TWOMBLY, THE FEDERAL RULES OF CIVIL PROCEDURE AND THE COURTS

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INTRODUCTION

In 1934, Congress enacted the Rules Enabling Act,[1] authorizing the Supreme Court to promulgate uniform rules governing practice and procedure in the federal courts. The Federal Rules of Civil Procedure were thereafter enacted and took effect in 1938.[2] A hallmark of the Federal Rules was a liberalization of pleading standards.[3] The drafters rejected both the common law model, which required that pleadings sound in a cognizable legal theory of recovery, and pleading rules under the various procedural codes enacted by state legislatures, which generally required a plaintiff to allege facts sufficient to establish a cause of action.[4]

Rather, the Federal Rules adopted a practice of notice pleading.[5] Rule 8(a)(2) simply requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[6] The goal of notice pleading was to assure that meritorious claimants got their day in court and that claims would not be dismissed because they were inartfully drafted or

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[1] Rules Enabling Act, ch. 651, 48 Stat. 1064, 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2000)).

[2] STEPHEN C. YEAZELL ET AL., CIVIL PROCEDURE 334 (6th ed. 2004).

[3] *See* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 68, at 470–80 (6th ed. 2002).

[4] *See id.* at 470–72.

[5] *See id.* Professor Wright notes that the drafters of the Federal Rules eschewed the label "notice pleading," fearing that use of such terminology might suggest the absence of any standards. He argues that the Federal Rules "contemplate the statement of circumstances, occurrences, and events in support of the claim presented, even that it permits these circumstances to be stated with great generality." *Id.* at 475.

[6] FED. R. CIV. P. 8(a)(2).

because the plaintiff at the time of filing the complaint did not have in hand all facts necessary to prove a cause of action at trial.[7] Construing Rule 8(a)(2), nearly two decades after the Rules had been issued, the Supreme Court in *Conley v. Gibson*[8] established the legal standard governing the adequacy of a complaint challenged on a motion to dismiss under Rule 12(b)(6), ruling that a complaint may not be dismissed at the pleading stage "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."[9]

While *Conley* has not been without its detractors,[10] the Supreme Court has repeatedly reaffirmed the *Conley* holding[11] and, more importantly, rejected any attempts to create judge-made rules of particularity in pleading, ruling that such matters were for the rulemakers—not the courts.[12] In the spring of 2007, however, the Supreme Court changed its tune dramatically. In *Bell Atlantic Corp. v. Twombly*,[13] the High Court, reversing the Second Circuit, held that a complaint that alleges mere parallel behavior among rival telecommunications companies, coupled with stray statements of agreement that amounted to legal conclusions failed, as a matter of law, to state a claim for an antitrust conspiracy in violation of section 1 of the Sherman Act.[14] The Court ruled that in order to withstand a motion to dismiss, an antitrust conspiracy complaint must plead "enough factual matter (taken as true) to suggest that an [unlawful]

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[7] *See* WRIGHT & KANE, *supra* note 3, § 68, at 470–80.

[8] 355 U.S. 41 (1957), *overruled in part by* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007).

[9] *Id.* at 45–46.

[10] *See, e.g.*, Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984); *see also* Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998) ("*Conley v. Gibson* turned Rule 8 on its head . . . .").

[11] *See Twombly*, 127 S. Ct. at 1978 (Stevens, J., dissenting) ("If *Conley*'s 'no set of facts' language is to be interred, let it not be without a eulogy. That exact language, which the majority says has 'puzzl[ed] the profession for 50 years,' has been cited as authority in a dozen opinions of this Court and four separate writings. In not one of those 16 opinions was the language 'questioned,' 'criticized,' or 'explained away.' Indeed, today's opinion is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation." (citation omitted) (footnote omitted)).

[12] *See, e.g.*, Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168–69 (1993).

[13] 127 S. Ct. 1955.

[14] *See id.* at 1970–71.

agreement was made."[15] The Court also emphasized that plaintiffs need not set forth detailed factual allegations, but at the same time that "grounds [showing] entitle[ment] to relief require[] more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[16] Rather, a complaint must contain "plausible grounds [from which] to infer an agreement" and allege "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[17] The Court expressly "retired" *Conley v. Gibson* and, in so doing, put an end to notice pleading as it has been understood in the seventy years since the enactment of the Federal Rules of Civil Procedure.[18]

This Article analyzes the rationale for the *Twombly* holding and concludes that: (1) the Court's assertion that judges cannot effectively control litigation costs because the parties—not the courts—control claims and defenses as well as the nature and amount of discovery in any given case is contrary to fact; and (2) certain classes of cases may well warrant particularized pleading but that decision should be made by the rulemakers through amendments to the Federal Rules of Civil Procedure and not by judges on an ad hoc basis.

I. TWOMBLY

Twombly arose in the wake of the 1982 break up of AT&T as a result of a consent decree settling a civil antitrust suit commenced by the United States nearly a decade earlier.[19] For much of the twentieth century, AT&T dominated both local and long distance telephone services, as well as the markets for telephone equipment and research. In 1974, the Antitrust Division of the Department of Justice filed a monopolization suit seeking to break up AT&T.[20] After nearly eight years of pretrial wrangling, AT&T agreed to enter into a consent decree in 1982.[21] As part of that consent decree, AT&T agreed to divest ownership

[15] *Id.* at 1965.
[16] *Id.* (internal quotation marks omitted).
[17] *Id.*
[18] *Id.* at 1969.
[19] United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).
[20] *Id.* at 139.
[21] *Id.* at 135, 139–40.

of local telephone companies.[22] The consent decree established a system of seven regional Bell operating companies, which were granted monopolies in providing local phone services.[23] The consent decree also created a competitive long distance market from which the newly established regional operators were excluded.[24]

A decade later, however, Congress enacted the Telecommunications Act of 1996,[25] which fundamentally restructured the market for local phone service by ending the regional monopolies held by each of the regional operating companies. In an effort to stimulate competition in local markets, the Telecommunications Act permitted each of the regional companies to compete in each others' markets and required each of the regional companies to share its technology with companies seeking to enter the new competitive local markets for telephone services.[26] In the years immediately following the enactment of the Telecommunications Act, the regional operating companies, referred to as Incumbent Local Exchanges Carriers ("ILECs") by the Court in *Twombly*, were slow to comply with the mandates of the Telecommunications Act.[27] These delaying tactics did not escape the notice of federal and state regulators. Bell Atlantic entered into a consent decree with the FCC under which it made a "voluntary contribution" of $3 million and was fined $10 million by the New York Public Service Commission for its failure to make its facilities available to AT&T.[28]

Twombly, a consumer of local phone and high speed internet services, brought a putative class action against the ILECs alleging that the ILECs (1) had conspired to inhibit the growth of rival local service providers in their respective territories by, among other things, limiting access to their networks, overbilling, and sabotaging rivals' relationships with their

[22] *Id.* at 141.

[23] *Id.* at 160.

[24] *Id.* at 186–89.

[25] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, (codified as amended in scattered sections of 47 U.S.C.).

[26] *Id.* at 61–63, 77–78; *see also* Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 475–76 (2002).

[27] *See, e.g.*, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 403–04 (2004).

[28] *Id.*

customers; and (2) had agreed among themselves not to compete with each other in their respective service areas.[29] The complaint made no specific factual allegations of agreement among the defendants;[30] it simply alleged the parallel course of conduct by the ILECs, and characterized this conduct as a conspiracy in violation of section 1 of the Sherman Act.[31]

Defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted, contending that proof of conscious parallelism, without more, is insufficient as a matter of law to establish an antitrust conspiracy.[32] Defendants further argued plaintiff would have to adduce additional evidence beyond parallel conduct—so-called plus factors—in order to succeed at trial and its failure to allege plus factors in the complaint was fatal to its claim.[33] The trial court granted the motion,[34] but the Second Circuit reversed.[35]

The Supreme Court reversed the Second Circuit and ordered that the complaint be dismissed.[36] The Court acknowledged that while the Federal Rules of Civil Procedure eased pleading requirements that had been in effect at common law and under the Codes, it would be a mistake to suggest "that the Federal Rules somehow dispensed with the pleading of facts altogether."[37] Rather, the Federal Rules merely relieve the plaintiff of the need to "set out *in detail* the facts upon which he bases his claim."[38]

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[29] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1962 (2007).

[30] *Id.*

[31] *Id.* The complaint alleged:

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

Id. at 1962–63 (quoting Complaint ¶ 51).

[32] *Id.* at 1963.

[33] *Id.*

[34] Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 176 (S.D.N.Y. 2003), *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955.

[35] 425 F.3d at 102.

[36] *Twombly*, 127 S. Ct. at 1963.

[37] *Id.* at 1965 n.3.

[38] *Id.*

The Court further reasoned that factual allegations are critical to a plaintiff's claim.[39]

To make a "showing" that he is "entitled" to relief, a pleader must assert "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[40] Courts are not "bound to accept as true a legal conclusion couched as a factual allegation."[41] Allegations of fact "must be enough to raise a right to relief above the speculative level."[42] A pleading must contain more than facts "that merely create[] a suspicion [of] a legally cognizable right of action."[43] It must contain "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[44]

Thus, to survive a motion to dismiss, a complaint must set forth facts "plausibly suggesting (not merely consistent with) agreement."[45] An allegation of conscious parallelism without more "stays in neutral territory."[46]

II. ANALYSIS

Much of the post-*Twombly* conversation has focused on the meaning of "plausible" in the context of surviving a motion to dismiss and whether the *Twombly* holding should be read broadly to apply to all federal cases or narrowly to apply only to complex cases.[47] Lost in that conversation is perhaps an even more significant aspect of the *Twombly* decision—the Court's conclusion that there is little that a judge can do to contain pretrial costs in a federal action and that therefore dismissing claims that from the pleadings appear to be insubstantial is the only effective vehicle for controlling litigation costs.[48] For that insight, the Court relies on a 1989 law review article by Judge Frank Easterbrook that characterizes trial judges as helpless in

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[39] *Id.*

[40] *Id.* at 1965.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 1966.

[46] *Id.*

[47] *See, e.g.*, Iqbal v. Hasty, 490 F.3d 143, 153–59 (2d Cir. 2007) (suggesting a case-by-case analysis), *petition for cert. filed*, 76 U.S.L.W. 3499 (U.S. Mar. 7, 2008) (No. 07-1150).

[48] *Twombly*, 127 S. Ct. at 1967.

two respects: (1) the parties control the claims and defenses asserted in the pleadings; and (2) the parties—not the courts—control discovery.[49]

At the time Judge Easterbrook made those observations, issues regarding discovery costs, discovery abuse, litigation delays, and the role of the judge in case management and in settlement were hot topics of debate. An in-depth study of discovery practices by then Professor, now Magistrate Judge Wayne Brazil, had concluded, a decade earlier, that discovery abuse was a significant problem in complex federal litigation, but not in most kinds of federal cases.[50] Nevertheless, little had been done to address that concern. In 1989, the Brookings Institution issued an expansive report critical of the manner in which federal litigation was being conducted, noting in particular that the process was laden with unnecessary costs and delays.[51] That study led Senator Joe Biden to propose reform legislation, which was signed into law by President George H.W. Bush as the Civil Justice Reform Act of 1990 ("CJRA").[52] The Brookings study also led President Bush to create the Quayle Commission, chaired by then Vice President Dan Quayle, to study ways in which to reform litigation practices by federal agencies.[53] The report of the Quayle Commission led to the implementation of a series of reform designed to reduce costs and delays in litigation by federal agencies.[54]

Most importantly, the Brookings study and enactment of the CJRA galvanized the Advisory Committee on Federal Civil Rules into action. For years prior to the Brookings study and enactment of the CJRA, the Advisory Committee had steadfastly resisted calls for limitations on the scope of discovery and numerical limitations on the use of discovery tools in a given litigation, notably on the number of interrogatories and

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[49] Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989).

[50] Wayne D. Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 A.B.A. J. 450, 450 (1981); Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 790, 792 (1980).

[51] *See* BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, JUSTICE FOR ALL: REDUCING COSTS AND DELAYS IN CIVIL LITIGATION (1989).

[52] Judicial Improvements Act of 1990, Pub. L. No. 101–650, tit. I, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471–482 (2000)).

[53] *See* PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991).

[54] *See id.* at 7–27.

depositions. On the other hand, in the 1983 Amendments to the Federal Rules of Civil Procedure, the Advisory Committee had both empowered and encouraged federal judges to take a more hands-on role in managing their dockets. The centerpiece of the 1983 Amendments was a rewritten and reformed Rule 16.[55] Judges were invited to use pretrial conferences as vehicles for managing the entire pretrial process and not simply as the means of planning the conduct of the trial.[56] Thus, for example, pretrial conferences could be used to resolve discovery disputes,[57] to dismiss sua sponte insubstantial claims or defenses,[58] or to promote settlement efforts.[59] In addition, the 1983 Amendment to Rule 11 mandated imposition of sanctions for assertion of baseless claims or defenses.[60] Similarly, Rule 26 as amended mandated sanctions when discovery sought was disproportional to the needs of the case.[61] The unifying themes of the 1983 Amendments were more active case management by judges and imposition of sanctions for transgression of Rules 11, 16 and 26.[62]

These measures, however, did not silence criticism of the federal civil justice system, and, pushed by Congress and the Brookings report, the Advisory Committee revisited issues of pretrial discovery and judicial management of litigation. That revisitation led directly to the 1993 Amendments to the Federal Rules. For the first time since the promulgation of the Federal Rules in 1938, the Advisory Committee made comprehensive changes with respect to the timing, amount and process of discovery.

First, the 1993 Amendments imposed presumptive limits on the number of depositions[63] and interrogatories in a given case.[64]

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[55] FED. R. CIV. P. 16 (1983) (amended 2007).

[56] *See, e.g.*, *id.* 16(a)(2) (authorizing the judge to conduct a pretrial conference for the purpose of "establishing early and continuing control so that the case will not be protracted because of lack of management").

[57] *See id.* 16(c)(9).

[58] *See id.* 16(c)(1).

[59] *See id.* 16(c)(7).

[60] *Id.* 11 (1983) (amended 2007).

[61] *See id.* 26.

[62] *See* Edward D. Cavanagh, *Frivolous Litigation: Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 499, 511 (1986).

[63] FED. R. CIV. P. 30(a)(2)(A) (1993) (amended 2007).

[64] *Id.* 33(a) (1993) (amended 2007).

Depositions were presumptively limited to ten per side[65] and interrogatories were limited to twenty-five per party.[66] The parties, subject to court approval, could choose a different limit or no limit; and the court itself, absent action by the parties, could impose its own limits.[67] Imposition of numerical limits made it clear—if it was not clear before—that parties were not entitled to discovery that leaves no stone unturned. The 1993 Amendments thus recognized inherent limits on discovery based on the needs of the particular case. Ultimately, the nature of the discovery limitations would be determined or at least approved by the judges assigned to the case. Put another way, the parties were no longer in control of discovery.

Second, the 1993 Amendments required that the parties meet and confer prior to the initial pretrial conference to formulate a joint discovery plan for presentation to the judge, for approval at the first pretrial conference.[68] This process would force parties to think about discovery systematically, rather than in an ad hoc manner. By approaching discovery systematically, the parties could more effectively determine their needs on discovery and better estimate the overall cost of discovery. Moreover, because the discovery plan had to be approved by the judge, the parties would have significant incentives to formulate plans that were reasonable. If nothing else, the joint plan requirement forced counsel for the parties to communicate and, hopefully, create an atmosphere conducive to cooperation.

Third, the 1993 Amendments barred any discovery until after the discovery plan had been approved by the assigned judge.[69] Prior to 1993, the discovery process had all of the organization of an Oklahoma land rush. Interrogatories and deposition notices could be, and frequently were, served with the complaint, to the obvious advantage of the plaintiff. Parties were free to pursue discovery in any order once the complaint had been filed. The 1993 Amendments leveled the playing field and encouraged the parties to develop plans that reasonably sequenced discovery.

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[65] *Id.* 30(a)(2)(A).
[66] *Id.* 33(a).
[67] *See, e.g.*, *id.* 30(a)(2)(A).
[68] *Id.* 26(f).
[69] *Id.*

Fourth, the 1993 Amendments introduced the concept of mandatory automatic disclosure into the pretrial discovery process.[70] Mandatory automatic disclosure required the parties to turn over certain core information, such as the names of witnesses, documents upon which the parties rely, and damage calculations, *without being asked*.[71] The concept underlying mandatory automatic disclosure was that these materials were integral to the lawsuit and would be requested on discovery in any event.[72] It therefore made sense from a cost standpoint to require the information to be exchanged without a prior request by the other side.[73] Once those initial disclosures had been made, it would be easier to determine what additional materials would be needed on discovery.[74] Unlike the other reforms introduced under the 1993 Amendments, mandatory automatic disclosure encountered significant opposition and criticism.[75] As pointed out below,[76] the concept never fulfilled its potential, in part because few lawyers were willing to give it a fair test in the marketplace and in part because it was simply too idealistic an approach in the hardscrabble world of federal litigation.

The advisory committee continued efforts to fine-tune discovery rules throughout the 1990s and into the 21st century.

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[70] *Id.* 26(a)(1).

[71] For a detailed discussion of mandatory automatic disclosure, see Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systematic Ills Afflicting the Federal Courts Be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721, 738–45 (1993).

[72] *See id.* at 740.

[73] *See id.*

[74] *See id.*

[75] *Compare* George F. Hritz, *Plan Will Increase Cost, Delay Outcomes*, N.Y. L.J., Apr. 13, 1993, at 2, 2 (predicting that automatic disclosure will prove costly and inefficient), Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush To Reform*, 27 GA. L. REV. 1, 39–48 (1992) (positing that mandatory disclosure will increase motion practice and overproduce documents of little relevance, thereby increasing litigation costs), Laura A. Kaster & Kenneth A. Wittenberg, *Rulemakers Should Be Litigators*, NAT'L L.J., Aug. 17, 1992, at 15 (commenting that mandatory disclosure impinges on work product and attorney-client protections), *and* Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 820–21 (1991) (questioning the viability of mandatory disclosure) *with* Charles P. Sifton, *Experiment a Bold and Thoughtful Step*, N.Y. L.J., Apr. 13, 1993 at 2 (noting that automatic disclosure in most cases will make civil discovery less adversarial), *and* Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 276 (1992) (arguing that mandatory disclosure amendments to Rule 26 will reduce costs and delay).

[76] *See, e.g.*, *infra* note 82 and accompanying text.

In 2000, it promulgated a rule further presumptively limiting each deposition pursuant to Rule 30 to one seven-hour day.[77] At the same time, the Committee amended Rule 26(b)(1) to limit the scope of attorney-initiated discovery to matters relevant to a "claim or defense."[78] The 2000 Amendments also specified that a party who finds discovery of matters relevant to claims and defenses inadequate may move the court to obtain additional discovery of information relevant to the "subject matter" of the action.[79] Accordingly, the Rules have not abandoned entirely the pre-2000 standard governing the scope of discovery. Rather, the 2000 Amendments provide that additional discovery under the broader "subject matter" criteria may be obtained only with the court's permission.

Perhaps the most striking oversight by the Court, however, is its refusal to acknowledge the 2006 Amendments to the Federal Rules on e-discovery which provide federal judges ample authority to rein in potentially expensive e-discovery.[80] It goes without saying that issues with respect to e-discovery were virtually unknown at the time of Judge Easterbrook's 1989 article. Equally important, the Court takes no notice of the success district court judges have experienced in controlling costs of e-discovery, notably Judge Scheindlin's Herculean efforts in *Zubulake v. UBS Warburg LLC*, which has become a template for judicial management of e-discovery issues.[81] Thus, contrary to the views expressed by the Court in *Twombly*, the Federal Rules themselves now provide for significant judicial controls of discovery and those controls appear to be working. Finally recognizing that the provisions of the 1993 Amendments establishing mandatory automatic disclosure had not had the desired results, the Committee scaled back mandatory automatic disclosure to require that parties disclose only those materials that support a party's claims or defenses, rather than force disclosure of materials that might support the other side's claims or defenses.[82]

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[77] FED. R. CIV. P. 30(d)(1).
[78] *Id.* 26(b)(1).
[79] *Id.* (emphasis omitted).
[80] *Id.* 34(a).
[81] *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).
[82] *See* FED. R. CIV. P. 26(a)(1).

The implementation of the 1993 and 2000 Amendments to the Federal Rules contradict the major premise of the *Twombly* decision that the parties—not the courts—control the claims and defenses asserted in an action, as well as the kind and amount of discovery. Clearly, the courts have the power to eliminate insubstantial claims or defenses early on in a lawsuit. Moreover, it is simply inaccurate to say in 2007 that the parties in federal actions control the nature and amount of discovery. Now the court is in charge from the moment of the first pretrial conference. The initial discovery plan proposed by the parties is subject to judicial approval. Interrogatories and depositions are subject to presumptive numerical limits that can be modified by court order. All discovery vehicles are subject to the overall limitation of proportionality, ultimately determined by the court. Indeed, without judicial oversight, the limitations on discovery would be meaningless.

Discovery reform, however, is not the only aspect of modern federal civil litigation overlooked by the Court in *Twombly*. The Court also failed to recognize or even mention case management techniques advocated in the Manual for Complex Litigation.[83] Now in its fourth edition, the Manual for Complex Litigation is published by the Federal Judicial Center, the research arm of the federal judiciary. The Manual is a virtual "how to" handbook for the management of complex civil litigation, providing detailed guidance on the supervision of all aspects of the pretrial and trial phases of complicated actions. The Manual has been used successfully in numerous cases to keep down discovery costs and reduce unnecessary delay, proving that a willing court can exercise meaningful control over claims and defenses asserted by the parties and discovery.

In addition, the Court in *Twombly* failed to acknowledge empirical studies that have found that in roughly fifty-percent of the civil cases litigated in the federal system, there is minimal discovery or no discovery at all.[84] This oversight is significant. The *Twombly* rationale is closely tied to concerns that defendants in antitrust cases are at a decided disadvantage when

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[83] MANUAL FOR COMPLEX LITIGATION (4th ed. 2004).

[84] James S. Kakalik et. al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 621 (1998) (citing PAUL R. CONNOLLY ET. AL., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 35 (1978)).

minimalistic pleading allows plaintiffs with flimsy claims to pursue broad pretrial discovery and thereby impose substantial costs on defendants, leaving defendants with little choice but to pay large sums to settle claims and buy peace.

That the Supreme Court seems so out of touch with the judicial system that it is charged with managing is troublesome. Even more troublesome is the Court's solution to the problems that it identifies—dismissal of the claim at the pleading stage. Query whether it makes good sense to invoke the drastic remedy of dismissal at the point in the case where the plaintiff and *the court know the least about it*. Dismissal is particularly harsh in conspiracy cases when there is an asymmetry of information, given that the defendant's conduct is typically covert and the evidence of conspiracy is in the exclusive control of the defendant. The *Twombly* ruling will mean that conspiracies, already difficult enough to prove, will escape detection. Yet, the Court makes no effort to address this inevitable result.

III. THE RESPONSE TO *TWOMBLY*

As a pronouncement of the nation's highest court, the *Twombly* decision is the law of the land and remains so until the Supreme Court overrules itself or Congress or the Advisory Committee on Federal Civil Rules intervenes. The prospect of the Supreme Court reconsidering *Twombly* in the near term is remote and so, too, are the prospects for Congressional action. The Supreme Court appears content to let lower courts struggle with the implementation of *Twombly*, and Congress no doubt has other fish to fry. The question, then, is whether the Advisory Committee should intervene.

Now is an opportune time for the rulemakers to weigh in for two reasons: (1) the uncertainty of the *Twombly* holding is creating confusion in the lower courts; and (2) the time has come systematically to reexamine notice pleading and determine whether the current Rule 9(b) categories for particularity in pleading should be expanded.

A. Uncertainty

As the Second Circuit has recognized, *Twombly* has created "[c]onsiderable uncertainty concerning the standard for assessing

the adequacy of pleadings."[85] This uncertainty emanates from several corners of the Circuit's decision. First, as discussed above, while the rationale of the *Twombly* majority suggests that the ruling be limited to complex cases involving "sprawling, costly, and hugely time-consuming" discovery, the Court articulates no such limits.[86] The Second Circuit has held that *Twombly* does not mandate a "universal standard of heightened fact pleading."[87] Other courts have taken a broader view of the *Twombly* holding.[88] It will take years to reach a consensus on this issue.

Second, the Court itself seems to be inconsistent in its application of the case. Two weeks after the *Twombly* ruling was issued, the Court in *Erickson v. Pardus*[89] upheld a pro se complaint by a prisoner who claimed that he had suffered injury by reason of the prison's wrongful termination of treatment for his Hepatitis C. The trial court had dismissed the prisoner's complaint on the grounds that he had failed to allege harm caused by the discontinuance of treatment, as opposed to harm from the disease itself.[90] The Supreme Court reversed, ruling that Rule 8(a)(2) requires only that a pleader give fair notice of the claim and grounds upon which it rests and that the plaintiff had done so.[91] In addition, the Court criticized the Court of Appeals' "departure from the liberal pleading standards set forth by Rule 8(a)(2)" in a case involving a pro se party.[92] Similarly, the Court's seeming approval of skeletal allegations of negligence in Official Form 9 in *Twombly* seems inconsistent with the *Twombly* ruling.[93]

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[85] Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3499 (U.S. Mar. 7, 2008) (No. 07-1150).

[86] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 n.6 (2007).

[87] *Iqbal*, 490 F.3d at 157. Having come to that conclusion, however, the Second Circuit provides little guidance as to when heightened fact pleading is appropriate. The court enunciates a "flexible 'plausibility standard' " under which a pleader must "amplify a claim with some factual allegations in those contexts where such amplification is needed to render a claim *plausible*." *Id.* at 157–58. In other words, particularized pleading is not needed, except when it is needed.

[88] *See, e.g.*, Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663, 667–68 (7th Cir. 2007).

[89] 127 S. Ct. 2197 (2007) (per curiam).

[90] *Id.* at 2199.

[91] *Id.* at 2200.

[92] *Id.*

[93] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1970 n.10 (2007).

Third, a plausibility standard articulated in *Twombly* would seem to be a low hurdle for the pleader.[94] Yet the Court purported to enunciate a more demanding, as opposed to a less demanding, pleading standard. The problem of uncertainty could be addressed systematically and once and for all by the Advisory Committee on Federal Rules. That approach seems preferable to a case-by-case evaluation.

B. Revisiting Rule 8(a)(2)

Now that *Twombly* has overruled *Conley v. Gibson*, it is imperative that the Advisory Committee revisit the pleading standards under Rule 8. This is not to suggest that notice pleading should be abandoned. Indeed, the Supreme Court in *Erickson* recognized the value of notice pleading.[95] Nevertheless, the litigation landscape in federal court has changed significantly since the Federal Rules were adopted. In 1938, big-case litigation was virtually unknown in the federal system. It would have been difficult for the rule makers in the 1930s to foresee the cost burden imposed by discovery in the twenty-first century. Now is an opportune time to consider whether pleading requirements should be fine tuned to assure a level playing field.

It would seem that little change is needed in run-of-the-mill cases, and the Supreme Court in *Erickson* acknowledged as much.[96] However, complex cases are another matter. The Advisory Committee should consider adopting the following principles.

1. Expanding the particularity in pleading requirement[97] to encompass cases generally viewed as complex. This category would include antitrust, securities, RICO, and environmental cases. It would also include mass disaster cases, nationwide product liability suits, as well as complex commercial litigation.

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[94] "Plausible" is defined as "superficially fair, reasonable or valuable, but often specious . . . superficially . . . persuasive . . . appearing worthy of Belief." MERRIAM-WEBSTER'S NEW COLLEGIATE DICTIONARY 902 (9th ed. 1989).

[95] *See Erickson*, 127 S. Ct. at 2200.

[96] *See id.*

[97] *See* FED. R. CIV. P. 9(b).

2. If the complaint was found deficient, the preferred remedy would be dismissal *without* prejudice.[98] That is, the plaintiff should be given a second shot at stating a claim. This approach is fair to all sides. It assures that a defendant will not incur costly discovery on a flimsy claim, but, at the same time, gives the plaintiff one more chance to stay in court. Nevertheless, the trial court should retain discretion to dismiss those claims that lack legal merit and cannot be resuscitated by any amount of repleading.

3. Trial courts should be reluctant to dismiss cases prior to discovery in situations when key information is in the exclusive control of defendants. For example, in antitrust conspiracy cases, when there is evidence of parallel behavior but no smoking gun, plaintiffs should be given some access to defendants' records before any ruling on a motion to dismiss. The amount of access and costs thereof would be governed by the proportionality concept embedded in the Federal Rules.

CONCLUSION

Twombly has shifted the balance of power in federal court decidedly in favor of defendants. The foregoing approach would serve to balance the burdens and risks of federal civil litigation and minimize the uncertainty created by the *Twombly* decision.

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[98] This is precisely the approach taken by the Supreme Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) wherein it stated:

> Had the District Court required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged. In making the contrary assumption for purposes of our decision, we are perhaps stretching the rule of *Conley v. Gibson* . . . too far. Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

Id. at 528 n.17.