Clark, *supra* note 22, at 528.

34. MAITLAND, *supra* note 24, at 5.

35. See Clark, *supra* note 22, at 527–30 (discussing civil practice in the thirteenth century, then moving directly to the parliamentary reforms in the nineteenth century).

36. See JENKS, *supra* note 9, at 349 (noting "the almost dead blank of the eighteenth century" regarding pleadings).

37. Clark, *supra* note 22, at 529 (noting that the bifurcation "into two systems with two courts entirely distinct from each other intensified the defects inherent in each system").

38. William Searle Holdsworth, *The New Rules of Pleading of the Hilary Term, 1834*, 1 CAMBRIDGE L.J. 261, 266 (1923).

which would qualify the factual claims and permit some flexibility in what the plaintiff actually proved at trial.³⁹ Defendants continued to retain the power to plead the “general issue,” which amounted to a blanket controversion of the plaintiff’s claims, and sidestepped much of the detail and danger of the point-by-point pleading that courts otherwise required.⁴⁰ Courts began more and more to favor pleading the general issue; eventually it became the default response for defendants, and specific denials or counterarguments were saved for the evidentiary stage of trial.⁴¹ This development had the effect of placing the burden of proof on the plaintiff for every element of his or her claims.⁴²

2. The Uniformity of Process Act of 1832

In 1828, the English Parliament appointed the first of a series of commissions to examine the law of procedure and recommend changes.⁴³ The commission’s recommendations led to the Uniformity of Process Act of 1832, which swept aside many of the inconsistencies in procedure.⁴⁴ Generally, every common-law personal action was to follow the same process, at least in the initial phases of litigation.⁴⁵ The Act included a significant departure from the historical practice requiring the presence of the defendant: under the Act, civil actions could proceed in the defendant’s absence.⁴⁶

In 1832, British practice started to show a promising trend toward simplicity and fairness in civil procedure. By clearing the books of the cumbersome and outdated differences in pleading practice, the Uniformity of Process Act made it easier than it had been in the past six centuries for a plaintiff to bring a case in court. Just as important, arrest on mesne process began to wane in importance.⁴⁷ However promising this trend, a parallel course of legislative and judicial action pushed civil pleading to a peak of prolixity and formalism.

39. *Id.*

40. *Id.*

41. *See id.* at 266–68 (tracing the increasing frequency in the courts of pleading the general issue, as well as the legislature’s endorsement of the practice).

42. *Id.* at 268.

43. Clark, *supra* note 22, at 530.

44. *See JENKS, supra* note 9, at 350 (highlighting a primary feature of the Act, which is its unification of the various pleading standards).

45. *Id.* The plaintiff would issue “a simple writ of summons stating briefly the nature of the action” and requiring the defendant’s appearance. *Id.* The writ was personally served on the defendant if at all possible. *Id.*

46. *Id.*

47. *Id.* at 348.

3. The Hilary Rules of 1834

The Civil Procedure Act of 1833 vested courts with the power to make their own procedural rules.⁴⁸ This gave rise to the Hilary Rules of 1834. The Hilary Rules were a paradigmatic example of “code pleading,” which placed its emphasis on a detailed statement of facts.⁴⁹ This emphasis was intended to give each party better notice of the others’ claims and defenses than had the common-law system.⁵⁰ It was thought that greater specificity in pleadings—free of plaintiffs’ *videlicets* and defendants’ general-issue answers—would reduce the risk of surprise to the parties, narrow the issues, and reduce trial expenses.⁵¹

The heralded benefits never came. Far from streamlining civil cases, the “extensive detail and strict standards” required under the Hilary Rules had a “disastrous” effect, resulting in a flood of litigation focused on the technicality of the Rules themselves.⁵² By making “special pleading”—the pleading of detailed facts—a requirement in every case instead of optional,⁵³ the attempt at reform had only made a bad situation worse. The purpose of the new rules was to facilitate making decisions on the merits, but under this rigid and unforgiving system, courts disposed of one in every four cases on the pleadings alone.⁵⁴

So what accounts for this quasi-legislative, quasi-judicial misstep? Much of the answer comes from the judicial philosophy prevailing at the time. Jurists viewed the common-law system of pleading as a science.⁵⁵ Lawyers insisted that “its rules were so logical as to be inevitable,” and that any major change would be ruinous.⁵⁶ Lord Mansfield⁵⁷ characterized the

48. Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1324 n.195 (1993) (quoting JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 25 (1977)).

49. See REPPY, *supra* note 11, at 33 n.121 (outlining the differences between issue pleading, code pleading, and notice pleading).

50. *Id.* at 787 n. 32 (quoting SAMUEL WARREN, LAW STUDIES 39 (1846)).

51. *Id.* at 787–88 n.32.

52. Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform*, 57 COLUM. L. REV. 518, 520 (1957).

53. Holdsworth, *supra* note 38, at 261.

54. Clarke B. Whittier, *Notice Pleading*, 31 HARV. L. REV. 501, 507 (1918). Compare this one-in-four rate under the Hilary Rules with the one-in-six rate under common-law pleading and with the one-in-seventy-six rate after pleading reform in English practice. *Id.*

55. Holdsworth, *supra* note 38, at 262.

56. *Id.* (explaining that nineteenth-century lawyers felt that any radical change to the common-law pleading system would “inflict damage not only on the law of pleading but on the common law as a whole”).

57. Mansfield was an “extraordinarily influential” jurist who spent many years as the Chief Justice of the Court of King’s Bench, and a staunch advocate of the “intrinsic value of the common law.” JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 9 (2004).

rules of pleading as “founded in strong sense and the soundest and closest logic”;⁵⁸ Blackstone spoke of the “science of special pleading.”⁵⁹ From this perspective, it was only natural to codify the system of special pleading and develop it to its fullest extent.

C. *The New York Code of 1848*

By the middle of the nineteenth century, the gradual accumulation and overrefinement of rules had calcified American civil procedure in much the same way as had occurred in English practice.⁶⁰ American reformers had only to look to the English experience under the Hilary Rules to know that special pleading was no solution.

New York was the first state to jettison common-law pleading, an effort that began with a revamped state constitution in 1846.⁶¹ The 1846 Constitution merged law and equity jurisdiction into a single tribunal and established a commission to update the rules of procedure.⁶² Under the leadership of David Dudley Field—who realized that civil procedure needed to be simplified, not elaborated—the commission produced the New York Code of 1848, also known as the Field Code.⁶³

In many ways, the Field Code was an improvement over the common-law rules.⁶⁴ It cast away the forms of action⁶⁵ and emphasized liberal construction of pleadings.⁶⁶ Complaints had only three requirements: first, basic identifying information; second, a statement of facts “in ordinary and concise language” that showed that the plaintiff had a cause of action; and third, a demand for relief.⁶⁷ The idea was to build on the useful parts of

58. Holdsworth, *supra* note 38, at 263.

59. 3 WILLIAM BLACKSTONE, COMMENTARIES *305–06. *See also* WRIGHT & MILLER VOL. 5, *supra* note 1, § 1202, at 90 (calling common-law pleading “wonderfully scientific”).

60. *See* HENRY M. FIELD, THE LIFE OF DAVID DUDLEY FIELD 43 (New York, Charles Scribner’s Sons 1898) (describing New York practice at common law and in equity as “complicated by a multitude of legal technicalities that made of it almost an occult science”).

61. GEORGE A. MILLER, AN INTRODUCTION TO PRACTICE WITH SPECIAL REFERENCE TO THE NEW YORK CODE OF CIVIL PROCEDURE 1 (1903); *see* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 370 (3d ed. 2002) (referring to the Field Code of 1848 as the first state merger of law and equity).

62. MILLER, *supra* note 61, at 1.

63. *Id.* The Field Code underwent substantial revisions the following year, but these revisions are not relevant to this discussion. NEW YORK, THE CODE OF PROCEDURE OF THE STATE OF NEW YORK: FROM 1848 TO 1871, at v (1870). *See also* FIELD, *supra* note 60, at 42–49 (describing David Dudley Field’s career as a legal reformer and his involvement in the 1848 Code).

64. *See* William Wirt Blume, *The Scope of a Civil Action*, 42 MICH. L. REV. 257, 260 (1943) (noting that the New York Code was widely copied by other states).

65. NEW YORK, *supra* note 63, at 3.

66. *Id.* at 114.

67. *Id.* at 103–04. In 1851, the second requirement, a statement of facts, was amended to read:

common-law pleading and to shed “that which had become merely technical and burdensome.”⁶⁸

But New York’s code did not divest civil pleading of all its relics. The plaintiff had to show that he had a “cause of action,” but there was never a good definition of what a cause of action was.⁶⁹ Under the code, one had to plead facts, but could not plead evidence or conclusions—a distinction that was easy enough to articulate on paper but difficult to maintain in practice.⁷⁰ Litigation foundered on attempts to define the differences among the three.⁷¹ The practical difficulties of the false distinctions among facts, evidence, and conclusions led courts to interpret the code creatively “to avoid either technical dispositions regardless of merits or virtually impossible drafting standards.”⁷² In cases of some kinds, courts strictly upheld the requirement of pleading facts; in other cases, pleading was flexible; in still other cases, there was no predictable standard.⁷³ Despite the code’s exhortation to do substantial justice, code procedures had a “harsh and scholastic insistence upon literal conformity” that came at the price of clarity and functionality.⁷⁴

Viewed now through the lens of history, the Field Code of 1848 stands as an intermediate step in the evolution of civil pleading.⁷⁵ The code’s

“A plain and concise statement of the facts constituting a cause of action without unnecessary repetition.” *Id.* at 104.

68. MILLER, *supra* note 61, at 28.

69. Weinstein & Distler, *supra* note 52, at 521. *See also* Blume, *supra* note 64, at 261 n. 14 (quoting 1 JAMES W. MOORE, FEDERAL PRACTICE 145 (1938)) (referring to the “morass of decisions” necessitated by “the troublesome ‘cause of action’”); *id.* at 258, 261 (condemning the ill-defined “cause of action” as “one of the greatest weaknesses of the code”); Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L. Q. 297, 312 (1938) (derogating the term “cause of action” as “quite undefined . . . and destined to a long, inglorious, and destructive career”).

70. HAROLD R. MEDINA, SUMMARY OF NEW YORK PLEADING PRACTICE AND EVIDENCE WITH FORMS 25 (13th ed. 1938). Medina offers an example meant to show the difference between evidence and facts:

If material fact is that certain paper was not filed in Register’s office, it is bad pleading to allege that a search of the Register’s office was made and the paper could not be found there. The *fact* was that the paper had not been filed; the *evidence* was that a certain person searched and could not find it. From such *evidence* at the trial the jury or court might infer the *fact* that the paper had not been filed.

Id. at 25–26.

71. *See* Weinstein & Distler, *supra* note 52, at 521 (noting the “lengthy disputes” that followed from attempts to define phrases like “facts constituting a cause of action”).

72. *Id.*

73. *Id.* In some circumstances, courts would allow pleading of both evidence and conclusions, the former in the interest of providing adequate notice, the latter “to avoid unnecessary prolixity.” *Id.*

74. Robert Wynes Millar, *Notabilia of American Civil Procedure 1887–1937*, 50 HARV. L. REV. 1017, 1039 (1937).

75. *See id.* at 1041 (describing the code system as a “hybrid” of rigid and flexible systems of

liberalization was radical for the time, but its reliance on common-law pleading principles doomed New York litigants to continual time-wasting battles over such issues as the distinction between facts and evidence. Too many cases were still preoccupied with formalisms and drawn away from the live controversy between the parties.

D. The Federal Rules of Civil Procedure

Simplicity, brevity, certitude. . . such are the distinctive characteristics of a good system of procedure.⁷⁶

Just as the ship that is in the water too long becomes encrusted with barnacles, so legal proceedings may become encrusted with tradition; and some of them may from time to time need to be scraped off.⁷⁷

Congress had long understood the practical value of allowing courts to make their own procedural rules, but by the 1930s, federal civil procedure had become a confusing mess. Under the Process Acts of 1789 and 1792, and the 1793 amendments thereto, the federal courts had rule-making authority in common-law, equity, and admiralty actions, but not for actions at law.⁷⁸ For actions at law, the Process Acts required federal courts to follow state procedures.⁷⁹ Federal courts created their own procedural rules in some situations, but were bound by state law in others. The result was a mishmash of rules especially inconsistent in the circuit courts.⁸⁰

procedure). The text accompanying this footnote differs somewhat from Millar's characterization of code systems. "Hybrid" suggests that code systems were an intentional combination of rigid and flexible systems; "intermediate step" suggests that code systems were part of an evolutionary process in pleading practice.

76. Millar, *supra* note 74, at 1070 (quoting PIERRE FRANÇOIS BELLOT, *LOI SUR LA PROCÉDURE CIVILE DU CANTON DE GENÈVE AVEC L'EXPOSÉ DES MOTIFS* 12 (4th ed. 1877)). Bellot was the author of the Genevan Code of Civil Procedure of 1819. Eugen Huber, *Switzerland, in A GENERAL SURVEY OF EVENTS, SOURCES, PERSONS AND MOVEMENTS IN CONTINENTAL LEGAL HISTORY* 483, 528 n. 3 (John Henry Wigmore et al. eds., 1912). He was also a professor of criminal and Roman law at the Academy of Geneva at a time when the Academy was among the most prominent universities in Europe. *Id.*

77. JOHN P. FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* 129 (1969).

78. Mullenix, *supra* note 48, at 1324–25.

79. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE* § 1002, at 11 (3d ed. 2002) (1969) [hereinafter *WRIGHT & MILLER VOL. 4*].

80. *Id.* at 11, 15. A major part of the problem was that the original Process Acts (also known as the Conformity Acts) required federal courts to apply state procedural law as it existed in 1789, so when state procedural-reform movements began, the federal courts remained mired in common-law procedure. *Id.* at 11, 14–15, 17–18. A "more flexible Conformity Act" passed in 1872 allowed federal courts to follow current state practice, but "no significant simplicity or uniformity in practice resulted." *Id.* at 15–16.

The need for federal procedural reform was clear.⁸¹ Wishing to unify federal civil practice, Congress passed the Rules Enabling Act of 1934, empowering the Supreme Court to create rules of procedure.⁸² By the authority of the Rules Enabling Act, the Court appointed an Advisory Committee on Civil Rules to aid in drafting the new rules, leaving to them “much of the actual work of drafting and research.”⁸³

The Advisory Committee was the juggernaut that orchestrated and executed the overhaul of federal procedure.⁸⁴ The reform was a gargantuan effort.⁸⁵ The committee spared itself no pains in its task. Each of the committee’s preliminary drafts was circulated to thousands of lawyers, judges, and teachers for comments.⁸⁶ Bar committees and law review articles scrutinized the draft Rules.⁸⁷ Each member of the Advisory Committee received copies of the comments on and criticisms of the draft Rules.⁸⁸ In round after round of review, the committee made changes based on these comments.⁸⁹ The feedback from the legal community enabled the development of “the best and most workable rules” that the Committee could write⁹⁰—rules that had already “run the gauntlet of examination and criticism”⁹¹ from those whom the rules would affect.

When the Federal Rules of Civil Procedure came into effect on September 16, 1938,⁹² they “were instantly recognized as the standard

81. *See id.* at 16 (observing the “atmosphere of uncertainty and confusion” that pervaded federal procedure prior to 1938). David Dudley Field, author of the New York Code of 1848, advocated for a federal code of procedure as far back as 1886. *Id.* at 18.

82. Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (current version codified at 28 U.S.C. § 2072 (1988)).

83. WRIGHT & MILLER VOL. 4, *supra* note 79, § 1004, at 28–29. The Reporter for the Advisory Committee was the eminent Charles E. Clark, Dean of the Yale School of Law. Clark, *supra* note 69, at 299. Clark was appointed Chief Judge of the Second Circuit Court of Appeals in 1939. *See, e.g., Annie Clark Married to Edgar Stewart*, N.Y. TIMES, Sept. 1, 1985, § 1, available at 1985 WLNR 588603 (noting that Clark was appointed to the Second Circuit in 1939). For a list of the various eminent lawyers and law professors that have made up the various Advisory Committees over time, including the original Committee, see WRIGHT & MILLER VOL. 4, *supra* note 79, § 1007, at 38–44.

84. WRIGHT & MILLER VOL. 4, *supra* note 79, § 1005, at 31–32.

85. Speaking of the recursive process of drafting the Rules, Clark wrote: “No finer example of collective effort of the profession for reform has been known. It shows the possibility of effective procedural reform at its best.” Clark, *supra* note 69, at 308 (citations omitted).

86. WRIGHT & MILLER VOL. 4, *supra* note 79, § 1005, at 32.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 31–32 (quoting ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, at iii (1954)).

92. *Id.* § 1004, at 30–31.

against which all other systems of procedure must be judged,”⁹³ given “almost uniform approval” by judges and lawyers alike.⁹⁴ There has been some tweaking of the Rules since their original promulgation, but the legal world has remained largely free of the clamor for reform that pervaded the decades prior to 1938.⁹⁵

1. Federal Rule of Civil Procedure 8

The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.⁹⁶

It is apparent from a rudimentary analysis that pleading rules set the stage for any civil claim. The standards for pleading determine whether a plaintiff can have a claim heard in court. No matter how favorable or protective the substantive laws may be, such laws are useless if a claimant cannot get into court. Recognizing the injustice of prior systems, which so frequently disposed of claims without ever addressing the merits, the Advisory Committee on Civil Rules drafted Rule 8 to minimize the chance of a meritorious claim being thrown out because of a technical defect in the pleadings.⁹⁷

93. *Id.* § 1005, at 31.

94. *Id.* § 1008, at 54. Wright and Miller follow with this observation:

The chorus of approval by judges, lawyers, and commentators has been virtually unanimous, unstinted, and spontaneous. In the years following the adopting of the rules, many lawyers and judges throughout the country pressed for similar procedural rules in most of the states and many states have adopted a similar procedure in whole or in part. This is no doubt due to the common sense, simplicity, and flexibility of procedure that are the chief characteristics of the Federal Rules of Civil Procedure.

Id. at 55–56 (citations omitted).

95. Professor Millar described the period of 1887–1937 as “strongly marked with the characteristic of all advancing systems, namely, progress in simplicity,” but not before referring to the “undeniable shortcomings” of federal procedure before 1938. *Millar, supra* note 74, at 1018. A notable exception to the widespread satisfaction with the Federal Rules was the movement for reform of Rule 8, discussed in Part I.D.1 *infra*.

96. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

97. *See* WRIGHT & MILLER VOL. 5, *supra* note 1, § 1202, at 90 (“The [code pleading] system was better calculated to vindicate highly technical rules of pleading than it was to dispense justice.”); *see also* ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, 1955 REPORT OF THE ADVISORY COMMITTEE PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS [hereinafter ADVISORY COMMITTEE], *reprinted in* 12A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL RULES app. F, at 645 (2008) [hereinafter WRIGHT & MILLER APPENDIX] (explaining that the Rules are designed “to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement”).

Procedural systems of the past have placed four broad categories of demands on the pleadings: (1) giving notice of a claim; (2) stating the facts as the parties believe them to be; (3) defining the issues; and (4) allowing prompt disposition of meritless claims and defenses.⁹⁸ Rule 8, which governs pleadings, is a major departure from the historical approach. Pleadings under the Rules need not establish a detailed set of facts; parties establish facts through discovery.⁹⁹ Issues are formulated and narrowed through discovery, pretrial conferences, or partial summary judgment.¹⁰⁰ Summary judgment also ensures that the only matters before a court are genuine controversies between the parties.¹⁰¹ Because all the other traditional functions of pleadings are provided for elsewhere in the Federal Rules, the sole purpose left entirely to the pleadings is providing notice.¹⁰²

Rule 8(a)(2) requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁰³ Noticeably absent from Rule 8(a)(2) is any mention of “facts,” “evidence,” “conclusions,” or a “cause of action.”¹⁰⁴ Phrasing pleading requirements in terms of entitlement to relief was meant to simplify pleading in two major ways. First, removing any technical pleading requirements would avoid the confusion surrounding the distinctions among “evidence,” “ultimate facts,” and “conclusions”—distinctions “virtually impossible” to maintain.¹⁰⁵ Second, this wording would end litigation preoccupied with defining a cause of action.¹⁰⁶

Rule 8(a)(2) “permit[s] the claim to be stated in general terms,” but still requires an “avertment of what has actually happened.”¹⁰⁷ A plaintiff must make some statement of the “circumstances, occurrences, and events” supporting the claim, but no technical forms are required.¹⁰⁸

A case decided less than six years after the Rules came into effect, *Dioguardi v. Durning*, pushed the limits of liberal pleading under Rule 8(a)(2).¹⁰⁹ In that case, Dioguardi, a pro se plaintiff with an “obviously home drawn” complaint, filed suit against the Collector of Customs in New

98. WRIGHT & MILLER VOL. 5, *supra* note 1, § 1202, at 88.

99. *Id.* at 89. Federal Rules of Civil Procedure 26–37 govern discovery.

100. *Id.* Federal Rule of Civil Procedure 56(d) governs partial summary judgment.

101. *Id.* Federal Rule of Civil Procedure 56 governs summary judgment generally.

102. *Id.*

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

104. WRIGHT & MILLER VOL. 5, *supra* note 1, § 1216, at 207; *see supra* notes 69–74 and accompanying text (summarizing the problems with the term “cause of action”).

105. Weinstein & Distler, *supra* note 52, at 520–21.

106. WRIGHT & MILLER VOL. 5, *supra* note 1, § 1216, at 207–08.

107. WRIGHT & MILLER VOL. 5, *supra* note 1, § 1200, at 86 n.11 (quoting ADVISORY COMMITTEE, *supra* note 97).

108. *Id.*

109. *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944).

York.¹¹⁰ Dioguardi claimed that the Collector sold Dioguardi's "bottles of 'tonics'" at auction after holding them for a year.¹¹¹ The District Court dismissed both the original and amended complaints, on the theory that the complaints "fail[ed] to state facts sufficient to constitute a cause of action."¹¹² In an opinion by Judge Charles E. Clark,¹¹³ the Second Circuit reversed the dismissal.

Judge Clark pointed out that under the Federal Rules, there is no need to plead a "cause of action," only "a short and plain statement of the claim showing that the pleader is entitled to relief."¹¹⁴ Since Dioguardi, "however inartistically," had stated facts that would establish a violation of federal law if proven true, the court could not justify depriving him of his "day in court."¹¹⁵

Dioguardi sparked a "considerable debate"¹¹⁶ over whether Rule 8(a)(2) should be amended to require complaints to include "facts constituting a cause of action."¹¹⁷ In 1952, the Ninth Circuit Judicial Conference adopted a resolution recommending an amendment to that effect;¹¹⁸ the resolution was ultimately referred to the Advisory Committee on the Civil Rules.¹¹⁹

After reconsidering all the arguments against simplified pleading, the Advisory Committee soundly rejected the proposed amendment in 1955.¹²⁰ The committee explained:

While there has been some minority criticism, the consensus favors the rule and the reported cases indicate that it has worked satisfactorily and has advanced the administration of justice in the district courts. . . .

It is accordingly the opinion of the Advisory Committee that, as it stands, the rule adequately sets forth the characteristics of good pleading; does away with the confusion resulting from the use of "facts" and "cause of action"; and requires the pleader

110. *Id.* at 774.

111. *Id.*

112. *Id.* (citation omitted in *Dioguardi*).

113. Judge Clark was "the principal draftsman of the federal rules." WRIGHT & MILLER VOL. 5, *supra* note 1, § 1220, at 245.

114. *Dioguardi*, 139 F.2d at 775 (quoting FED. R. CIV. P. 8(a) (1938) (amended 2007)).

115. *Id.*

116. WRIGHT & MILLER VOL. 5, *supra* note 1, § 1220, at 285.

117. *Id.* § 1216, at 239.

118. *Id.*

119. *Id.*

120. *Id.* at 239-40.

to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.¹²¹

The 1952 proposed amendment to Rule 8 was the last “serious suggestion[]” of a “reversion to the old pleading practice.”¹²²

The liberal pleading standards of Rule 8 remained essentially settled for more than half a century afterward. When the Supreme Court considered Rule 8(a)(2) a few years later, the result was a “ringing endorsement” of the Second Circuit’s interpretation in *Dioguardi*.¹²³ In *Conley v. Gibson*, a group of railroad workers filed a discrimination claim in federal district court, alleging that their collective-bargaining agent was not representing them fairly in labor disputes.¹²⁴ The district court dismissed the complaint, and the Fifth Circuit affirmed.¹²⁵ On appeal, Justice Black, writing for a unanimous Court, reversed.¹²⁶ *Conley* emphasized that the Federal Rules “do not require a claimant to set out in detail the facts” that would support the claim.¹²⁷ Citing *Dioguardi*, among other cases, Justice Black announced the interpretation of pleading standards that would become widely accepted: “[W]e follow, of course, the accepted rule 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.”¹²⁸ For more than half a century, *Conley* remained the leading case in evaluating the sufficiency of a complaint.¹²⁹

II. BELL ATLANTIC CORP. V. TWOMBLY

A. *The Court’s Opinion*

On May 21, 2007, the Supreme Court announced its decision in *Bell Atlantic Corp. v. Twombly*.¹³⁰ There is nothing exceptional about the facts of the case. The plaintiffs filed a putative class-action suit against the seven

121. WRIGHT & MILLER APPENDIX, *supra* note 97, at 645.

122. WRIGHT & MILLER VOL. 5, *supra* note 1, § 1216, at 240.

123. *Id.* § 1220, at 287.

124. *Conley v. Gibson*, 355 U.S. 41, 42–43 (1957).

125. *Id.* at 43–44.

126. *Id.* at 48.

127. *Id.* at 47.

128. *Id.* at 45–46.

129. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 1357, at 571 (3d ed. 2004) (1969) [hereinafter WRIGHT & MILLER VOL. 5B] (collecting Supreme Court cases reaffirming the *Conley* principle).

130. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

Regional Bell Operating Companies (collectively, Incumbent Local Exchange Carriers, or ILECs) created after the 1984 breakup of AT&T.¹³¹ The complaint alleged that the ILECs conspired to restrain trade in violation of § 1 of the Sherman Act.¹³² Specifically, the ILECs allegedly “engaged in parallel conduct” to put upstart communications companies at a competitive disadvantage¹³³ and that the ILECs had entered into agreements not to compete with each other.¹³⁴ Phrasing the question presented as “whether a [Sherman Act] § 1 complaint can survive a motion to dismiss when it alleges . . . parallel conduct . . . absent some factual context suggesting agreement, as distinct from identical, independent action,” the Court held that “such a complaint should be dismissed.”¹³⁵

At first glance, the Court’s holding makes no departure from precedent on § 1 claims. For nearly fifty years following the promulgation of the Federal Rules of Civil Procedure, courts refused to apply any heightened pleading requirements to antitrust claims.¹³⁶ However, in 1983, the Supreme Court stated in a footnote that “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”¹³⁷ Some lower courts interpreted this ruling as sanctioning a practice that some courts had already adopted: requiring the pleading of the factual circumstances constituting the conspiracy.¹³⁸ From this standpoint, *Bell Atlantic* is consistent with a doctrine that had been developing for more than thirty years.

But *Bell Atlantic* did not simply apply settled doctrine. There are two features of the case that make it unusual. First, the Court explicitly overruled *Conley v. Gibson*,¹³⁹ which had long set the standard for sufficiency of pleadings under Rule 8(a)(2).¹⁴⁰ According to *Conley*, “a

131. *Id.* at 1961.

132. *Id.* at 1962, 1962 n.1; Sherman Act, 15 U.S.C. § 1 (2004).

133. *Bell Atlantic*, 127 S. Ct. at 1962 (quoting Complaint ¶ 47, *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 2 Civ. 10220) [hereinafter *Complaint*]).

134. *Id.* (citing *Complaint* ¶¶ 41–42).

135. *Id.* at 1961.

136. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1012–13 (2003) (citing *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976); *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)).

137. *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).

138. Fairman, *supra* note 136, at 1015 (citing *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 273 (5th Cir. 1979); *Heart Disease Research Found. v. Gen. Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972)).

139. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007) (overruling *Conley v. Gibson*, 355 U.S. 41 (1957)).

140. As of December 2007, a Westlaw query revealed that *Conley* had been cited some 28,000 times for the issue of sufficiency of pleadings.

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.”¹⁴¹ Over the years, the Court had repeatedly affirmed the validity of *Conley*.¹⁴² *Conley*’s “no set of facts” standard had coexisted with the antitrust pleading standard since at least 1972,¹⁴³ yet it was not until *Bell Atlantic* that the Court overruled the *Conley* standard. The Supreme Court could have affirmed the district court’s dismissal of the *Bell Atlantic* complaint simply by reference to the Court’s 1983 endorsement of demands for “specificity” in “potentially massive” factual controversies.¹⁴⁴ Yet the Court chose not to take this expedient route, and the explicit decree that *Conley* had “earned its retirement” implies a change in the pleading standard.¹⁴⁵ Because courts employed *Conley* in almost every pleading context, the ramifications of overruling the decision may extend much further than antitrust law alone.

Second, the Court held that in order to survive a motion to dismiss, the plaintiff must make it appear “plausible” that he will prevail on the merits.¹⁴⁶ Because discovery in antitrust cases is “inevitably costly and protracted,”¹⁴⁷ the Court explained, a plaintiff should not be allowed to “take up the time of a number of other people”¹⁴⁸ if the complaint does not cross “[s]ome threshold of plausibility.”¹⁴⁹ The Court contrasted a “plausible” claim with a “conceivable” claim¹⁵⁰—the former being sufficient, the latter not—though the difference between them is not clear. The Court also emphasized a distinction between “the factually neutral and

141. *Conley*, 355 U.S. at 45–46 (emphasis added).

142. *See, e.g., McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) (quoting *Conley*, 355 U.S. at 45–46) (“It is axiomatic that a complaint should not be dismissed unless ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’”); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley*, 355 U.S. at 45–46) (“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.”); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (citing *Hishon*, 467 U.S. at 73) (quoting *Hishon*’s affirmation of the *Conley* pleading standard).

143. *See supra* note 138 and accompanying text (noting that lower courts had required more factual specificity in antitrust complaints since the Supreme Court’s apparent endorsement of the practice in 1983).

144. *See Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983) (“[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”).

145. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007).

146. *Id.* at 1963 (quoting *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005)).

147. *Id.* at 1966 (quoting *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003)).

148. *Id.* (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

149. *Id.* (quoting *Asahi Glass*, 289 F. Supp. 2d at 995).

150. *Id.* at 1974.

the factually suggestive,” explaining that only the latter “enter[s] the realm of plausible liability.”¹⁵¹ Under *Bell Atlantic*, “allegedly conspiratorial actions [that] could equally have been prompted by lawful, independent goals which do not constitute a conspiracy” do not support a cause of action.¹⁵² In other words, if a conspiracy and legitimate action are equally likely, there is a presumption of legitimacy.

Yet the *Bell Atlantic* majority explicitly denied imposing a heightened pleading standard.¹⁵³ Even as it overruled *Conley* and insisted that a claim must be plausible and not just conceivable, the majority embraced language from older cases that appears to state the opposite. *Bell Atlantic* reaffirmed that “a well pleaded complaint may proceed even if it appears ‘that a recovery is very remote and unlikely.’”¹⁵⁴ Likewise, “once a claim for relief has been stated, a plaintiff ‘receives the benefit of imagination, so long as the hypotheses are consistent with the complaint.’”¹⁵⁵

The conflicting signals defy reconciliation. The Court “retired” a landmark standard and announced a new one, then said that nothing has (really) changed. That reassurance suggests that the discussion of “plausibility” versus “conceivability” is nothing more than a new way of describing the same standard as before. But then why bother with the dissertation on pleading standards, and why abandon *Conley*? It would make no sense for the Court to nullify such frequently cited language simply because a Court majority disfavored the particular choice of words in *Conley*. Just as the Court itself would read a statute, all parts of the opinion should be construed to have meaning. Looking at it that way, the opinion is self-contradictory in its plain language. It is hard to understand how a complaint can show that relief is plausible, yet more than conceivable, while still being very remote and unlikely.

151. *Id.* at 1966 n.5.

152. *Id.* at 1971 (quoting *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 256 (S.D.N.Y. 1995)).

153. *Id.* at 1973 n.14.

154. *Id.* at 1965 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

155. *Id.* at 1969 (quoting *Sanjuan v. Am. Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994)). One possible resolution of the apparent inconsistency in the *Bell Atlantic* pleading scheme revolves around the phrase “claim for relief.” It is easy to skim past “claim for relief” and focus on “conceivable” and “plausible,” but the ill-defined phrase “claim for relief” may have become the modern equivalent of the code’s “cause of action.” Making sense of the Court’s praise liberal standards in the midst of *Bell Atlantic*’s rhetorical jungle requires reading “claim for relief” in light of the plausibility standard. Once a claim has been shown to be plausible, the claim is afforded the “benefit of the imagination” during a Rule 12(b)(6) motion to dismiss. A judge may not use his discretion to heighten pleading standards beyond (bare, simple) plausibility. Of course, given the uncertain meaning of “plausibility,” this secondary limit on judicial discretion is not very meaningful.

B. Justice Stevens' Dissent

Justice Stevens, writing in dissent, vigorously disputed the Court's reasoning and holding. He condemned the Court for basing their holding on concerns about expense to defendants and the risk of confusing the jury,¹⁵⁶ and criticized their lack of faith in the trial courts' ability to manage discovery.¹⁵⁷ He argued that overruling *Conley* was needless.¹⁵⁸ If the Court wanted to change its position on legal sufficiency in complaints of conspiracy, Stevens said, *Conley* was the wrong case to reverse.¹⁵⁹ He was appalled that the new standard for sufficiency of a complaint was the Court's substantive evaluation of a complaint's factual plausibility.¹⁶⁰

The problems with a sufficiency standard based on an appraisal of factual likelihood were several, he wrote. In the first place, substantive review on a motion to dismiss is counter to the spirit of the Federal Rules, which were designed "not to keep litigants out of court but rather to keep them in."¹⁶¹ Pleadings under the Rules are not meant to establish the merits of a case.¹⁶² That idea was discarded long ago, a relic of special pleading¹⁶³ and pleading in medieval courts of equity.¹⁶⁴ Pleadings are now meant to provide notice to defendants and allow them sufficient information to prepare their defense, with the merits emerging and the issues clarifying through the course of litigation. The specter of Rule 11

156. *Id.* at 1975 (Stevens, J., dissenting). Stevens contended that worries about a jury's possible confusion between proof of parallel conduct and proof of conspiracy could be allayed by "lucid instructions to juries." *Id.*

157. *Id.* at 1989.

158. *Id.* at 1978. Stevens noted that the ILEC petitioners and their amici had not asked the Court to overrule *Conley*. *Id.* at 1979.

159. *Id.* at 1974. The Court had previously held that "parallel conduct is circumstantial evidence admissible on the issue of conspiracy." *Id.* (citing *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-42 (1954)). Since the issue in *Bell Atlantic* centered on whether allegations of parallel conduct stated a claim under § 1 of the Sherman Act, *Theatre Enterprises* showed that a claim had been stated—meaning that the opposite holding should have been based on a reversal of *Theatre Enterprises*. *Id.*

160. *Id.* at 1975.

161. *Id.* at 1976. Stevens supported this statement with an overview of the Hilary Rules of 1834, the New York Code of 1848, and Equity Rule 25. *Id.* at 1975-76. He emphasized that the Advisory Committee on Civil Rules formulated Rule 8 specifically to implement the lessons learned from these systems and to respond to the problems of special pleading. *Id.* at 1976.

162. *Id.* at 1976. By looking to the "plausibility" of the complaint's allegations, the Court treated a motion to dismiss as an inquiry into the merits. Stevens objected that "fear of the burdens of litigation does not justify [the Court's] factual conclusions supported only by lawyers' arguments rather than sworn denials or admissible evidence." *Id.* at 1983.

163. See *supra* notes 54-56 and accompanying text.

164. See *supra* notes 28-34 and accompanying text.

looms in the background, carrying its threat of sanctions for groundless or abusive litigation.¹⁶⁵

Stevens decried the “plausibility” standard as a throwback to the discredited distinction between “facts” and “conclusions.”¹⁶⁶ A look at Form 11 in the appendix to the Federal Rules illustrates the summary nature of claims that are now legally sufficient. In a Form 11 complaint, the only stated ground for relief is the defendant’s negligent driving—which “would have been called a ‘conclusion of law’ under the code pleading of old,” and subject to dismissal.¹⁶⁷ Stevens saw the Court’s holding as antithetical to this philosophy.

It was with unmistakable regret that Stevens eulogized the passing of the *Conley* “no set of facts” standard.¹⁶⁸ He questioned the majority’s characterization of the *Conley* standard as puzzling.¹⁶⁹ Stevens noted that *Conley*, as well as several of the cases affirming the approach to Rule 8 that *Conley* took, were unanimous decisions, evincing an understanding of federal pleading standards that was consistent across the spectrum of conservative and liberal Justices.¹⁷⁰ Instead of a requirement that a complaint show only the *possibility* of entitlement to relief, pleading sufficiency is now an evidentiary standard.¹⁷¹

Stevens found it “mind-boggling” that the Court dismissed the complaint in *Bell Atlantic* for failure, as a matter of law, to have alleged

165. Stevens emphasized the flexibility of the pretrial process and the fact-finding powers of the “crucible of trial.” *Bell Atlantic*, 127 S. Ct. at 1976 (Stevens, J., dissenting). He also reviewed the wide array of integrated tools available to trial judges under the Rules for managing discovery and the trial process in general. *Id.* at 1987 n.13.

166. *Id.* at 1985 (“The Court’s dichotomy between factual allegations and ‘legal conclusions’ is the stuff of a bygone era.”). Stevens cited a variety of cases, law-review articles, and treatises supporting the proposition that the distinction between facts and conclusions is dead. *Id.*

167. *Id.* at 1977.

168. *See id.* at 1978 (“If *Conley*’s ‘no set of facts’ language is to be interred, let it not be without a eulogy.”).

169. *Id.* Stevens cited the twelve Supreme Court opinions and four separate writings that affirmed the *Conley* standard without any apparent puzzlement, as well as cases from twenty-six states and the District of Columbia, all of which had adopted the “no set of facts” standard for sufficiency of pleadings. *Id.* at n.4–5.

170. *See id.* at 1977 (mentioning the *Conley* court’s unanimity); *id.* at 1981–82 (citing *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167–71 (1993) (holding that under Rule 8 standards, no particularity was required to support an allegation that a municipality was not immune from suit)); *id.* at 1982 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (holding that “under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case” of employment discrimination)).

171. *See id.* at 1979 n.6 (Stevens, J., dissenting) (observing that a complaint’s implausibility “should not be fatal at the pleading stage”); *see id.* at 1979–80 (arguing that “permissible factual support” is a separate issue from what constitutes an “adequately pleaded complaint”); *see also id.* at 1983 (suggesting that the majority’s holding would make sense if it were on a motion for summary judgment).

agreement, despite the complaint's saying exactly that.¹⁷² He could not have justified summary dismissal¹⁷³ even if he had agreed that the plaintiff's allegations were implausible.¹⁷⁴ The plaintiffs had made a number of statements that merited further inquiry, said Stevens. One statement alleged that Richard Notebaert, the former CEO of one of the ILECs, had said that competition with neighboring ILECs "might be a good way to turn a quick dollar, but that doesn't make it right."¹⁷⁵

At a minimum, Stevens would have allowed deposition of Notebaert to probe this "curious statement,"¹⁷⁶ and deposition of at least one executive from each of the other defendant companies.¹⁷⁷ Stevens would have felt ready to dismiss only if this further inquiry failed to provide support for the claims.¹⁷⁸

C. Lower Courts' Interpretations

A thorough canvassing of cases applying and construing *Bell Atlantic* would be impossible. The case has already been cited many thousands of times, in a wide range of contexts, with varying interpretations.¹⁷⁹ A representative sampling of the case law subsequent to *Bell Atlantic* will suffice to show how lower courts have responded.

1. *Iqbal v. Hasty*

The first of the lower courts to address *Bell Atlantic* in detail was the Second Circuit, with *Iqbal v. Hasty*.¹⁸⁰ Unlike *Bell Atlantic*, *Iqbal* was a case raising questions about the qualified immunity of government officials.¹⁸¹ The discussion in *Iqbal* began by noting that *Bell Atlantic* had caused "considerable uncertainty" over what constitutes adequate

172. *Id.* at 1984.

173. *Id.* at 1987.

174. *Id.* at 1984–85.

175. *Id.* at 1974 (internal quotation marks omitted).

176. *Id.* at 1986.

177. *Id.* at 1987. Stevens pointed out that if he had been the trial judge, he would not have permitted "massive discovery" on the basis of the complaint, but that some limited discovery was appropriate. *Id.* at 1986.

178. *See id.* at 1987 (stating that "[e]ven a sworn denial of [the] charge would not justify a summary dismissal without giving the plaintiffs the opportunity" to depose a select number of defendants).

179. *See, e.g.*, Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 606 (2007) (noting the confusion and inconsistency surrounding application of *Bell Atlantic*).

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

181. *Id.* at 143.

pleadings.¹⁸² A detailed analysis followed, focusing first on the elements of *Bell Atlantic* that suggest changes to the pleading standard possibly applicable beyond the antitrust context. The court underscored the significance of disavowing *Conley*.¹⁸³ According to the Second Circuit, disavowing *Conley* showed the Supreme Court's intention "to make some alteration in the regime of pure notice pleading."¹⁸⁴ Second, the Court's emphasis on pleading facts showed that a Sherman Act § 1 claim requires "more than notice."¹⁸⁵ Third, the Court suggested that "careful case management" would be inadequate to reveal implausible claims early in the discovery process.¹⁸⁶ Finally, the Court's use of some form of the word "plausibility" fifteen times in the *Bell Atlantic* opinion pointed to a new pleading standard.¹⁸⁷

The Second Circuit then took stock of the factors in *Bell Atlantic* suggesting that the decision might not require a heightened pleading standard, opining that "whatever the Court is requiring in *Bell Atlantic* might be limited to, or at least applied most rigorously in, the context" of Sherman Act § 1 claims.¹⁸⁸ The *Bell Atlantic* Court did explicitly state that it was not "requir[ing] heightened fact pleading of specifics."¹⁸⁹ Also significant to the Second Circuit was the Court's discussion and continued approval of Form 9 of the Federal Civil Rules, which includes a location, date, time, and specific defendant, but no factual claims regarding the manner of the defendant's negligence.¹⁹⁰ *Bell Atlantic*'s emphasis on costs suggests that the decision applies only to "cases where massive discovery is likely to create unacceptable settlement pressures."¹⁹¹ The Supreme Court left untouched language from *Leatherman v. Tarrant County Narcotics & Coordination Unit*, which stated that "federal courts and litigants must rely on summary judgment and control of discovery to *weed out* unmeritorious claims sooner rather than later."¹⁹² It might be thought that the *Bell Atlantic*

182. *Id.* at 155.

183. *Id.*

184. *Id.*

185. *Id.* at 156.

186. *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007)).

187. *Id.*

188. *Id.*

189. *Id.* (quoting *Bell Atlantic*, 127 S. Ct. at 1974) (alteration in original).

190. *Id.* Note that the form for pleading negligence is no longer Form 9 but instead Form 11. COMMITTEE ON THE JUDICIARY, FEDERAL RULES OF CIVIL PROCEDURE 125 (2007), available at <http://www.uscourts.gov/rules/civil2007.pdf>. See also *supra* note 167 and accompanying text (discussing Justice Stevens' dissent in *Bell Atlantic* with reference to what is now Form 11).

191. *Iqbal*, 490 F.3d at 157.

192. *Id.* (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 506 U.S. 163, 168–69 (1993)) (emphasis in *Iqbal*).

majority simply overlooked this statement, and would have overruled it along with *Conley* if the majority had been mindful of the *Leatherman* language, but Justice Stevens discussed this language in his *Bell Atlantic* dissent. Because Justice Stevens called attention to *Leatherman*, it was clear that the *Bell Atlantic* majority had not overlooked a case that it meant to overrule.¹⁹³ The Second Circuit also noted that two weeks after the decision in *Bell Atlantic* was announced, the Court in *Erickson v. Pardus* cited *Bell Atlantic* for the proposition that “[s]pecific facts are not necessary” under Rule 8(a)(2); the only requirement is “fair notice.”¹⁹⁴ The timing of *Erickson* suggested that the Supreme Court was using that case to limit the breadth with which *Bell Atlantic* might be read.

Iqbal resolved the tension in *Bell Atlantic* by announcing a “flexible” plausibility standard rather than “a universal standard of heightened fact pleading.”¹⁹⁵ Because the decision in *Bell Atlantic* discussed general standards at such length, the Second Circuit was “reluctant” to limit *Bell Atlantic* to Sherman Act § 1 claims.¹⁹⁶ The Second Circuit held that despite good reasons to impose a heightened pleading standard within the particular facts of *Iqbal*, heightened pleading requirements “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”¹⁹⁷ Nonetheless, the *Iqbal* court seemed to embrace “the plausibility standard of *Bell Atlantic*” in a non-antitrust context.¹⁹⁸

2. Other Federal-Court Decisions

As mentioned above, lower courts’ interpretations of *Bell Atlantic* have varied. Both the First Circuit¹⁹⁹ and the Eleventh Circuit²⁰⁰ have held that *Bell Atlantic* may be relevant in the case of fraud claims, a finding that is somewhat surprising, since fraud usually falls under the ambit of Rule 9.²⁰¹ The decision has been extended in the Third Circuit to antitrust summary-judgment motions.²⁰² The Fifth Circuit took *Bell Atlantic* far from the

193. *Id.* at 157 n.5 (citing *Bell Atlantic*, 127 S. Ct. at 1981–82 (Stevens, J., dissenting)).

194. *Id.* at 157 (quoting *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007)).

195. *Id.*

196. *Id.*

197. *Id.* at 158 (quoting *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002)).

198. *Id.*

199. See *Rodriguez-Ortiz v. Margo Caribe, Inc.*, 490 F.3d 92, 95 (1st Cir. 2007) (referring to the *Bell Atlantic* plausibility standard in the context of fraud claims).

200. See *Weissman v. Nat’l Ass’n of Sec. Dealers, Inc.*, 500 F.3d 1293, 1302–03 (11th Cir. 2007) (Pryor, J., concurring in part and dissenting in part).

201. FED. R. CIV. P. 9.

202. *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 48, 51 (3d Cir. 2007) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)).

antitrust context, using it as the standard of review when upholding the dismissal of a pro se complaint for \$261,000 in a case dealing with a child-support payment.²⁰³

In an August 2007 case, the Sixth Circuit noted the confusion caused by the “nuances” of *Bell Atlantic*, but did not take a position on the matter until late in the following month.²⁰⁴ In a case addressing a challenge to the constitutionality of residency requirements for employment as a firefighter, the court demanded that “the factual allegations of a complaint ‘be enough to raise a right to relief above a speculative level.’”²⁰⁵

The Seventh Circuit, in a 2–1 decision, considered it “doubtful” that *Bell Atlantic* altered notice pleading, at least in the context of Title VII claims,²⁰⁶ although the concurring opinion argued that Rule 8(a)(2) now requires “a plaintiff [to] plead enough facts to demonstrate a plausible claim.”²⁰⁷ Some time later, the same court applied the plausibility standard in a case dealing with a challenge to an airport expansion.²⁰⁸

The Tenth Circuit applied *Bell Atlantic* in a particularly unusual context. In *Alvarado v. KOB-TV, L.L.C.*, the plaintiffs filed suit against the City of Albuquerque, alleging defamation, false imprisonment, and violations of their constitutional right to privacy.²⁰⁹ The plaintiffs also named KOB-TV as a defendant, claiming invasion of privacy and intentional infliction of emotional distress.²¹⁰ The city removed the case to federal court, and the district court dismissed the claims against KOB-TV on the TV station’s Rule 12(b)(6) motion.²¹¹ On de novo review, the Tenth Circuit affirmed the district court’s dismissal of the state-law claims based on the plausibility standard of *Bell Atlantic*.²¹²

In an interesting departure from several other circuit courts’ interpretations, the Federal Circuit has taken the view not only that *Bell Atlantic* made no change to pleading standards under Rule 8, but that it

203. *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007). This is a surprising use of *Bell Atlantic*, since courts usually review pro se complaints under a more relaxed standard than they review lawyer-drafted complaints. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (holding a pro se complaint to a more lenient standard); *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (noting higher standard for lawyer-drafted complaints).

204. *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 541–42 (6th Cir. 2007).

205. *Ass’n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 550 (6th Cir. 2007).

206. *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 783 n.4 (7th Cir. 2007).

207. *Id.* at 784 (Flaum, J., concurring) (arguing that the dismissed complaint was sufficient pre-*Bell Atlantic*, but no longer is).

208. *St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2007).

209. *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1214 (10th Cir. 2007).

210. *Id.*

211. *Id.*

212. *Id.* at 1215.

actually “favorably quoted” *Conley v. Gibson* and the gloss on Rule 8 therein, the disavowal of *Conley*’s most-quoted language aside.²¹³

III. MITIGATING THE IMPACT ON PLAINTIFFS

Admittedly, it is tempting to eliminate the meritless complaint at the pleading stage. Unfortunately, this “is another instance of judicial haste which in the long run makes waste.”²¹⁴

The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion.²¹⁵

The foregoing examination of case law in the circuit courts showcases the mess that *Bell Atlantic* has created. Some courts have construed *Bell Atlantic* narrowly. Others have applied it to cases that have no relation to the context in which *Bell Atlantic* was decided. Still others have all but ignored the decision. But from the chaos of *Bell Atlantic*’s aftermath, a clear (if not universal) trend emerges: courts have used *Bell Atlantic* to take a more rigorous view of pleadings under Rule 8(a)(2), whether by reference to pleading of facts, plausibility pleading, heightened pleading, or raising the likelihood of relief above a speculative level.

The Court claimed that it was not requiring “heightened fact pleading of specifics,”²¹⁶ but the dichotomy between “conceivable” and “plausible” is a new idea. Evidently, the difference between conceivability and plausibility is great enough that a conceivable complaint is subject to summary dismissal, whereas a plausible complaint is not. Wright and Miller explain that the purpose of a Rule 12(b)(6) motion “is to test the formal sufficiency of the statement of the claim for relief; the motion is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff’s case.”²¹⁷ If motions to dismiss do not address questions about merits, it is hard to see how conceivability and plausibility are applicable concepts.²¹⁸ Both terms, so important to the

213. *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 n.4 (Fed. Cir. 2007).

214. *Estelle v. Gamble*, 429 U.S. 97, 113 (1976) (Stevens, J., dissenting) (quoting *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944)).

215. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966).

216. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).

217. WRIGHT & MILLER VOL. 5B, *supra* note 129, § 1356, at 354.

218. If “conceivable” and “plausible” were meant as terms of art with nonstandard meanings, the Court failed to give any definition of them. Lower courts have achieved no consensus on their meaning. *See supra* Part II.C.2.

disposition in *Bell Atlantic*, relate to factual likelihood,²¹⁹ yet a motion to dismiss is a test of a complaint's legal sufficiency. If plausibility is now the standard, then a court considering a Rule 12(b)(6) motion faces a challenge contradictory by its very terms: the court must make a decree about a complaint's factual likelihood as a matter of law.

Notwithstanding the Court's claim in *Bell Atlantic* that it was leaving pleading standards unchanged, the disavowal of the *Conley* "no set of facts" language has made it understandably difficult for lower courts to approach motions to dismiss in the same way as before. Even though the *Conley* test may not have been applied literally,²²⁰ it was the most-applied standard for motions to dismiss.²²¹ *Conley* was generally understood to allow claims to proceed in the absence of "some insuperable bar to securing relief."²²² Such an insuperable bar might be a damages claim for wrongful termination of a contract, when the contract's terms state that the defendant had the right to terminate the contract at will, with or without cause.²²³ The greatest advantage of this standard was that it made rulings on motions to dismiss as mechanical as could be. It minimized the role of judicial discretion and the possibility of bias during Rule 12(b)(6) motions. It also ensured that a claimant whose complaint was not obviously frivolous could have his day in court.

Disavowing *Conley* pulled the carpet from beneath the feet of federal judges. It took away the most common test for motions to dismiss, a test that isolated dismissals to logically incongruent claims. In the absence of *Conley*, the obvious inference is that claims with something less than an insuperable bar to relief can be dismissed. But how much less? Federal judges are still straining their powers of reasoning to solve this riddle. If judges can no longer rely on purely deductive logic²²⁴ to analyze the sufficiency of a complaint, they are left to their intuition to decide where to

219. "Conceive" is defined, in relevant part, as: "To form or develop in the mind; devise" or, "To apprehend mentally; understand." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 390 (3d ed. 1992). "Plausible" is defined, in relevant part, as: "Seemingly or apparently valid, likely, or acceptable; credible." *Id.* at 1388.

220. *Bell Atlantic*, 127 S. Ct. at 1969 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

221. WRIGHT & MILLER 5B, *supra* note 129, § 1357, at 571. *See also id.* at n.45 (providing, in the course of more than fifty pages, a collection of cases applying and endorsing the *Conley* standard).

222. *Id.* at 701; *see also* *Reed v. Bd. of Ed. of Parkway Sch. Dist.*, 460 F.2d 824, 825 (8th Cir. 1972) (endorsing Professor Wright's "insuperable bar to relief" interpretation of *Conley*).

223. WRIGHT & MILLER 5B, *supra* note 129, § 1357, at 708 (citing *Case v. State Farm Mut. Auto. Ins. Co.*, 294 F.2d 676 (5th Cir. 1961)).

224. Dismissal of a complaint like that in *State Farm* is a matter of purely deductive logic. The contract included terms making the contract terminable at will, with or without cause; the defendant terminated the contract pursuant to these terms; it necessarily follows that a claim of wrongful termination cannot possibly succeed.

set the standard. Since *Conley* set the standard for legal sufficiency of a complaint as low as possible, it is but a short step to the conclusion that the standard is now higher.

Judicially imposed heightening of pleading standards raises some serious questions. Whether or not *Bell Atlantic* should be interpreted to change the Rule 8(a)(2) standard, courts have applied it that way. Perhaps the most obvious question is this: what of the mandate, recognized by the Supreme Court itself, that changing federal pleading standards “can only be accomplished ‘by the process of amending the Federal Rules, and not by judicial interpretation’”?²²⁵ This limit on judicial power seems to have gone unheeded. What of the centuries’ worth of judicial and legislative experience that consistently point toward the benefits of simplicity in pleadings? Too many interpretations of *Bell Atlantic* represent a step backward in the evolution of jurisprudence. It is not a new idea that “legal technicality is a disease not of old age, but of the infancy of societies,”²²⁶ yet *Bell Atlantic* has been invoked in courts’ demands for greater technicality. It is not a step toward greater justice and fairness that the Fifth Circuit cited *Bell Atlantic* as the appropriate standard of review in keeping a pro se plea for \$261,000 in unpaid child support obligations from ever being heard on the merits.²²⁷ Some prophylactic measure is needed.

*A. Using a Limited Discovery Period
to Make an Initial Investigation into the Merits*

Attempted use of the pleadings as proof is now less necessary than ever with the development of two devices to supply such elements of proof as may be necessary before trial. These are discovery and summary judgment, both the subject of extensive provisions in the new rules.²²⁸

225. *Bell Atlantic*, 127 S. Ct. at 1973 n.14 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002)).

226. Nathan Isaacs, *Logic v. Common Sense in Pleading*, 16 MICH. L. REV. 589, 593 (1918).

227. *Cuvillier v. Taylor*, 503 F.3d 397, 399, 401 (5th Cir. 2007). It is unclear if the decision would have been different pre-*Bell Atlantic*, although the court makes it a point to note that the previous standard in the Fifth Circuit had come from *Conley*: that a case will not be dismissed “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.” *Id.* at 401 n.4 (quoting *Kennedy v. Tanqipahoa Parish Library Bd. of Control*, 224 F.3d 359, 365 (5th Cir. 2000)). The specific reference to the retirement of *Conley*’s “no set of facts” language strongly implies that the Fifth Circuit now holds pleadings to a higher standard of specificity or plausibility.

228. Clark, *supra* note 69, at 318.

The *Bell Atlantic* majority decreed that “careful case management” is not enough in cases with potential for discovery abuse, based on the “modest” success of judicial supervision and the risk that “cost-conscious defendants [will] settle even anemic cases before discovery begins.”²²⁹ Justice Stevens disagreed. He argued that “strict control of discovery,” combined with other elements of cautious jurisprudence, would address the concern about burdening defendants.²³⁰

There is a way to walk the line described by Justice Stevens in dissent, and at least one court has done so. In *In re Netflix Antitrust Litigation*, the plaintiffs brought a putative class action suit against Netflix, an Internet-based movie-rental company, alleging a variety of antitrust claims under § 2 of the Sherman Act involving retail giants Wal-Mart, Amazon, and Blockbuster.²³¹ Basing its standard of review in part on *Bell Atlantic*, the court granted Netflix’s motion to dismiss, but gave the plaintiffs leave to amend.²³² Before ending its analysis, the court turned its attention to a previous order staying discovery.²³³ Citing *Bell Atlantic*, the district court noted that it may be particularly appropriate to stay discovery in antitrust cases, “where discovery tends to be broad, time-consuming, and expensive.”²³⁴

While recognizing that “determining whether some illegal agreement may have taken place between unspecified persons at different [companies] . . . at some point over seven years”²³⁵ is a massive undertaking, the district court allowed “narrowly-tailored [sic] discovery” to go forward on the following terms:

Netflix is ordered to disclose all documents summarizing, describing, referring to or constituting written or oral communications between Netflix (or a representative), on one hand, and Wal-Mart or Amazon (or a representative), on the other hand, on the subject of the patents in suit (or either or them) from the date of issuance of the patents in suit (or either or them) to the filing of the complaint in this action.²³⁶

229. *Bell Atlantic*, 127 S. Ct. at 1967.

230. *Id.* at 1975 (Stevens, J., dissenting).

231. *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308, 311–13 (N.D. Cal. 2007).

232. *Id.* at 312, 319, 321.

233. *Id.* at 321.

234. *Id.* (citing *Bell Atlantic*, 127 S. Ct. at 1967) (alteration in original).

235. *Id.* (quoting *Bell Atlantic*, 127 S. Ct. at 1967 n.6).

236. *Id.*

The court allowed Netflix roughly three weeks to comply with the production order and the plaintiffs were given thirty days to file an amended complaint.²³⁷

Federal courts should seriously consider adopting this approach. Judicially managed discovery preserves plaintiffs' right to be heard in court and affirms the fundamental commitment to fairness that inspired the Federal Rules in the first place. Heightened pleading standards act as a shield to defendants; the higher the pleading standard, the easier it is for a defendant to have the case dismissed without so much as being required to deny the plaintiff's allegations.²³⁸ Dispositions of cases at the pleading stage resolve no conflicts. Like now-outmoded decisions on demurrer,²³⁹ determinations of the sufficiency with which complaints state facts "settle no real questions concerning the substantial rights of the parties, but are in reality determinations in the law of procedure. . . . The point is that most of these matters need not be decided at all and . . . [j]udicial labor should not be spent upon them."²⁴⁰

If the costs associated with even limited document production are prohibitive, depositions and interrogatories are still available. Discovery is costly and burdensome only when it involves huge document exchanges, with the attendant in-depth review required to make sure that no privileged information is being disclosed. Depositions and interrogatories bring minimal costs, no greater for a large corporate defendant than a small private one. There is no doubt that discovery can be very expensive, that discovery has been abused, or that the full discovery process is a major undertaking. But none of the worries about full-blown document production arise in the context of oral or written answers to questions.

Allowing a limited period of discovery provides plaintiffs with a fair way to counter defendant-friendly plausibility pleading. Whether by restricting the scope to production of certain kinds of documents, interrogatories or depositions directed to company executives, or some other case-specific approach, limited discovery will allow an initial inquiry into the substance of a complaint to determine whether the claims are truly meritless.

Discovery of this sort is most needed in situations where legally sufficient evidence is most likely to exist under the exclusive control of the defendant. Consider cases of conspiracy or discrimination. Especially if the

237. *Id.*

238. *See, e.g., Bell Atlantic*, 127 S. Ct. at 1975 (Stevens, J., dissenting) (noting that the defendants were never required to file an answer denying the allegations of conspiracy).

239. Demurrers are not included in the list of pleadings allowed under the Federal Rules. FED. R. CIV. P. 7.

240. Whittier, *supra* note 54, at 512.

defendant is knowingly acting against the law, defendants can be expected to take care to control dissemination of inculpatory evidence. A plaintiff who has been wronged by unfairly high service prices resulting from a conspiracy, or who has been wrongfully terminated on the basis of race, may well know that his or her rights have been violated, but have no means by which to gather proof that will withstand the rigor of a court's scrutiny. The discovery provisions of Rule 26 are flexible enough to allow development of a substantive framework for a claim without delving into open-ended demands for production of all relevant documents.²⁴¹

Higher pleading standards should be matched with greater freedom to gather information. *Bell Atlantic* shifts pleading practice away from the philosophy, embedded in the Federal Rules, that justice is best served when courts examine facts before making judgments. Courts have used *Bell Atlantic* to dismiss complaints without allowing plaintiffs to depose defendants or to submit written questions, and without even requiring defendants to answer the claims. This regression needs correcting. Defendants should not be able to use a lack of certainty at the pleading stage as a shield against justice.

B. Associated Costs and Impacts

The Supreme Court has emphasized the risk of “the potentially enormous expense of discovery.”²⁴² Consider the following hypothetical: John, a consumer of X Corporation's products, files a class-action suit against Corporations X and Y, alleging a conspiracy between them to inflate the price of their goods. The complaint states only that the companies have been conspiring for the past five years, but does not mention who the conspirators actually are, nor the substance of their agreement. During discovery, John makes a demand for production of documents with the greatest breadth that Rule 26(b) will allow.²⁴³ This demand could include any documents generated by either company during that five-year period, any emails sent or received by any employee, and any other relevant records or files in the companies' possession. Counsel for the companies would then have to sift through every piece of gathered information, redacting when necessary, and making claims of privilege

241. FED. R. CIV. P. 26. A court has the discretion to narrow the scope of discovery requests, Rule 26(b); to issue protective orders to prevent “annoyance, embarrassment, oppression, or undue burden or expense” to any party, Rule 26(c); and to prescribe the timing and sequence of discovery, Rule 26(d).

242. *Bell Atlantic*, 127 S. Ct. at 1967.

243. FED. R. CIV. P. 26.

where applicable. The time and money required to accomplish this kind of task is staggering. It becomes easy to see why, when faced with this kind of scenario, a corporation would rather settle even a meritless claim than go through the process of discovery.

Ultimately, though, with careful judicial management of the sort used in *In re Netflix Antitrust Litigation*²⁴⁴ or envisioned by Justice Stevens in *Bell Atlantic*,²⁴⁵ the greatest impact on defendants is an imposition on their time. Limited discovery, focused on determining whether a claim may proceed, need only involve a small proportion of theoretically relevant information. Deposition of a select few company executives, or a demand for production of communications between specific individuals, imposes a burden on the defendant of a magnitude far short of that described in the above hypothetical. Giving defendants three weeks to comply with the production request and the plaintiffs a month to amend their complaint puts a definite cap on the length of time involved. If such limited discovery reveals that the plaintiff's case has merit, there is every reason to push the case forward. If limited discovery turns up nothing, the case is over.

If courts adopt a standard practice of awarding costs and attorneys' fees to the defendant following fruitless limited discovery, there is still less worry about burden on the defendant. Not only would the award of costs and fees alleviate the financial burden, but the prospect of having to pay for the defendant's litigation would dissuade plaintiffs from engaging in "fishing expedition[s]."²⁴⁶

The benefit to plaintiffs would be substantial. A provision for limited discovery greatly enhances the likelihood that meritorious claims will be heard in court. Without allowing limited discovery, *Bell Atlantic* bars any realistic chance of recovery by a broad swath of potential plaintiffs. Applying *Bell Atlantic* wholesale to similar cases implies that a plaintiff could survive a Rule 12(b)(6) motion in only two kinds of circumstances. In one kind of case, the behavior of defendants suggesting conspiracy would have to be public knowledge—not a realistic prospect, as conspirators rarely make public statements that they intend to violate federal antitrust law. In the other kind of case, the plaintiffs would need to have some kind of special knowledge, such as connections to company insiders. However,

244. *In re Netflix Antitrust Litig.*, 506 F. Supp. 2d 308 (N.D. Cal. 2007).

245. *Bell Atlantic*, 127 S. Ct. at 1975 (Stevens, J., dissenting).

246. *See, e.g.*, *United States v. Hubbell*, 530 U.S. 27, 32 (2000) (quoting *United States v. Hubbell*, 11 F. Supp. 2d 25, 37 (D.D.C. 1998) (describing a subpoena issued without knowledge of what it would actually reveal as "the quintessential fishing expedition"). A downside to routinely awarding costs and fees to the defendant is that it could discourage weak plaintiffs from bringing legitimate claims against powerful defendants.

most plaintiffs motivated to file suit, class action or otherwise, cannot be expected to have inside knowledge.

Discovery is “the backbone of civil litigation in American courts.”²⁴⁷ Plaintiffs should be allowed some access to this fundamental tool of litigation when their claims are complex and dependent on information closely guarded by the defendants.

CONCLUSION

Bell Atlantic Corp. v. Twombly has caused widespread confusion over what federal pleading standards require. Whether intentionally or not, *Bell Atlantic* disturbed a long-held understanding about the simplified pleading requirements of Rule 8(a)(2). Many lower courts have applied the holding and reasoning of *Bell Atlantic* in cases far removed from the antitrust context of the decision. In so doing, courts have myopically focused on a few phrases from the Supreme Court and ignored the centuries of evolving legal thought that have consistently tended toward keeping plaintiffs in court and deciding their claims on their merits. Under *Bell Atlantic*, a lack of access to information that a plaintiff could not reasonably be expected to have results in a dismissal: a final judgment on the merits, without the merits ever having been examined. A claim that a judge thinks unlikely to succeed can be summarily deemed an issue unworthy of trial, no matter how serious the allegations.

Mitigating the impact of this jurisprudential regression requires taking steps to protect plaintiffs, who have been placed in an unprecedentedly vulnerable position. To this end, plaintiffs whose claims have been deemed “conceivable” but not “plausible” must be allowed some limited form of discovery by which to bolster their claims and meet the new de facto standard. This is the best way, and the only way, to restore the focus in American pleading practice to doing substantial justice.

Damon Amyx*

247. Travis C. Headley, *Creative Sanctions for Discovery Abuse in Texas*, 32 ST. MARY'S L.J. 115, 116 (2000).

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