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The Twombly Revolution?

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No decision in recent memory has generated as much interest and is of such potentially sweeping scope as the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*.[1] Already, the decision has been characterized as "startling" and a "surprising departure from ingrained federal pleading rules."[2] As one court has observed in the aftermath of *Twombly*, "[f]ew

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

2. *See, e.g.*, Sensations, Inc. v. City of Grand Rapids, 526 F.3d 291, 296 n.1 (6th Cir. 2008) (noting "'some uncertainty concerning the scope of' *Twombly*" (citing Commercial Money Ctr., Inc. v. Ill. Union Ins. Co., 508 F.3d 327, 337 n.4 (6th Cir. 2007)); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431–32 (2008) ("In a startling move by the U.S. Supreme Court, the

issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts."[3] As a result, the decision has been the subject of significant debate.

In *Twombly*, the Court offered a potentially revolutionary gloss on traditional notice pleading standards under the Federal Rules of Civil Procedure. The decision on its face purports to do nothing more than interpret the plain language of Rule 8(a). Nonetheless, in doing so, the Court articulates a standard that requires more searching scrutiny of the pleadings, which now must not merely put a defendant on "notice" of the claims against it, but must state those claims in a manner that demonstrates that plaintiffs' entitlement to relief is "plausible".[4]

This plausibility standard has been the focus of intense scrutiny. Some members of the academy and judiciary already have sought to limit the scope of the Court's decision and its new standard, claiming that it is "vague," "less than pellucid," or has caused "significant uncertainty."[5] A careful reading of the Court's decision, however, demonstrates that this angst is largely unwarranted. The majority in *Twombly* undertook a careful analysis based on the text and purpose of the Federal Rules, articulating a standard that is relatively clear. The Court has made plain that, in its opinion, the Federal Rules always required that at a minimum plaintiffs must state a claim that is logically coherent—i.e., the allegations in plaintiffs' complaint must be both necessary and sufficient to establish defendant's liability. This Article maintains that this logical coherence requirement is largely the aim of the Court's plausibility standard, that the Court correctly held that this requirement was mandated by the Federal Rules, and that it is

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seventy-year-old liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2) has been decidedly tightened (if not discarded) in favor of a stricter standard requiring the pleading of facts painting a 'plausible' picture of liability."); Linda S. Mullenix, *Troubling Twombly*, NAT'L L.J., June 11, 2007, at 13 (*Twombly* is "a surprising departure from ingrained federal pleading rules.").

3. Phillips v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008).

4. Several courts have noted that, under *Twombly*, scrutiny of the pleadings must be stringent. *See, e.g.*, Giarratano v. Johnson, 521 F.3d 298, 304 n.3 (4th Cir. 2008) ("[T]he *Twombly* standard is even more favorable to dismissal of a complaint" than prior formulations.).

5. Wilkerson v. New Media Tech. Charter Sch. Inc., 522 F.3d 315, 321 (3d Cir. 2008) (observing that "the exact parameters of the *Twombly* decision are not yet known"); Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008) ("We are not the first to acknowledge that the new formulation is less than pellucid."); *Phillips*, 515 F.3d at 230, 234 (*Twombly* is "confusing" and "[t]he issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come."); Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007) (*Twombly* has created "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings"), *rev'd*, No. 07-1015, 2009 WL 1361536 (U.S. May 18, 2009); Weisbarth v. Geauga Park Dist., 499 F.3d 538, 541 (6th Cir. 2007) ("Significant 'uncertainty as to the intended scope of the Court's decision [in *Twombly*]' persists, however, particularly regarding its reach beyond the antitrust context." (quoting *Iqbal*, 490 F.3d at 157–58)); Anderson v. Sara Lee Corp., 508 F.3d 181, 188 n.7 (4th Cir. 2007) ("In the wake of *Twombly*, courts and commentators have been grappling with the decision's meaning and reach.").

indeed, as the majority observed, an appropriate and necessary standard—particularly in light of the increasing costs associated with defending a claim in the federal courts.

Part I of this Article discusses the various opinions issued in *Twombly*.[6] The majority opinion contained a careful analysis of the text and policy underlying Rule 8(a) of the Federal Rules of Civil Procedure, concluding that, while the rules establish a system of "notice pleading," they do not contemplate that plaintiffs may pursue claims that are entirely speculative or that merely "possibly" entitle them to relief.[7] Rather, they require that plaintiffs demonstrate that their claims are "plausible," which flows from Rule 8(a)'s requirement that plaintiffs make a "showing" that they are entitled to relief.[8] The majority rejected any assertion that it was imposing new or heightened pleading requirements.[9] Rather, it made clear its belief that these requirements were consistent with the text and intent of the Federal Rules.[10]

Part II discusses limitations of the Court's decision suggested to date.[11] Some commentators and judges have suggested that *Twombly* may be limited to the antitrust context, to complex cases, or by prior or subsequent precedent.[12] None of these purported limitations finds support in the Court's decision, however.[13] Rather, the Court made plain that its ruling was dictated by the text of the Federal Rules, which do not manifest any limitations aimed at particular categories of cases.[14] Nor did the Court suggest any such limitations either in the body of its opinion or in subsequent rulings.[15] In fact, the Court specifically rejected many of the same arguments in its decision.[16] Accordingly, the judicial (albeit early) consensus is that no such limitations exist.

Part III discusses the proper interpretation of the *Twombly* decision.[17] While some courts and commentators have suggested that the Court's

6. *See infra* notes 33–132 and accompanying text.
7. *See infra* Part I.A.
8. *See infra* Part I.A.1.
9. *See infra* Part I.A.1.
10. *See infra* Part I.A.1.
11. *See infra* notes 133–168 and accompanying text.
12. *See infra* Part II.
13. *See infra* Part II.A–D (discussing the purported antitrust limitation, the complex case limitation, subsequent decision limitation, and the existing precedent limitation).
14. *See infra* Part II.A–D.
15. *See infra* Part II.C–D.
16. *See infra* Part II.C–D.
17. *See infra* notes 169–189 and accompanying text.

"plausibility" standard is less than clear, a careful reading of the Court's decision demonstrates that its meaning is plain.[18] The Court sought to articulate a requirement it believed was firmly rooted in the text of the rules—that the allegations in a plaintiff's complaint must be logically coherent in the sense that, if accepted as true, they are necessary and sufficient to establish a cause of action.[19] Pleadings that do not allege the necessary elements of a cause of action by definition do not meet the requirement under Rule 8(a) that a plaintiff demonstrate entitlement to legal relief.[20] As the Court made clear, the mere "possibility" that a plaintiff may be entitled to relief is not enough.[21] The allegations must assert a logically coherent theory that, if accepted as true, would entitle plaintiff to relief.[22] This interpretation of the rules is fully justified. It is consistent with their language as well as what we know about the drafters' intent.[23]

Part IV addresses *Twombly* in the context of other recent Supreme Court pleading decisions as well as the changing landscape of civil litigation under the Federal Rules.[24] The Court has made clear in a variety of contexts that judicial scrutiny at the pleading stage is critical in modern litigation.[25] It has issued several recent rulings in the securities context, for example, that have imposed stringent requirements for stating a claim under the federal securities laws.[26] In doing so, the Court has noted the congressional desire to curb out-of-control litigation practices as well as the increasing costs of defending claims in the federal system.[27] These increasing costs and the broad scope of modern discovery must be counterbalanced by appropriately stringent scrutiny of the legal sufficiency of plaintiffs' claims early in the litigation.[28] This is the context in which *Twombly* was decided. To properly interpret the case, one must view it within the broader context of the Court's decisions regarding threshold pleading requirements as well as the evolution of civil practice under the Federal Rules.[29]

Finally, Part V discusses the potential criticisms of the *Twombly* decision.[30] Once *Twombly* is properly understood as imposing a logical coherence requirement on the initial pleadings, many of the objections

18. *See infra* notes 169–189 and accompanying text.
19. *See infra* Part III.A.
20. *See infra* Part III.A.
21. *See infra* Part III.B.
22. *See infra* Part III.B.
23. *See infra* notes 169–189 and accompanying text.
24. *See infra* notes 190–223 and accompanying text.
25. *Id.*
26. *See infra* notes 191–206 and accompanying text.
27. *See infra* notes 207–223 and accompanying text.
28. *Id.*
29. *Id.*
30. *See infra* notes 224–39 and accompanying text.

voiced to date simply drop by the wayside.[31] Such a requirement is plainly consistent with the text of Rule 8(a) as well as with the Federal Rules construed as a whole. Moreover, it also finds strong support in the Court's prior decisions as well as the prevailing practice in the lower courts.[32]

Not only is the Court's decision plainly justified under the rules, but it also is desirable from a policy perspective. As the costs of litigation increase and the scope of discovery expands, the need for more stringent pleading standards increases. It is neither efficient nor fair to allow claims of dubious merit to proceed when doing so may lead to settlements that are not based on the underlying merits, but rather the potential costs associated with defending a lawsuit in our modern civil justice system. *Twombly* thus presents a welcome clarification of modern pleading standards that is likely to increase the efficiency and fairness of civil proceedings.

I. THE *TWOMBLY* OPINIONS

In *Twombly*, the parties asked the Supreme Court to address the pleading standards under the Federal Rules in the context of an antitrust conspiracy claim.[33] Specifically, consumers brought a purported class action against a variety of local telephone carriers alleging that they had engaged in a conspiracy in violation of § 1 of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[34]

Plaintiffs alleged that this conspiracy was designed to hinder the entry of rival firms in the local telephone and Internet service markets and thereby restrain competition.[35] In addition, they alleged that the defendants entered into agreements to avoid competing against one another.[36] As a result, they

31. *See infra* notes 226–229 and accompanying text.

32. *See infra* notes 230–232 and accompanying text.

33. 127 S. Ct. at 1955.

34. 15 U.S.C. § 1 (2006). The Supreme Court had held that "[t]he crucial question" in assessing whether § 1 was violated is whether the alleged anticompetitive conduct "stem[s] from independent decision or from an agreement." Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954). Evidence of parallel "business behavior is admissible circumstantial evidence from which" agreement may be inferred, but does not "conclusively establish agreement or . . . itself constitute[ ] a Sherman Act offense." *Id.* at 540–41.

35. *Twombly*, 127 S. Ct. at 1962.

36. *Id.*

maintained, consumers of these services were forced to pay higher rates than they would have if defendants had not taken such actions.[37]

The defendants were companies created as a result of the 1984 break-up of AT&T, which established a system of regional monopolies that provided local telephone service in conjunction with a competitive market for long-distance service from which these local monopolies were excluded.[38] In the Telecommunications Act of 1996, Congress subsequently prohibited this monopoly status and authorized these local carriers to enter the long-distance market, restructuring the industry in an attempt to facilitate competition.[39] Nonetheless, plaintiffs alleged that these companies' anti-competitive conduct persisted, harming consumers through increased fees for telephone and Internet services.[40]

The district court dismissed plaintiffs' complaint, concluding that they had alleged only parallel business conduct and not the agreement to restrain trade necessary to state a cause of action under § 1 of the Sherman Act.[41] In so ruling, it emphasized that plaintiffs had failed to allege facts that would "exclude independent self-interested conduct as an explanation for defendants' parallel behavior."[42] The Second Circuit reversed, holding that the allegations supporting parallel action were sufficient to state a claim because defendants failed to show that there was "no set of facts" under which plaintiffs could demonstrate that the parallelism alleged in the complaint was the result of collusion among the defendants rather than coincidence.[43] The appellate court specifically ruled that "plus factors" that would exclude independent self-interest as a motivation for parallel conduct "are not required to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal."[44]

Defendants filed a petition for certiorari asking the Supreme Court to resolve this dispute regarding the appropriate standard under Federal Rule of

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37. *Id.*

38. *Id.* at 1961–62.

39. 110 Stat. 56 (1996). As the Court observed in *Twombly*, this Act was designed to "fundamentally restructure[ ] local telephone markets" by, among other things, requiring each local carrier "to share its network with competitors." 127 S. Ct. at 1961 (quoting AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999) and Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 402 (2004)).

40. As the Court in *Twombly* observed, the defendants had "vigorously litigated" the scope of their obligation to share their networks with potential competitors and obtained some success, resulting in the FCC revising its regulations to "narrow the range of network elements to be shared" with potential competitors. 127 S. Ct. at 1961–62.

41. Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003), *rev'd*, 127 S. Ct. 1955 (2007).

42. *Id.*

43. Twombly v. Bell Atl. Corp., 425 F.3d 99, 114 (2d Cir. 2005).

44. *Id.*

Civil Procedure 8(a)(2).[45] That rule requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[46] In *Conley v. Gibson*, the Court had previously interpreted this language as requiring a plaintiff to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[47] The question presented in *Twombly* effectively called upon the Court to revisit this longstanding interpretation of the Federal Rules and its notice pleading requirement and to determine whether, as the Court in *Conley* suggested, "a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle him to relief."[48]

Given the significance and potentially controversial nature of this question, the *Twombly* decision was remarkably cohesive. Seven Justices joined a strong majority opinion authored by Justice Souter. Only Justices Stevens and Ginsburg dissented.[49] The majority's decision contains a thorough and thoughtful analysis of both the text and underlying policy rationale behind the Federal Rules and traditional notice pleading standards. In the process, the Court articulated a strong vision of the judicial role in assessing the legal sufficiency of the pleadings early in the litigation, one that will likely have a sweeping effect on civil litigation in the federal system.

A. The Majority Opinion

The majority made clear that the issue before it was a simple one. It observed that under the Sherman Act, "'[t]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'"[50] "Even 'conscious parallelism,' a common reaction of 'firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions' is 'not in itself unlawful.'"[51] Accordingly, the Sherman Act required that plaintiffs plead an agreement among the

45. *Twombly*, 127 S. Ct. at 1963.

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

47. 355 U.S. 41, 47 (1957).

48. *Id.* at 45–46.

49. *See Twombly*, 127 S. Ct. at 1974 (Stevens, J., dissenting).

50. *Id.* at 1964 (majority opinion) (quoting Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954)).

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

defendants that was designed to restrain trade. "Unilateral" conduct was not sufficient to demonstrate an antitrust conspiracy.[52]

The question before the Court was whether the plaintiffs' complaint sufficiently pleaded this element. The majority began its analysis by repeating the standard characterization of Rule 8(a) as establishing a system of "notice pleading": The rule, the majority observed, "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[53] Under this standard, a plaintiff need not make "detailed factual allegations."[54] However, a plaintiff cannot merely rest on "labels and conclusions" or "a formulaic recitation of the elements of a cause of action."[55] Rule 8(a) requires that a plaintiff provide "grounds" for the plaintiff's alleged "entitle[ment] to relief."[56] Accordingly, "[f]actual allegations must be enough to raise a right to relief above the speculative level."[57]

1. Textual Analysis

Having articulated these general principles, the Court proceeded to elaborate on the traditional notice pleading requirements. It held that in pleading a claim, a plaintiff must allege sufficient facts to demonstrate that its claim is "plausible."[58] The majority distinguished this standard from a "probability" standard, which would impose a higher burden on plaintiffs.[59] A plaintiff was not required to allege facts that demonstrate a "probability" that it was entitled to relief; rather, it was merely required to provide a showing that its claim was "plausible."[60] Nor could a judge dismiss a plaintiff's complaint based on his or her experienced belief that plaintiff's ability to recover was "remote and unlikely."[61] Rather, the inquiry must focus on the sufficiency of the pleadings and whether on their face they state a valid claim.

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52. *Id.*

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

54. *Twombly*, 127 S. Ct. at 1974. As the Court observed, this requirement was articulated in *Conley*. *See id.* at 1965 n.3 (citing *Conley*, 355 U.S. at 47).

55. *Id.* at 1964–65 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)).

56. *Id.*

57. *Id.* at 1965.

58. *Id.*

59. As the Court observed, "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.*

60. *Id.*

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

Nonetheless, the majority's decision made clear that plaintiffs had to include allegations in their complaint suggesting that they were entitled to relief.[62] It was not sufficient for a plaintiff to plead allegations that were merely consistent with a defendant's liability.[63] Such allegations could also be consistent with the defendant being found not liable. The plausibility standard, the Court underscored, was designed to ensure that plaintiffs cross this threshold from equanimity between liability and non-liability to a set of allegations that were sufficient if taken as true to establish liability.[64]

In articulating this test, the majority focused heavily on the text of Rule 8(a).[65] In particular, it noted the rule's requirement that a plaintiff provide "not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests."[66] "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"[67]

The Court thus "retire[d]" the "famous observation" in *Conley v. Gibson* 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."[68] The majority reasoned that "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[69] According to the majority, the problem with the overly-literal reading of *Conley* that plaintiffs urged and which some courts had adopted was that "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support

62. *Id.* at 1966.

63. *Id.*

64. *Id.*

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

66. *Twombly*, 127 S. Ct. at 1965 n.3.

67. *Id.* at 1966 (quoting FED. R. CIV. P. 8(a)). In fact, the majority went so far as to suggest that "[p]laintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior explained in *Theatre Enterprises*, *Monsanto*, and *Matsushita*." *Id.* at 1968.

68. *Id.* at 1968–69 (quoting *Conley*, 355 U.S. 41, 45–46 (1957)). The Court observed that *Conley*'s "'no set of facts' language has been questioned, criticized, and explained away long enough." *Id.* at 1959.

69. *Id.* at 1969.

recovery."[70] As a result, the Court noted that numerous courts had already rejected "taking the literal terms of the *Conley* passage as a pleading standard."[71] Rather, according to the Court, they had followed something akin to the plausibility standard.

At the same time, the majority expressly stated that it was not applying a "heightened" pleading standard such as that for pleading fraud under Federal Rule of Civil Procedure 9.[72] As the majority observed, imposing such a requirement was beyond the purview of the courts.[73] Rather, it could "only be accomplished 'by the process of amending the Federal Rules.'"[74] As the majority explained, "[h]ere, our concern is not that the allegations in the complaint were insufficiently 'particular[ized]', rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible."[75] Thus, according to the majority, the plausibility test flows directly from the text and does not impose a new pleading standard.

2. The Argument From Precedent

The Court also maintained that its interpretation of Rule 8(a) was consistent with prior precedent. In particular, the Court observed that in *Dura Pharmaceuticals, Inc. v. Broudo*,[76] it had previously held that "something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with 'a largely groundless claim' be allowed to 'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'"[77]

Thus, the majority maintained that it had previously made clear that allegations that merely established the "possibility" of relief were insufficient under Rule 8(a). While it may not have fully articulated the standard necessary to satisfy the Rule 8(a) requirement in prior decisions such as *Dura Pharmaceuticals*, at a minimum the Court had previously established what was *not* sufficient. The plausibility standard described by the Court supplied this missing link, establishing the threshold standard that must be met in order to state a legally sufficient claim under Rule 8.

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70. *Id.* at 1968 (quoting *Conley*, 355 U.S. at 45–46).

71. *Id.* at 1969 (citing Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989); O'Brien v. DiGrazia, 544 F.2d 543, 546 n.3 (1st Cir. 1976); McGregor v. Indus. Excess Landfill, Inc., 856 F.2d 39, 42–43 (6th Cir. 1988)).

72. *Id.* at 1973 n.14.

73. *Id.*

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

75. *Id.* (internal citation omitted).

76. 544 U.S. 336 (2005).

77. *Twombly*, 127 S. Ct. at 1966 (quoting *Dura Pharms.*, 544 U.S. at 347).

3. Underlying Policy Concerns

Finally, the Court also noted the important policy implications of its ruling. There is a basic tradeoff that must be made between the level of scrutiny applied at the pleading stage and the costs associated with continuing litigation. The Court reiterated the important function that judicial scrutiny of the pleadings serves in the federal system. "[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'"[78] Thus, judicial scrutiny of the pleadings plays an important role in the efficient conduct of civil litigation.

In particular, the majority appeared concerned that discovery costs were only increasing for parties engaged in modern complex civil cases. It noted specifically that "antitrust discovery can be expensive," observing by way of example that *Twombly* was a putative class action brought on behalf of millions of subscribers to local telephone and Internet services against major telecommunications firms for conduct that occurred over a period of seven years.[79] Thus, the potential for costly discovery in *Twombly* was significant. More generally, the Court expressed a concern that discovery costs were only increasing and that lawsuits were being settled based on their *in terrorem* value rather than the actual merits of the case.

4. Application of the Plausibility Standard

Applying its newly-articulated standard, the Court found that plaintiffs' complaint was deficient.[80] Plaintiffs had alleged that defendants engaged in parallel conduct, but had failed to allege in anything other than a conclusory manner that defendants entered into an agreement to restrain trade.[81] As the Court observed, "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."[82] While plaintiffs'

78. *Id.* (internal quotations omitted) (quoting WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 233–34).

79. *Id.* at 1967.

80. *Id.* at 1970.

81. *See id.* at 1962–63.

82. *Id.* at 1966. As the Court explained: "An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Id.* (quoting FED. R. CIV. P. 8(a)(2)). The Court noted that

complaint did contain "a few stray statements speak[ing] directly of agreement," the majority concluded that these were "merely legal conclusions resting on the prior allegations."[83]

As the Court reiterated, "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"[84] Thus, the Court concluded, the complaint failed to meet the requirements of Rule 8 because it did not include a critical element that plaintiffs needed to demonstrate to establish their claim. As the majority observed, the allegations in the complaint were fully consistent with conduct constituting "the natural, unilateral reaction of each [incumbent local exchange carriers] intent on keeping its regional dominance."[85]

B. The Twombly *Dissent*

While achieving a broad consensus, the *Twombly* decision was not unanimous. The two dissenting members of the Court rejected the majority's textual analysis, suggesting that it constituted a sweeping re-writing of the Federal Rules.[86] In addition, they suggested that stringent standards for reviewing the sufficiency of the pleadings were not particularly necessary given that, in their view, there were other mechanisms available under the Federal Rules for controlling unwarranted litigation costs and dealing with claims that had little or no merit.[87]

1. Textual Analysis

The dissenters focused heavily on the notice aspect of the modern federal pleading rules. They maintained that Rule 8(a)(2) was designed simply to provide the other side with notice of the claims against it. As

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"when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.*

83. *Id.* at 1970.

84. *Id.* at 1966 (quoting FED. R. CIV. P. 8(a)(2)). "A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory." *Id.*

85. *Id.* at 1971.

86. *See id.* at 1975–76 (Stevens, J., dissenting); *id.* at 1988–89 ("[T]hat the Court has announced a significant new rule that does not even purport to respond to any congressional command is glaringly obvious."); *id.* at 1989 (characterizing majority's decision as a "stark break from precedent" and stating that it "marks a fundamental—and unjustified—change in the character of pretrial practice").

87. *See id.* at 1987 n.13.

such, the Federal Rules did not impose what the dissent characterized as a "heightened" pleading standard.[88]

In support of this conclusion, the dissent discussed at length the evolution of the Federal Rules, noting that the modern rules emerged as a rejection of prior approaches to pleading, which required the pleading of specific facts.[89] According to Justice Stevens, the drafters of Rule 8 "intentionally avoided any reference to 'facts' or 'evidence' or 'conclusions,'" specifically because they were rejecting the prior fact pleading requirements.[90] "Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial."[91]

The dissenters gave short shrift to Rule 8's requirement of a "showing," relegating their discussion of this requirement, which was the lynchpin of the majority decision, to a footnote.[92] While they acknowledged that the rule did in fact require such a showing, they maintained that whether this language "requires allegations of fact will depend on the particulars of the claim."[93] The dissent explained that the plausibility requirement that the majority articulated was different than the "showing" required under Rule 8 without elaborating at any length, other than suggesting that this language was designed to prohibit conclusory allegations.[94] Thus, for example, if the pleadings had simply alleged that there was an "agreement" without more, they may have run afoul of this requirement, which the dissent believed was closely tied to the requirement that the complaint provide adequate notice.[95] Nonetheless, the dissent maintained that, even under the majority's "plausibility" standard, the pleadings in *Twombly* were more than sufficient.[96]

The dissent argued that in adopting the plausibility test, the majority had imported a standard that was more appropriately applied at the summary judgment stage.[97] It noted that the plausibility requirement had been

88. *See id.* at 1983.
89. *See id.* at 1975–77.
90. *Id.* at 1976.
91. *Id.*
92. *Id.* at 1979 n.6.
93. *Id.* at 1980.
94. *Id.* at 1983.
95. *Id.* at 1985.
96. *Id.*
97. *Id.* at 1983.

articulated in the Court's prior decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[98] a case that involved a motion for summary judgment on plaintiff's antitrust claims under Rule 56.[99] The dissent argued that the majority's decision was inconsistent with prior decisions that had recognized that "a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage."[100]

The dissenters also pointed to Form 9 of the Federal Rules, which provides a sample for pleading a negligence claim.[101] The dissent maintained that that form, which is notoriously cursory, demonstrated that the drafters of the Federal Rules did not intend anything other than requiring plaintiffs to provide notice to the other side regarding the general nature of their claims.[102] Accordingly, the dissenters maintained, the majority's opinion imposed a "heightened" pleading standard at odds with the Federal Rules when read as a whole.[103]

The majority rejected the dissent's suggestion that the standard it articulated was inconsistent with Form 9, finding that the allegations in the *Twombly* complaint were deficient in comparison with the requirements

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98. 475 U.S. 574 (1986).

99. *Twombly*, 127 S. Ct. at 1982–83 (Stevens, J., dissenting).

100. *Id.* at 1983. Some courts have agreed that *Twombly* "abrogated" the traditional notice pleading standard. *See, e.g.*, Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 n.5 (9th Cir. 2008); *see also* Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007) ("[T]he Court's explanation for its holding indicated that it intended to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since *Conley v. Gibson*."), *rev'd*, No. 07-1015, 2009 WL 1361536 (U.S. May 18, 2009). Others have concluded that the Court did not entirely abrogate notice pleading. *See, e.g.*, Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008) ("[U]nder our reading, the notice pleading standard of Rule 8(a)(2) remains intact."); McZeal v. Sprint Nextel Corp., 501 F.3d 1354, 1356 n.4, 1357 (Fed. Cir. 2007) (Under *Twombly*, "a patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend"; *Twombly* did not "change[] the pleading requirement of Federal Rule of Civil Procedure 8 as articulated in *Conley*."). Others have characterized *Twombly* as providing "a further articulation of the standard by which to evaluate the sufficiency of all claims brought pursuant to Rule 8(a)." Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 974 n.43 (11th Cir. 2008). Finally, other courts have stated that "the opinion seeks to find a middle ground between 'heightened fact pleading,' which is expressly rejected, . . . and allowing complaints that are no more than 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.'" Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 127 S. Ct. at 1965, 1974). *See also* Spencer, *supra* note 2, at 431, 474 (arguing that, after *Twombly*, "[n]otice pleading is dead" and that "it is hard to distinguish the Court's plausibility standard from the heightened pleading obligation of Rule 9(b)").

101. *Twombly*, 127 S. Ct. at 1977 (Stevens, J., dissenting). Form 9 has since been renumbered under the restyling of the rules, effective December 2007, and is now Form 11.

102. *Id.*

103. *Id.* at 1984. *See also Iqbal*, 490 F.3d at 156 (arguing that "[t]he adequacy of a generalized allegation of negligence in the approved Form 9 seems to weigh heavily against reading *Bell Atlantic* to condemn the insufficiency of all legal conclusions in a pleading, as long as the defendant is given notice of the date, time, and place where the legally vulnerable conduct occurred"), *rev'd*, 2009 WL 1361536 (U.S. May 18, 2009).

suggested in that form. As the majority observed:

> Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four [incumbent local exchange carriers] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place.[104]

Moreover, as noted above,[105] the majority specifically disavowed any suggestion that it was imposing a "heightened" pleading standard requiring particularity in the pleading of facts such as that embodied in Rule 9. Rather, the majority maintained that it was simply interpreting Rule 8 according to its plain language and, moreover, that its interpretation of Rule 8 was in fact that generally accepted by the lower federal courts, which had not adhered to a literal reading of the language in the Court's decision in *Conley*.

2. The Argument From Precedent

The dissent argued that the *Conley* formulation should not be so lightly rejected given its longstanding pedigree. It maintained that, "[c]onsistent with the design of the Federal Rules, *Conley*'s 'no set of facts' formulation permits outright dismissal only when proceeding to discovery or beyond would be futile."[106] Accordingly, the dissent claimed that the *Conley* language imposed only a minimal requirement that plaintiffs provide only the most general notice of their claims. In the words of Justice Stevens, "[i]t reflects a philosophy that, unlike in the days of code pleading, separating the wheat from the chaff is a task assigned to the pretrial and trial process."[107]

Moreover, the dissent claimed that the lower courts had in fact relied extensively on the *Conley* formulation and that, accordingly, the majority's

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104. *Twombly*, 127 S. Ct. at 1971 n.10 (majority opinion) ("A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin.").

105. *See supra* notes 72–75 and accompanying text.

106. *Twombly*, 127 S. Ct. at 1977 (Stevens, J., dissenting). "[A]s the *Conley* Court well knew, the pleading standard the Federal Rules meant to codify does not require, or even invite, the pleading of facts." *Id.* at 1979.

107. *Id.* at 1981. "*Conley*'s language, in short, captures the policy choice embodied in the Federal Rules and binding on the federal courts. We have consistently reaffirmed that basic understanding of the Federal Rules in the half century since *Conley*." *Id.*

decision in *Twombly* represented a sea change in the pleading requirements currently applied by the federal courts.[108] According to the dissent, the *Conley* formulation had *not* been the subject of longstanding criticism, but rather was an accepted description of the pleading standard embodied in Rule 8.[109] In the dissent's view, the majority's decision amounted to "rewrit[ing] the Nation's civil procedure textbooks."[110]

3. Underlying Policy Concerns

The dissent characterized the majority's decision as being based, not on the text of Rule 8, but rather on certain "practical concerns" regarding the cost of modern litigation.[111] It conceded that antitrust litigation could be "enormously expensive" and that "there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions."[112] The dissent's solution to such problems was "careful case management," which would include limitations on discovery, scrutiny of the evidence at the summary judgment stage, and "lucid instructions to juries."[113]

Among the "case management" procedures the dissent cited were Rule 12(e)'s mechanism for requiring plaintiff to provide a more definite statement of the claims contained in the complaint; Rule 7(a)'s authorization for courts to require a plaintiff to reply to a defendant's answer; Rule 23's requirements for "rigorous analysis"[114] of a plaintiff's class allegations to determine whether certification is appropriate; Rule 26's provisions allowing judges to control the scope and sequence of discovery to prevent

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108. *See id.* at 1977–78. Moreover, the dissent asserted that:

> Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears "beyond doubt" that "no set of facts" in support of the claim would entitle the plaintiff to relief.

Id. at 1978.

109. *See id.* at 1978 (arguing that the *Conley* language "has been cited as authority in a dozen opinions of this Court").

110. *Id.* at 1979.

111. *Id.* at 1975, 1989 ("The transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of pretrial discovery.").

112. *Id.* at 1975.

113. *Id.* The Supreme Court in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* had previously noted that "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." 507 U.S. 163, 168–69 (1993).

114. *Twombly*, 127 S. Ct. at 1987.

"annoyance, embarrassment, oppression, or undue burden or expense";[115] and Rule 16's authorization of significant judicial involvement in pretrial proceedings through pretrial conferences and scheduling orders that address "the necessity or desirability of amendments to the pleadings," "the control and scheduling of discovery," and "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."[116] In addition, the dissent cited the sanctions provisions contained in Rule 11 as a mechanism for curbing *in terrorem* suits.[117]

The dissent recognized the potential dangers associated with allowing plaintiffs to engage in potentially wide-ranging discovery based on the admittedly cursory allegations in their complaint. As Justice Stevens observed, "if I had been the trial judge in this case, I would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint."[118] Nonetheless, Justice Stevens believed that case management provided the solution: "The potential for 'sprawling, costly, and hugely time-consuming' discovery . . . is no reason to throw the baby out with the bathwater."[119]

Here, the majority and dissent significantly departed company. The majority rejected these assertions, noting "the common lament that the success of judicial supervision in checking discovery abuse has been modest."[120] In doing so, it relied heavily upon an article written by Judge Easterbrook, cataloguing the numerous practical problems associated with expecting judges to manage litigation so that dubious claims do not impose unwarranted litigation costs.[121] As Judge Easterbrook noted, trial judges are generally not in a position to know whether certain discovery is appropriate at the outset of the case based on the limited description of the dispute that may be provided in plaintiffs' complaint.[122] Moreover, even where the complaint provides a fair amount of detail, the judge cannot possibly predict

115. *Id.* (citing FED. R. CIV. P. 26(c)(1)).

116. *Id.* at 1987 n.13. According to the dissent, "the Federal Rules contemplate that pretrial matters will be settled through a flexible process of give and take, of proffers, stipulations, and stonewalls, not by having trial judges screen allegations for their plausibility *vel non* without requiring an answer from the defendant." *Id.* (citing Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rodgers, 357 U.S. 197, 206 (1958)).

117. *Id.*

118. *Id.*

119. *Id.* at 1987.

120. *Id.* at 1959 (majority opinion).

121. *See generally* Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635 (1989).

122. *Id.* at 638.

what discovery might be fruitful and what discovery will constitute a waste of the parties' time and resources.[123] As the *Twombly* majority observed, "[t]he judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find."[124] Moreover, "[a] magistrate supervising discovery does not—cannot—know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown."[125] Thus, Judge Easterbrook concluded, and the *Twombly* majority agreed, that

> [t]he portions of the Rules of Civil Procedure calling on judges to trim back excessive demands . . . have been, are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information.[126]

Likewise, the majority rejected the dissent's proposal for limiting the costs of discovery through "phased" discovery proceedings.[127] As the Court observed, not only did such proposals suffer from the problems identified by Judge Easterbrook, but in a complex case such as *Twombly*, even the initial "phase" of discovery would prove "hugely time-consuming" and costly.[128] Accordingly, approaching discovery in a piecemeal fashion was unlikely to solve the problem.

Finally, the majority rejected the dissent's reliance on summary judgment procedures as providing a potential check on abusive litigation. As the majority observed, summary judgment could not serve as an effective check because the costs associated with discovery will be incurred *before* such proceedings can be completed and "will push cost-conscious defendants to settle even anemic cases."[129]

4. Application

The majority and the dissent thus had much different views concerning the proper framework for evaluating the sufficiency of allegations at the pleading stage. The dissent vigorously maintained that most, if not all,

123. *Id.*; *see infra* notes 126–127 and accompanying text.
124. *Twombly*, 127 S. Ct. at 1968 (quoting Easterbrook, *supra* note 121, at 638–39).
125. *Id.*
126. *Id.*
127. *See supra* notes 115–16 and accompanying text.
128. *Twombly*, 127 S. Ct. at 1968.
129. *Id.* at 1967.

claims should proceed to trial or at least be resolved at the summary judgment stage, making extensive discovery a routine aspect of cases in the federal system.[130] In particular, the dissent made clear that, in its view, the fact that plaintiffs had alleged that there was an agreement among defendants was sufficient to survive the motion to dismiss in *Twombly*.[131] Its approach to the evaluation of pleadings thus manifests an entirely different worldview. While the dissent argued that the majority's decision was inconsistent with the text and purpose of the Federal Rules, its opinion is filled with language indicating its objections on policy grounds.[132] The majority and the dissent manifested a fundamental difference of view regarding the significance of the costs associated with modern litigation in the federal system as well as the benefits of using trial to decide disputes as opposed to judicial decision making.

II. SUGGESTED LIMITATIONS ON *TWOMBLY*

In the wake of the potentially sweeping implications of *Twombly*, commentators and some judges have suggested potential limitations on the decision. However, none of these potential limitations have much, if any, support in the Court's decision. To the contrary, the majority specifically considered and expressly rejected many of these limitations. Accordingly, the early decisions applying *Twombly* have not adopted these proposals to artificially limit the Court's decision.

A. The Antitrust Limitation

Some commentators have suggested that *Twombly* should be limited to the antitrust context or that, at a minimum, its effect should not be as sweeping outside the antitrust context.[133] They point to the Court's

130. *Id.* at 1985–86 (Stevens, J., dissenting).

131. *Id.*

132. *See supra* notes 111–29 and accompanying text.

133. *Cf.* Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 n.5 (9th Cir. 2008) ("At least for the purposes of adequate pleading in antitrust cases, the Court specifically abrogated the usual 'notice pleading' rule, found in Federal Rule of Civil Procedure 8(a)(2) and *Conley v. Gibson*."); *see also* Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 102 NW. U.L. REV. COLLOQUY 117, 117 (2007) (arguing that *Twombly* is limited to antitrust and did not "rework pleading rules across the board," but recognizing that courts had not adopted this interpretation); Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 437 n.37 (2007) (maintaining that it is "not clear" whether *Twombly* "is really just about pleading in antitrust cases"); Note, *Pleading Standards*, 121 HARV. L. REV. 305, 310 n.51 (2007) ("Some scholars view *Twombly* as primarily an antitrust case.").

discussion of the significant litigation costs associated with antitrust cases as well as its reliance on antitrust precedent arising in the summary judgment context for its articulation of the plausibility standard as evidence that the Court was concerned only with antitrust pleading standards.[134]

Nonetheless, there are no such distinctions in the text of Rule 8, which was the purported basis for the Court's decision. Rule 8 applies equally to antitrust cases and garden variety contract cases. Moreover, this neutrality is an important characteristic of the Federal Rules of Civil Procedure.[135] Not only does having different rules for different kinds of cases find no support in the text, but it would also be highly inefficient and would lead to potential unfairness in the application of federal procedure.

Moreover, the same concerns justifying stringent scrutiny of the pleadings arise not only in the antitrust context, but in other kinds of cases as well. Thus, for example, the *Twombly* majority specifically noted the potential for *in terrorem* litigation in the securities context.[136] Indeed, there is a general trend toward increasing litigation costs across the board in the federal system due to developments such as the increasing importance of electronic discovery and the increasing use of electronic media to store information.[137]

Finally, the "antitrust" precedent arising in the summary judgment context, upon which the *Twombly* majority relied, articulated a general standard based on the text of the Federal Rules that has been repeated outside the antitrust context.[138] The Court's decision in *Matsushita v. Electric Industrial Co. v. Zenith Radio Corp.*[139] is widely recognized as stating the generally applicable standard for summary judgment under Rule 56.[140] This standard is not limited to antitrust cases. So too, the Court's

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134. *See Twombly*, 127 S. Ct. at 1967 (observing that "proceeding to antitrust discovery can be expensive"); *id.* at 1968 (relying on *Theatre Enterprises*, *Monsanto*, and *Matsushita* for the plausibility requirement); Bradley, *supra* note 133, at 117 (arguing that "plausibility" is "antitrust jargon").

135. *See* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2074 (1989) (neutrality is "an obvious objective" and "paramount value" of the rules); *but cf.* Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2219–20 (1989) (arguing that a lack of neutrality has crept into the rules).

136. *See Twombly*, 127 S. Ct. at 1966.

137. *See generally* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 590 (2001) ("[I]t is reasonable to believe that the sheer volume of electronically stored data will continue to increase dramatically the costs and burdens of electronic discovery relative to traditional paper discovery.").

138. *See Twombly*, 127 S. Ct. at 1968.

139. 475 U.S. 574 (1986).

140. *See* Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1186 (2008) (noting that, while some commentators initially argued that "the Supreme Court's *Matsushita* decision—*Twombly*'s earlier analog for summary judgment"—was "seemingly based on antitrust-specific concerns," it "has been used much more broadly in civil litigation"); Jack H. Friedenthal, *Cases on*

application of the plausibility standard at the pleadings stage in *Twombly*, cannot be limited to antitrust cases. The majority articulated a standard under Rule 8 that is broadly applicable to all civil cases.[141]

B. The Complex Case Limitation

A related limitation that some commentators and courts have proposed would circumscribe *Twombly* to complex cases.[142] Again, advocates of this interpretation point to the Court's concerns with discovery costs as if this were the sole basis for the Court's decision.[143] However, again, the Court's

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Summary Judgment: Has There Been a Material Change in Standards?, 63 NOTRE DAME L. REV. 770, 787 (1988) (noting that the Supreme Court's decisions in *Anderson*, *Celotex*, and *Matsushita* "provid[e] a logical framework for deciding how and when [summary judgment] can be used").

141. As this Article was going to print, the Supreme Court issued its decision in *Ashcroft v. Iqbal*, confirming that "*Twombly* expounded the pleading standard for 'all civil actions,' . . . and it applies to antitrust and discrimination suits alike." No. 07-1015, 2009 WL 1361536, at *16 (U.S. May 18, 2009). *See also, e.g.*, Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 2008 WL 5273309, at *7 n.2 (6th Cir. Dec. 22, 2008) ("This Court has cited the heightened pleading standard of *Twombly* in a wide variety of cases, not simply limiting its applicability to antitrust actions."); Phillips v. County of Allegheny, 515 F.3d at 224, 234 (3d Cir. 2008) ("[W]e decline at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context."); ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 n.2 (2d Cir. 2007) ("We have declined to read *Twombly*'s flexible 'plausibility standard' as relating only to antitrust cases."); Iqbal v. Hasty, 490 F.3d 143, 157 n.7 (2d Cir. 2007) ("[I]t would be cavalier to believe that the Court's rejection of the 'no set of facts' language from *Conley* . . . applies only to section 1 antitrust claims."), *rev'd*, No. 07-1015, 2009 WL 1361536 (U.S. May 18, 2009); Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 108 (2008).

142. *Cf.* Gunasekera v. Irwin, 551 F.3d 461, 466 (6th Cir. 2009) ("Courts in and out of the Sixth Circuit have identified uncertainty regarding the scope of *Twombly* and have indicated that its holding is likely limited to expensive, complicated litigation like that considered in *Twombly*."); Limestone Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 803 (7th Cir. 2008) ("Under *Bell Atlantic*, the complaint in a potentially complex litigation, or one that by reason of the potential cost of a judgment to the defendant creates the 'in terrorem' effect against which *Blue Chip* warned, must have some degree of plausibility to survive dismissal."); Robbins v. Oklahoma, 519 F.3d 1242, 1249 (10th Cir. 2008) (suggesting that "[t]he *Twombly* standard may have greater bite" in cases involving "complex claims against multiple defendants"); *Iqbal*, 490 F.3d at 157–58 (*Twombly* "is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible."), *rev'd*, 2009 WL 1361536 (U.S. May 18, 2009).

143. *See Twombly*, 127 S. Ct. at 1967; *Vill. of Lemont*, 520 F.3d at 803 (observing that "[t]he Court was concerned lest a defendant be forced to conduct expensive pretrial discovery in order to demonstrate the groundlessness of the plaintiff's claim"); *Iqbal*, 490 F.3d at 157 (The majority's concerns with the costs of discovery "provide some basis for believing that whatever adjustment in pleading standards results from *Bell Atlantic* is limited to cases where massive discovery is likely to create unacceptable settlement pressures."), *rev'd*, 2009 WL 1361536 (U.S. May 18, 2009); Lonny S. Hoffman, *Burn Up the Chaff With Unquenchable Fire: What Two Doctrinal Intersections Can*

decision relied primarily upon the text of the Federal Rules and thus cannot be limited in this manner. It was not solely a policy-driven decision, but rather a textually-based decision that had sound support in prior decisional law interpreting Rule 8. Indeed, the majority went to great lengths to repudiate this assertion, which was specifically raised by the dissent.[144]

Likewise, certain courts have suggested that the degree of specificity in the complaint after *Twombly* "depends on context."[145] Thus, "[a] simple negligence action based on an automobile accident may require little more than the allegation that the defendant negligently struck the plaintiff with his car while crossing a particular highway on a specified date and time."[146] However, in more complex cases, such as the antitrust case that was the subject of the *Twombly* decision, more extensive factual allegations may be required.

While this interpretation may make some sense—obviously the elements that must be pled are more numerous the more complex the case, and there is a corresponding increase in the potential for logical gaps in the pleadings—nonetheless, it is an imprecise oversimplification of the *Twombly* approach. The *Twombly* majority specifically addressed the negligence

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Teach Us About Judicial Power Over Pleadings, 88 B.U. L. REV. 1217, 1237–38 (2008) ("[S]ome have suggested that perhaps one way to read the decision in *Twombly* is to regard it as an effort by the Court to impose heightened judicial scrutiny over pleadings but, simultaneously, to try to corral the extent of the decision's reach by pegging the need for heightened judicial scrutiny to the risk of exorbitant discovery costs.").

144. *See Twombly*, 127 S. Ct. at 1973 n.14, 1983 (Stevens, J., dissenting); *see also* Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135, 138 (2007) (arguing that *Twombly* cannot be "cabined by the costs and expenses that might accrue": "The best reading of *Bell Atlantic* is that the new standard is absolute, that mere notice pleading is dead for all cases and causes of action."); Spencer, *supra* note 2, at 457 (rejecting the assertion that *Twombly* "will not be applied to other cases or at least will not be applied to cases not presenting the efficiency and judicial administration concerns pointed to by the Court in *Twombly*").

145. *Robbins*, 519 F.3d at 1248 ("The Third Circuit has noted, and we agree, that the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations, depends on context . . . . " (citing *Phillips*, 515 F.3d at 231–32)); *cf. Vill. of Lemont*, 520 F.3d at 803 ("[H]ow many facts are enough will depend on the type of case. In a complex antitrust or RICO case a fuller set of factual allegations than found in the sample complaints in the civil rules' Appendix of Forms may be necessary to show that the plaintiff's claim is not 'largely groundless.'" (quoting *Phillips*, 515 F.3d at 231–32)); *Iqbal*, 490 F.3d at 157–58 (*Twombly* "is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."), *rev'd*, 2009 WL 1361536 (U.S. May 18, 2009); 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, 604 (2006) (observing that while the "fair notice standard does not vary from one type of claim to another," nonetheless "what constitutes fair notice under one circumstance may not necessarily constitute fair notice under another"); Spencer, *supra* note 2, at 459 (arguing that "the Court's plausibility standard may require different levels of factual detail depending upon the substantive context").

146. *Robbins*, 519 F.3d at 1248 (citing FED. R. CIV. P. Form 9).

example that is the subject of Form 9 of the Federal Rules.[147] It did not indicate that the standard it articulated was any different for negligence cases.[148] To the contrary, it made clear that the standard was *the same.*[149] Moreover, applying different procedural rules or standards to different kinds of cases would be inconsistent with the rules' purported neutrality as well as potentially lead to unwarranted inefficiency and complexity.[150] The majority's decision makes clear that, in both the negligence and antitrust context, plaintiffs must make *plausible* allegations, and in both contexts the definition of plausibility is the same.[151]

C. Limitations Imposed By Subsequent Decisions

Some commentators have argued that the Court has limited the reach of *Twombly* in subsequent decisions. In particular, they maintain that the Court immediately reversed course by restating the general "notice pleading" requirement in *Erickson v. Pardus.*[152] There, the Court stated that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not

147. *Twombly*, 127 S. Ct. at 1971 n.10.

148. *See id.* at 1973 n.14 ("[W]e do not apply any 'heightened' pleading standard . . . [and] the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible."); *see also id.* at 1974 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face. Because the plaintiffs here have not nudged their claim across the line from conceivable to plausible, their complaint must be dismissed.").

149. *Id.*

150. *See* Spencer, *supra* note 2, at 460 (arguing that "a fluid, form-shifting standard is troubling" because it "violates the principle of transubstantivity" and would "impose a more onerous burden in those cases where a liberal notice pleading standard is needed most").

151. *See generally Twombly*, 127 S. Ct. 1955.

152. 127 S. Ct. 2197 (2007). *See, e.g.*, Ass'n of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 555 (6th Cir. 2007) (Moore, J., concurring in part and dissenting in part) (arguing that "if there was any doubt whether *Twombly* altered the pleading requirements, the Supreme Court put that doubt to rest in *Erickson v. Pardus*"); Iqbal v. Hasty, 490 F.3d 143, 157 (2d Cir. 2007) (citing "conflicting signals" given by the Court in *Erickson* by citing the traditional "fair notice" formulation "just two weeks after issuing its opinion in *Bell Atlantic*"), *rev'd*, No. 07-1015, 2009 WL 1361536 (U.S. May 18, 2009); Bradley, *supra* note 133, at 122 (arguing that in *Erickson*, "the Court allowed a complaint based only on scant allegations . . . ."); Chemerinsky, *supra* note 133, at 437 n.38 (noting that in *Erickson*, the Court "reaffirmed traditional rules of notice pleading"); Ides, *supra* note 145, at 604 (noting that "[a]t least at a surface level, *Bell Atlantic* and *Erickson* appear to be in tension with one another"); *Pleading Standards*, *supra* note 133, at 310–11 n.51 ("Several commentators have argued that *Erickson* shows that *Twombly* should be read less expansively than some have suggested."). Some courts have cited *Erickson* as evidence that the Court intended to articulate a flexible standard that was case specific. *See Phillips*, 515 F.3d at 232.

necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[153]

Not only is this interpretation of the Court's decisions fanciful, but it is inconsistent with their plain language. *Erickson* merely quoted the "fair notice" language of *Twombly*.[154] It did not explicitly cut back on any of the elaboration of that general standard contained in *Twombly*.[155] Indeed, the *Twombly* majority went to great lengths to underscore that it was not imposing a heightened pleading standard or abandoning the "notice pleading" incorporated in the Federal Rules.[156] Rather, it reiterated that the plausibility standard flowed directly from the text of Rule 8.[157] The language in *Erickson* is thus fully consistent with *Twombly*. Accordingly, courts considering similar arguments have rejected them.[158]

D. Limitations Imposed By Existing Precedent

Some commentators have also argued that the *Twombly* decision is implicitly limited by prior precedent that the Court did not purport to overrule. In particular, these commentators point to the Court's decision in *Swierkiewicz v. Sorema N.A.*[159] as potentially constraining the reach of the *Twombly* decision. *Swierkiewicz* addressed the viability of a civil rights claim brought by an individual claiming ethnic origin discrimination.[160] The Court held that "an employment discrimination complaint need not include" specific facts establishing a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green*, but rather "must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'"[161] In so ruling, the Court distinguished between the standard for pleading an employment discrimination claim

153. *Erickson*, 127 S. Ct. at 2200 (citing *Twombly*, 127 S. Ct. at 1959).

154. *Id.*

155. As one court has explained, the *Erickson* Court "reversed a Tenth Circuit decision for requiring fact pleading." Limestone Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 803 (7th Cir. 2008).

156. *Twombly*, 127 S. Ct. at 1973 n.14.

157. *Id.* at 1965 n.3, 1966.

158. *See, e.g.*, Giarratano v. Johnson, 521 F.3d 298, 304 n.5 (4th Cir. 2008) ("We do not read *Erickson* to undermine *Twombly*'s requirement that a pleading contain 'more than labels and conclusions . . . .'"); *see also* Dodson, *supra* note 144, at 140 ("*Erickson* reaffirmed *Bell Atlantic*'s requirement that the complaint provide notice *plus* grounds. . . . The two cases are looking at the same standard . . . ."); Spencer, *supra* note 2, at 456 (maintaining that while *Erickson* may "soften the edges of *Twombly*, seeming to assure readers that not all of *Conley*'s legacy has been discarded," its "homage to notice pleading and the liberal ethos ring hollow"). The Supreme Court's recent decision in *Ashcroft v. Iqbal*, 2009 WL 1361536 (U.S. May 18, 2009), likewise refutes this interpretation. There, the Court reaffirmed the plausibility standard.

159. 534 U.S. 506 (2002).

160. *Id.* at 509.

161. *Id.* at 508 (quoting FED. R. CIV. P. 8(a)(2)).

under Rule 8 and the standard for *proving* such a claim, which it articulated in *McDonnell Douglas*.

However, nothing in *Swierkiewicz* is at odds with the majority's analysis in *Twombly*. The Court in *Swierkiewicz* did not purport to address a situation where the plaintiff's complaint was perfectly consistent with a lack of liability. To the contrary, defendants' argument in *Swierkiewicz* was that the complaint was too conclusory.[162] The Court rejected that argument based on the particular allegations in the complaint, which made clear the grounds upon which the plaintiff based his assertions of discrimination, "detail[ing] the events leading to [plaintiff's] termination, provid[ing] relevant dates, and includ[ing] the ages and nationalities of at least some of the relevant persons involved with [plaintiff's] termination."[163]

Indeed, the majority in *Twombly* repeatedly relied upon *Swierkiewicz* in its opinion.[164] The majority did not see anything inconsistent in its ruling and the *Swierkiewicz* decision. Nor did it indicate that *Swierkiewicz* imposed any limitations on the scope of its decision. To the contrary, it rejected the arguments made by the dissenters who maintained that the two decisions were irreconcilable and that the majority was in effect overruling the Court's prior decision.[165] As the Court explained, "'*Swierkiewicz* did not change the law of pleading, but simply reemphasized . . . that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements.'"[166] Thus, again, the Court eschewed plaintiffs' assertion that it was requiring "heightened fact pleading of specifics," reiterating that the plausibility test was based on the plain language of Rule 8.[167] In sum, decisions such as *Swierkiewicz* provide no basis for imposing artificial limits on the *Twombly* decision. To the contrary, these and other suggested limitations were

162. *Id.* at 514.

163. *Id.*

164. *See* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965, 1969, 1973 n.14 (2007) (citing *Swierkiewicz*, 534 U.S. at 508 n.1, 514–15). Likewise, the dissent criticized the majority's ruling as inconsistent with *Swierkiewicz*. *See id.* at 1982–83 (Stevens, J., dissenting) ("Everything today's majority says would therefore make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court has described. But it should go without saying in the wake of *Swierkiewicz* that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage.").

165. *See Twombly*, 127 S. Ct. at 1973 (majority opinion).

166. *Id.* (quoting Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 181 (S.D.N.Y. 2003), *rev'd*, 127 S. Ct. 1955 (2007)).

167. *Id.* at 1974.

specifically raised and rejected by the *Twombly* majority.[168]

III. THE PLAUSIBILITY STANDARD

The fundamental question with which courts have begun to grapple since *Twombly* is the import and scope of the "plausibility" standard.[169] As noted above, some courts and commentators have argued that the standard is "vague."[170] While such concerns are likely to dissipate with time and further judicial construction, in fact they are largely unfair.[171] A careful reading of the Court's decision provides fairly clear guidelines for courts assessing whether a complaint meets the requirements of Rule 8.

A. Logical Coherence

The central theme of the plausibility standard is logical coherence. The *Twombly* majority emphasized that plaintiffs' complaint was deficient because it contained allegations that were fully consistent with the non-liability of the defendants.[172] In doing so, the Court appeared to be interpreting the Federal Rules as requiring that plaintiffs' allegations contain a set of factual assertions that, if taken as true, are both necessary and sufficient to establish defendants' liability. The allegations in *Twombly* did not contain one necessary element—an "agreement" among the defendants to restrain trade. Accordingly, the Court found that such allegations were insufficient to state a claim.[173]

While certain courts and commentators have criticized the majority's interpretation, it is consistent with common sense. A complaint that does not contain allegations necessary and sufficient to warrant liability cannot possibly contain the "showing" necessary to meet the requirements of Rule

168. *See, e.g., id.* at 1965, 1969, 1973 n.14.

169. *See* Robbins v. Oklahoma, 519 F.3d 1242, 1244 (10th Cir. 2008) ("The most difficult question in interpreting *Twombly* is what the Court means by 'plausibility.'"); Phillips v. City of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008) ("What makes *Twombly*'s impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new 'plausibility' paradigm for evaluating the sufficiency of complaints.").

170. *See supra* note 5 and accompanying text.

171. That is not to say that courts have not misinterpreted *Twombly*. For example, in *EEOC v. Concentra Health Servs., Inc.*, a divided Seventh Circuit panel stated that *Twombly* "appears to hold that the plaintiffs pleaded themselves out of court with detailed 'allegations of parallel conduct' that did not plausibly suggest such a conspiracy." 496 F.3d 773, 778 n.1 (7th Cir. 2007) (quoting *Twombly*, 127 S. Ct. at 1963). However, as the concurrence observed, the majority in *Twombly* did not dismiss plaintiffs' suit "because they pled too much detail," but rather "the Court dismissed the plaintiffs' complaint because it did not plead enough." *Id.* at 783 n.1 (Flaum, J., concurring) (citing *Twombly*, 127 S. Ct. at 1964–69).

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

173. *Id.* at 1973.

8. There can be no "showing" of liability when plaintiffs' theory is filled with logical holes or omits essential elements they must prove in order to establish defendants' liability.

Nor does such an interpretation of the rules impose a requirement that plaintiffs plead facts with added specificity. The problem the Court addressed in *Twombly* is not one of specificity of the factual allegations, but whether plaintiffs have pleaded the necessary elements to establish liability. Requiring plaintiffs to plead each necessary element of their claims does not impose a heightened pleading standard or return us to the days of "fact pleading." Rather, it simply requires that plaintiffs include allegations in their complaint that, if believed, are not merely consistent with liability or non-liability, but rather affirmatively establish liability. In order to make the "showing" required under Rule 8, plaintiffs must demonstrate that liability is a necessary consequence of the allegations in their complaint.

The plausibility standard is also arguably dictated by the notice requirement of Rule 8.[174] While the majority did not rely on this aspect of Rule 8, it further supports the majority's conclusion. A defendant cannot be put "on notice" of the claim against it if a plaintiff's complaint is riddled with logical gaps or is logically incoherent. It is only where the complaint states a logically coherent theory of liability that a defendant is truly "on notice" of the claim against it.

This analysis further undermines the dissent's objections to the plausibility standard. While the dissent relied heavily on the notice requirement of Rule 8, that requirement itself supports the plausibility standard. The dissent's suggestion that notice pleading is inconsistent with a plausibility standard is arguably based on a flawed conception of the notice requirement. Logical coherence dictates something like a plausibility requirement.

B. The Insufficiency of Conclusory Allegations

However, there is another fundamental element that the Court acknowledged in its decision—the requirement that a plaintiff state more

174. *See Robbins*, 519 F.3d at 1248 ("This requirement of plausibility serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them."); *Phillips*, 515 F.3d at 232 (noting that "without some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only 'fair notice,' but also the 'grounds' on which the claim rests").

than mere conclusions.[175] In one sense, conclusory allegations can be logically coherent. If, for example, the plaintiffs in *Twombly* simply stated that the defendants had committed "violations of the Sherman Act," that allegation would be logically coherent. On the other hand, it would not be particularly meaningful because the plaintiffs would not have stated the fundamental elements necessary to establish the alleged violations. Also, defendants would not be placed on notice regarding the facts that the plaintiffs allege establish their claim. Moreover, is it really logically coherent to simply state what amounts to a tautology—i.e., defendants are liable because they have violated the law? Can plaintiffs evade the requirement that they plead logically coherent theories by avoiding stating any of the facts that support critical elements of their claims? In this sense, such conclusory allegations fail to meet the logical coherence requirement.

Thus, there is another requirement under *Twombly* to state a legally sufficient claim.[176] A plaintiff cannot rely on conclusory allegations.[177] Whether one construes this as an additional requirement or merely one aspect of logical coherence, the majority in *Twombly* made clear that logical coherence was plainly required under Rule 8(a), which mandates that plaintiffs make a "showing" that they are entitled to legal relief.[178] Conclusory allegations cannot constitute such a "showing." Nor do they in any real sense put the defendant on "notice" of the plaintiffs' claims. Merely *asserting* liability without alleging any factual basis cannot possibly inform the defendant of the nature of plaintiffs' claims. Thus, such conclusory allegations fail under the plain language of the rule.

The conceptual framework for addressing this problem is suggested in a footnote in the *Twombly* decision.[179] There, the Court described three categories of allegations.[180] First, it noted that there was a line that must be drawn between "conclusory" and "factual" allegations.[181] Conclusory allegations are plainly insufficient to establish a claim.[182] However, as noted above, there are multiple reasons such allegations may be deemed insufficient.[183] In *Twombly*, the majority seemed to be suggesting that "conclusory" allegations were deficient because they could not be credited

175. This was a longstanding requirement under Rule 8 even before *Twombly*. *See, e.g.*, Martin v. Davies, 917 F.2d 336, 340 (7th Cir. 1990); Munz v. Parr, 758 F.2d 1254, 1259 (8th Cir. 1985); Hurney v. Carver, 602 F.2d 993, 995 (1st Cir. 1979).

176. *See Twombly*, 127 S. Ct. at 1964–66.

177. *See id.* at 1966.

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

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

180. *Id.* at 1965 nn.4–5.

181. *Id.* at 1966 n.5.

182. *See id.* at 1966.

183. *Id.* at 1965–66.

as "factual" in nature.[184] Under this rubric, the logical coherence test would apply only after this threshold of pleading non-conclusory allegations was satisfied.

It is the second dividing line between the last two categories of allegations with which the Court in *Twombly* was primarily concerned: the distinction between "factually neutral" allegations and "factually suggestive" allegations.[185] As the Court observed, each of these dividing lines "must be crossed to enter the realm of plausible."[186] The first line divided claims that were essentially legal assertions from those that were factual allegations. The factual allegation category then was subdivided into two subsets—"factually neutral" allegations and "factually suggestive" allegations.[187] Only the latter were sufficient to satisfy the pleading requirements under Rule 8(a).[188] Accordingly, plaintiffs must "nudge[] their claims across the line from conceivable to plausible" in order to avoid dismissal of their complaints.[189]

IV. *TWOMBLY* IN CONTEXT

To fully understand the *Twombly* decision, it must be viewed in the context of the Court's other decisions regarding pleading standards. In particular, the Court has issued a number of decisions in recent years that have urged courts to apply more stringent scrutiny at the pleading stage.[190] *Twombly* may be viewed largely as evidencing this broader trend, which may be driven by concerns with the increasing costs of litigation in the federal system.

A. The Court's Recent Decisions Regarding Pleading Standards And Other Potential Limitations On Civil Claims

Contrary to the dissenting opinion and much of the early reaction to *Twombly*, the Court's decision did not represent a sharp break with its prior pleading jurisprudence. Rather, *Twombly* must be viewed as part of a broader trend in which the Court recognizes the importance of imposing real

184. *Id.* at 1965.
185. *See id.* at 1966 n. 5.
186. *Id.*
187. *See id.*
188. *Id.* at 1965–66.
189. *Id.* at 1974.
190. *See infra* notes 191–206 and accompanying text.

and meaningful judicial scrutiny at the pleading stage, particularly as cases become more costly and complex to litigate.

The Court itself recognized that its decision in *Twombly* flowed from its prior pleadings decisions. It noted, for example, that it had previously "alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharmaceuticals, Inc. v. Broudo*."[191] *Dura Pharmaceuticals* was a securities case in which the Court considered the requirements for pleading loss causation.[192] As the majority observed in *Twombly*, the Court in *Dura Pharmaceuticals* had "explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value."[193]

Indeed, the Court has been particularly active in enforcing rigorous pleading requirements in the securities context. In its recent decision in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,[194] for example, the Court considered the appropriate standard for pleading a "strong inference of scienter" under the Private Securities Litigation Reform Act (PSLRA). Under Section 21D(b)(2) of the PSLRA, plaintiffs were required to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[195] The lower federal courts had offered differing interpretations with respect to what this provision required.[196]

Justice Ginsburg, writing for the majority, held that "[i]t does not suffice that a reasonable factfinder plausibly could infer from the complaint's allegations the requisite state of mind."[197] Instead, "a court . . . must consider, not only inferences urged by the plaintiff, . . . but also competing inferences rationally drawn from the facts alleged."[198] "A complaint will survive . . . only if a reasonable person would deem the inference of scienter

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191. *Twombly*, 127 S. Ct. at 1966 (citing Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005)).

192. *See generally Dura Pharms.*, 544 U.S. 336.

193. *Twombly*, 127 S. Ct. at 1966 (quoting *Dura Pharms.*, 544 U.S. at 347) (internal quotations deleted).

194. 127 S. Ct. 2499, 2506 (2007).

195. 15 U.S.C. § 78u-4(b)(2).

196. *See, e.g.*, *Tellabs*, 127 S. Ct. at 2506 n.2.

197. *Id.* at 2504. As the majority explained,

> An inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the defendant's conduct. To qualify as "strong" within the intendment of § 21D(b)(2), . . . an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.

Id. at 2504–05.

198. *Id.* at 2504.

cogent and at least as compelling as any opposing inference one could draw from the facts alleged."[199] In so ruling, the Court in *Tellabs* is generally viewed as having increased the requirements for pleading scienter.[200]

While the Court in *Tellabs* was considering the appropriate pleading standard under a congressional statute,[201] rather than the Federal Rules, the Court discussed many of the same considerations that emerged in *Twombly*. Thus, for example, the Court noted the importance of judicial scrutiny at the pleadings stage in order to ensure that unnecessary costs are not imposed on litigants or the courts, where a plaintiff's claim is insufficient to state a claim as a matter of law. As the majority observed, "[p]rivate securities fraud actions, . . . if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law."[202] The efficiencies to be derived from ensuring the appropriate level of scrutiny at the pleading stage seemed to be foremost in the minds of the majorities in both *Twombly* and *Tellabs*.

Moreover, it is significant that neither of these decisions were written by the overtly "conservative" members of the Court who might be expected to welcome increased scrutiny of plaintiffs' claims at the pleadings stage. Rather, we find Justices Ginsburg and Souter writing the majority opinions, making clear that the standards for assessing the pleadings must be taken seriously and that there are significant institutional concerns associated with ensuring the appropriate level of scrutiny at the pleadings stage.[203]

Viewed more broadly, the Court's decisions regarding pleading standards can be viewed as part of a trend toward restricting the cases that are allowed to be decided by the jury. The Court imposed stringent standards for scrutinizing the reliability of proffered scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[204] In doing so, the Court

199. *Id.* at 2510.

200. However, as Justice Scalia noted in his concurrence, the Court could have gone much further and required plaintiffs to demonstrate more than mere equivalence between their proposed inference and any opposing inference. *See id.* at 2513 (Scalia, J., concurring); *see also id.* at 2516 (Alito, J., concurring) (agreeing that "a 'strong inference' of scienter, in the present context, means an inference that is more likely than not correct").

201. The majority made a point of noting that the PSLRA was specifically designed to act "[a]s a check against abusive litigation by private parties" and that, in particular, "[e]xacting pleading requirements are among the control measures Congress included in the PSLRA." *Id.* at 2504 (majority opinion).

202. *Id.* (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 81 (2006)).

203. *See Twombly*, 127 S. Ct. 1955; *see also Tellabs*, 127 S. Ct. 2499.

204. 509 U.S. 579, 589 (1993). In fact, the majority in *Tellabs* specifically made reference to *Daubert*, observing that "[i]n numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment." *Tellabs*, 127

interpreted Rule 702 of the Federal Rules of Evidence as charging judges with acting as "gatekeepers" responsible for ensuring that only evidence that is both reliable and relevant may be submitted to the jury.[205]

Likewise, the Court has evidenced a trend toward interpreting statutory preemption doctrines broadly to preclude juries from second-guessing judgments made by federal regulators. The Court has heard a series of cases in which it has suggested that it would interpret the scope of federal statutory preemption broadly. Again, the Court has expressed a concern that juries are not competent to assess complicated scientific questions that are better left to expert regulators.[206] While the Court's case law in this area is in flux, it appears that this is another area in which the trend is toward increasing judicial gatekeeping and applying more stringent scrutiny to the claims that are allowed to proceed to trial.

B. Twombly *In The Context of The Evolving Civil Litigation Landscape*

The Court's decisions, including *Twombly*, must be viewed in the context of the rules as a whole and the underlying dynamics within the civil justice system. As the majority emphasized, judicial scrutiny of the pleading provides an important counterbalance to the broad discovery authorized under the Federal Rules.[207] The Federal Rules authorize wide-ranging discovery in an effort to obtain accurate results in the litigation process.[208] The greater the discovery, the greater the likelihood that an accurate outcome will be achieved in the litigation process. Nonetheless, this accuracy comes at a cost. The greater the discovery, the greater the costs—not only monetary, but also in terms of the time spent by the parties and the court. Judicial scrutiny of the pleadings serves an important gatekeeping role in ensuring that such costs are incurred only where they are warranted—i.e., only where the plaintiff's claim is plausible and has some non-negligible

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S. Ct. at 2512 n.8.

205. *Daubert*, 509 U.S. at 597.

206. *See* Transcript of Oral Argument at 30–31, 42–43, Warner-Lambert Co. v. Kent, 128 S. Ct. 1168 (2008) (No. 06-1498), 2008 WL 495030; *see also* Transcript of Oral Argument at 19, 26, 37, Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008) (No. 06-179), 2007 WL 4241897.

207. *See* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1975 (2007) ("Those concerns [which] presumably explain the Court's departure from settled procedural law . . . . merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking.") (footnote omitted).

208. These provisions have not been without controversy. *See* Redish, *supra* note 137, at 563 (observing that "[d]ispute was widespread at the time of the [discovery] process's adoption as part of the Federal Rules of Civil Procedure in 1938, which made discovery an instrumental part of the revolutionary notice pleading system, and the debate has continued vigorously ever since" (footnote omitted)).

possibility of success.

These concerns have only increased with the proliferation of electronic discovery.[209] As records are increasingly stored in electronic media, parties in litigation increasingly are faced with the burden of preserving, searching, and producing voluminous materials during the course of the litigation—all at significant costs.[210] The unique challenges of electronic discovery have been catalogued by a variety of commentators. These challenges include the sheer volume of electronic discovery, the difficulty of retrieving relevant information while excluding irrelevant or privileged information from discovery, and the form in which electronic information is produced.[211]

One way of addressing these concerns is through amendment of the discovery rules. One could attempt to curb the potential abuses of discovery by placing limits on the scope of discovery or other restrictions. Some might argue that this has happened to a very limited extent with respect to discovery of electronic information.[212] In December 2006, the Federal Rules were amended to take into account the unique aspects of electronic discovery. Among other things, the rules now make a distinction between "reasonably accessible" information and "inaccessible" information, making the former subject to discovery without judicial order when "relevant and non-privileged," while the latter is discoverable only upon a showing of good cause and, even then, may be subject to certain conditions or limitations.[213] In addition, Rule 37 now contains a provision that allows a

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209. *See* Amy J. Longo & Dale Cendali, *Current Trends in Electronic Discovery*, A.L.I.-A.B.A. 193, 197 (2007) ("The proliferation of electronic information has forever altered the way that parties conduct litigation, particularly discovery."); Redish, *supra* note 137, at 564 (observing that "the discovery of electronic evidence has assumed enormous importance in modern litigation").

210. Redish, *supra* note 137, at 581 (observing that "the costs and burdens that result from the[] difficulties [associated with electronic discovery] can be of such a magnitude as to have a profound and unpredictable impact on basic societal choices not directly involving the lawsuit").

211. *See id.* at 589; *see also* Richard L. Marcus, *E-Discovery & Beyond: Toward* Brave New World *or* 1984*?*, 25 REV. LITIG. 633, 640–47 (2006).

212. *But see* Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167, 174 (2006), http://thepocketpart.org/images/pdfs/82.pdf (arguing that "[t]he rule amendments, and, more importantly, the features of electronic discovery that made the amendments necessary in the first place, will place increasing demands on litigants, lawyers, and judges to manage discovery earlier, more often, and in more detail than conventional discovery required").

213. FED. R. CIV. P. 26(b)(2)(B). The Advisory Committee notes provide some factors courts may consider in determining whether discovery is nonetheless warranted, including:

> (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be

party to avoid discovery sanctions "[a]bsent exceptional circumstances" where it has lost electronic information due to the routine operation of its computer systems (as opposed to some purposeful effort to frustrate discovery).[214] Rule 34 allows a party to specify the form in which electronic information shall be produced; absent specification, it shall be produced as it is "ordinarily maintained or in a reasonably usable form or forms."[215] The rules also encourage the parties to meet and confer at the outset of discovery regarding a number of topics, including the preservation of electronic information, the form in which electronic information shall be produced, and procedures for preventing the inadvertent disclosure of privileged information.[216] Finally, if the parties are unable to agree on procedures regarding the inadvertent production of privileged materials, Rule 26(b)(5)(B) provides default rules that allow a party to notify its opponent that certain produced information is privileged, require the opposing party to return such information or destroy it, and refrain from further disclosure of the information until the court resolves the privilege claim.[217] As the Advisory Committee notes observe, such provisions were particularly critical given that, "[w]hen the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed."[218]

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obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

They further note that "[t]he decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case." FED. R. CIV. P. 26(b)(2)(B) advisory committee's note to the 2006 amendment.

214. FED. R. CIV. P. 37(e) ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."). *But see* Rosenthal, *supra* note 212, at 190 (arguing that there may be "increased sanctions motions" under the new rules because "judges seeking effective control over electronic discovery may impose unrealistically stringent demands on litigants and lawyers, which will predictably lead to an increase in sanctions motions if parties cannot meet the demands").

215. FED. R. CIV. P. 34(b).

216. FED. R. CIV. P. 26(f)(3)–(4). The Advisory Committee notes observe that "[t]he particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case." FED. R. CIV. P. 26(f)(3)–(4) advisory committee's note. The rules also encourage courts to address "disclosure or discovery of electronically stored information" at the Rule 16 pre-trial conference. FED. R. CIV. P. 16(b)(3). This provision "is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur." FED. R. CIV. P. 16(b)(3) advisory committee's note to the 2006 amendment.

217. FED. R. CIV. P. 26(b)(5)(B).

218. FED. R. CIV. P. 26 advisory committee's note to the 2006 amendment.

These provisions provide some protection for a party faced with massive discovery; nonetheless they do not go particularly far. The Federal Rules still provide for wide-ranging discovery even in the context of electronic information.[219] The costs of such discovery are well-documented and will only increase over time.[220] Thus, this mechanism has not provided a means for checking the potential costs of discovery. Nor, as the *Twombly* majority observed, is it necessarily the most effective mechanism.[221] Frequently, judges simply are not in a position to impose real limitations on discovery given their limited resources and knowledge regarding the substantive aspects of the litigation.[222] Accordingly, it is not clear that such amendments can provide an effective check on discovery abuse. Finally, one could debate whether restricting discovery is the most appropriate mechanism for balancing the costs and benefits of litigation. Arguably, judicial scrutiny of the pleadings followed by discovery for those claims that survive this threshold stage in the litigation is superior.[223] Across-the-board restrictions on discovery will apply to both those claims that have merit and those that do not. In contrast, strengthening pleading standards will target those claims with little or no merit while not disadvantaging those with merit. Utilizing limits on discovery as a means of controlling litigation costs may unduly disadvantage plaintiffs with meritorious claims.

V. CRITICISMS OF THE PLAUSIBILITY STANDARD

Viewed within this framework, many of the criticisms of the majority's decision in *Twombly* fall by the wayside. The Court's decision is fully consistent with the text of the rules as well as their underlying rationale. As such, it articulates a standard that is neither "vague" nor "confusing,"[224] nor a "startling" deviation from existing precedent.[225] Rather, *Twombly* is part of a broader trend that recognizes the important role of the judge as

219. *See* FED. R. CIV. P. 26(a).

220. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007) (citing William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1898–99 (2003); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 30 (2004); Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000).

221. *Twombly*, 127 S. Ct. at 1967 & n.6 (citing Easterbrook, *supra* note 121, at 638).

222. *Id.*

223. *Id.*

224. *See supra* note 5 and accompanying text.

225. *See supra* note 2 and accompanying text.

gatekeeper.

First, the plausibility standard does not represent a deviation from traditional notice pleading.[226] As noted above, the plausibility standard properly understood is a necessary component of the notice requirement.[227] There cannot be notice without the logical coherence enforced under the plausibility rule. Accordingly, *Twombly* does not represent a deviation from traditional principles of notice pleading properly construed. This conclusion does not undermine the significance of the Court's decision, however. The Court essentially ratified a trend in the lower federal courts to increase the scrutiny applied to the pleadings.[228] By doing so, it sought to ensure that judges act as vigorous gatekeepers. Moreover, the scrutiny *Twombly* requires is mandated by the Federal Rules. While the notice pleading standard has been characterized as "liberal,"[229] it is not so liberal that it would allow pleadings that are riddled with logical flaws or gaps to survive a motion to dismiss for failure to state a claim.

Second, the plausibility standard does not overturn settled precedent.[230] To the contrary, it is in line with the Court's recent approach to pleading standards. To the extent the Court purported to "overrule" precedent at all, it merely overruled a heavily criticized and poorly worded formulation of the Rule 8(a) standard in *Conley*.[231] In doing so, however, the Court was merely enforcing the directive in the Federal Rules and ratifying the reality within the federal courts, which had eschewed the hyper-literal reading of the *Conley* language.[232]

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226. *See Twombly*, 127 S. Ct. at 1976 (Stevens, J., dissenting).

227. *See supra* note 174 and accompanying text.

228. As Professor Fairman explained, notice pleading was largely a "myth" given the actual practice in the federal courts:

> Notwithstanding its foundation in the Federal Rules and repeated Supreme Court imprimatur, notice pleading is a myth. From antitrust to environmental litigation, conspiracy to copyright, substance specific areas of law are riddled with requirements of particularized fact-based pleading. To be sure, federal courts recite the mantra of notice pleading with amazing regularity. However, their rhetoric does not match the reality of federal pleading practice. Sometimes subtle, other times overt, federal courts in every circuit impose non-Rule-based heightened pleading in direct contravention of notice pleading doctrine.

Christopher Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003). *See also* Ides, *supra* note 145, at 604 (observing that "lower federal courts more than occasionally inhale the mantra of simplified pleading and exhale a heightened pleading standard"); Spencer, *supra* note 2, at 432 (noting that "the Court's move in th[e] direction [of plausibility pleading] is consistent with long-held sentiment among the lower federal courts").

229. *Twombly*, 127 S. Ct. at 1973 (majority opinion).

230. *See id.* at 1977–78 (Stevens, J., dissenting); Spencer, *supra* note 2, at 460 (agreeing with *Twombly* dissent that the majority's decision is based on "an untenable interpretation of Rule 8(a) that is wholly inconsistent with Supreme Court precedent").

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

232. *See supra* note 71 and accompanying text.

Third, the plausibility standard is consistent with the Federal Rules as construed as a whole.[233] The majority correctly stated that its formulation did not impose a "heightened" pleading standard.[234] Accordingly, it did not undermine Rule 9's requirement of additional specificity in certain categories of cases, nor other provisions of the Federal Rules designed to address the problem of a lack of specificity in the pleadings, such as Rule 12(e).[235] Rather, viewed in context, the *Twombly* decision merely reinforces the importance of the Rule 8(a) pleading standard as the gateway to further proceedings under the generous discovery provisions of the Federal Rules. One of the (but not the only) counterweights to liberal discovery under the Federal Rules is stringent judicial scrutiny at the pleadings stage.[236] Accordingly, the *Twombly* ruling is *supported* by the structure of the Federal Rules when considered as a whole.

Finally, the plausibility standard does not represent the triumph of policy considerations over the text of the rules.[237] The majority properly stated that the plausibility standard flowed from the text of Rule 8.[238] It is supported not only by the rule's requirement of a "showing" but also fair "notice" to the opposing parties.[239] As such, it is not merely a policy-based standard. Nonetheless, it does advance important policies that underlie the Federal Rules.

VI. CONCLUSION

The full scope and effect of *Twombly* has yet to play out in the courts. Nonetheless, faithful adherence to the Court's decision would have potentially sweeping effects. The Court has made clear that federal courts must scrutinize complaints to ensure that they are not conclusory and that they allege facts that, if taken as true, are necessary and sufficient to establish plaintiffs' claims.[240] Likewise, it has made clear that this scrutiny

233. *See Twombly*, 127 S. Ct. at 1984 (Stevens, J., dissenting); Spencer, *supra* note 2, at 461, 470–89 (arguing that *Twombly* "offered an interpretation of Rule 8 that simply does not fit with the liberal provisions of the Federal Rules as a whole").

234. *Twombly*, 127 S. Ct. at 1973 n.14.

235. *Id.* (distinguishing Rule 9's requirement that allegations be "particularized" from the plausibility standard).

236. *See Twombly*, 127 S. Ct. at 1975 (Stevens, J., dissenting).

237. *Id.* at 1975, 1989.

238. *Id.* at 1966 (majority opinion).

239. *See id.* at 1959.

240. *Id.* at 1965.

is required under the plain language of Rule 8(a).[241]

The proposed limitations on the *Twombly* decision simply lack support. While judicial scrutiny at the pleading stage may be particularly warranted in antitrust and other complex cases, which threaten to impose significant discovery costs on defendants, there is simply no basis in either the Court's decision or the plain language of the rules for such case-specific limitations. The Federal Rules apply equally to all cases and do not purport to make such distinctions. Moreover, the Court's analysis was based primarily not on such policy considerations, but its interpretation of the plain meaning of the language of Rule 8.[242] Accordingly, faithful adherence to the *Twombly* decision will have potentially wide-ranging effects.

Nonetheless, one cannot discount the important policy implications of *Twombly* or its place in the broader context of modern civil litigation. Decisions such as *Daubert* and *Twombly*, which mandate greater judicial involvement in assessing the merits of plaintiffs' claims at early stages of the litigation are increasingly important in our modern civil justice system. Given the exploding costs of civil litigation and expanding discovery obligations, the risk that settlements may be based not on the merits of a particular case, but rather the *in terrorem* value of a lawsuit, has only increased.[243] Thus, the Court has correctly observed in a variety of contexts that increasing judicial scrutiny is likely to have important and beneficial offsetting effects with respect to other trends in modern civil litigation.[244]

This is not to say that these trends are necessarily undesirable. Increased discovery may lead to more accurate and just outcomes in certain circumstances as parties are able to obtain the facts necessary to fully prove their claims. Nonetheless, one cannot discount the costs associated with such developments and the need for some checks and balances to offset potential abuses. Accordingly, *Twombly* represents an important structural development under the Federal Rules, which is likely to improve adjudicative outcomes.

241. *Id.* at 1966.
242. *See generally id.*
243. *Id.* at 1975 (Stevens, J., dissenting).
244. *See generally id.*