RATIONAL PLEADING IN THE MODERN WORLD OF CIVIL LITIGATION: THE LESSONS AND PUBLIC POLICY BENEFITS OF *TWOMBLY* AND *IQBAL*

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INTRODUCTION

The past few years have introduced some exciting, indeed revolutionary, changes to the world of pleading.[1] In what is traditionally a static topic of civil procedure, often viewed as an afterthought by all but first year law students, federal pleading requirements have received a modern-day makeover by the United States Supreme Court in two key decisions, *Bell Atlantic Corp. v. Twombly*[2] and *Ashcroft v. Iqbal*.[3] With these rulings, the Court signaled a decisive break from the broad "notice pleading" standard[4] that evolved out of the Federal Rules of Civil Procedure and became absorbed into many states' analogous pleading rules.[5] In its place, the Court has ushered

1. *See generally* Edward D. Cavanagh, Twombly: *The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1 (2008); Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063 (2009); Ettie Ward, *The After-shocks of* Twombly: *Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 893 (2008).

2. 550 U.S. 544 (2007).

3. 129 S. Ct. 1937 (2009).

4. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008); Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135, 138 (2007), *available at* http://www.virginialawreview.org/inbrief/2007/07/29/dodson.pdf (declaring that "notice pleading is dead" after the Supreme Court issued its decision in *Twombly*).

5. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) (reporting that most states have either replicated or similarly modified federal pleading rules); *see also* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL

in the era of so-called "plausibility pleading,"[6] which represents a more exacting standard, yet one that has resulted in significant confusion as lower courts attempt to decipher its meaning and impact.[7]

Although the contours of *Twombly* and *Iqbal* may not yet be fully understood, the Supreme Court's purpose in developing a more careful judicial review of pleadings was clear: More thorough review is necessary to protect against frivolous and purely speculative lawsuits.[8] Such cases take a considerable toll on the judicial system, wasting scarce judicial resources, delaying justice for meritorious cases, and burdening defendants with "sprawling, costly, and hugely time-consuming" discovery.[9] As the Court stated in *Twombly*, this mere "threat of discovery expense will push cost-conscious defendants to settle even anemic cases" during the pretrial stage.[10] Of equal importance to the Court's reasoning is that the lack of sufficient pleadings review has created an incentive for discovery "fishing expeditions,"[11] whereby claims are initiated with the primary objective of obtaining discovery to find support to file other lawsuits. The purpose of these lawsuits is not to win and secure a client recovery, but rather to provide information to spawn other lawsuits, which can similarly be used to leverage settlement.

As the Supreme Court further appreciated in recalibrating federal pleading requirements, the harmful effects of marginal litigation are often compounded in the modern world of civil litigation. The concept of notice pleading developed in the 1930s as a reaction to arcane common law pleading rules and rigid code pleading.[12] Civil litigation at the time involved rela-

PROCEDURE § 5.1 (4th ed. 1985) (discussing the intertwined history of state and federal pleading reform).

6. Spencer, *supra* note 4, at 431 ("Say hello to plausibility pleading.").

7. *See, e.g.*, Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1011 ("Amorphous. This is how the Supreme Court's recent pleading paradigm has been appropriately described."); Benjamin W. Cheesbro, Note, *A Pirate's Treasure?: Heightened Pleadings Standards for Copyright Infringement Complaints After* Bell Atlantic Corp. v. Twombly, 16 J. INTELL. PROP. L. 241, 266 (2009) ("*Twombly* created quite a kerfuffle, and the dust has yet to settle.").

8. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–60 (2007).

9. *Id.* at 560 n.6.

10. *Id.* at 559.

11. *Id.* at 577 (Stevens, J., dissenting).

12. *See infra* Part I.A.

tively simple and straightforward matters,[13] and most modern forms of complex litigation, such as regulatory actions or products liability suits regarding warnings and design, either were substantially limited in scope and sophistication or did not yet exist.[14] Concepts such as e-discovery, which alone can cost litigants millions of dollars, were not yet even in the realm of science fiction.

It is in this context that this Article analyzes the public policy of *Twombly* and *Iqbal*, and offers neutral principles for how both federal and state courts might interpret the Supreme Court's new, and admittedly vague, standard. Part I begins by explaining the historical justifications and development of notice pleading. It goes on to discuss the Supreme Court's interpretation of federal pleading requirements in *Twombly* and *Iqbal* and the Court's retreat from notice pleading. Part II examines how these rulings reflect a set of changed circumstances as to the propriety of traditional notice pleading in modern civil litigation. It then offers rational principles for courts to apply in meeting the Supreme Court's new mandate and determining the sufficiency of a pleading. These principles are rooted in the notion that the complexity of a case should bear directly on the degree of pleading specificity needed to establish plausibility. Finally, Part III analyzes the public policy implications of these principles and of greater judicial review of pleadings in general, and responds to arguments of proponents of broad notice pleading.

The Article concludes that broad, bare-bones notice pleading has rightfully "earned its retirement,"[15] and that lower courts could benefit from a framework for determining the plausibility of a complaint. The Article further concludes that although only federal courts are obligated to interpret pleadings in light of *Twombly* and *Iqbal*, there are convincing policy reasons for state courts to do the same.

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13. *See infra* notes 72–78 and accompanying text.

14. *See* DAN B. DOBBS, THE LAW OF TORTS 969–77 (2000) (discussing the development of product liability law); VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ'S TORTS: CASES AND MATERIALS 735–38 (11th ed. 2005) (same); *see also* James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990).

15. *Twombly*, 550 U.S. at 563.

I. THE RISE AND FALL OF NOTICE PLEADING

A. The Development of Basic Pleading Standards

From the earliest formulations of pleading requirements in England during the Middle Ages until the establishment of the Federal Rules of Civil Procedure in the first half of the twentieth century, the focus in pleading was on formality. Generally speaking, courts during this period applied a rigid, highly technical review of pleadings for compliance with common law rules and, where established, civil codes.[16] In many instances, these procedural systems were designed not simply to control the level and types of cases heard, but as a mechanism to keep litigants out of the courtroom.[17] Legal history is stained with examples of such allegiance to formalism effectively providing a trap for the unwary and disenfranchised.[18] Over time, these legal hurdles stood increasingly at odds with Americans' expanding personal liberties and notions of equal justice, thereby fermenting an environment conducive to a fundamental overhaul of the existing pleading system.

1. Common Law Pleading

In Medieval England, courts generally presented those seeking legal recourse with two options: "the burdensomely technical route through the courts of law or the burdensomely factual route through the courts of equity."[19] Before this arduous process could even begin, however, plaintiffs had to overcome significant hardships in getting before the correct court and securing a defendant's appearance. For example, in the Court of the

16. Kendall W. Hannon, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1812 (2008) ("The ultimate result at common law was a complex, verbose, and convoluted pleading that did not make clear what, exactly, the suit was predicated on.").

17. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004); Ward, *supra* note 1, at 896–97.

18. *See* Note, *Common Law Pleading*, 10 HARV. L. REV. 238, 239 (1897) (defending the old regime from the allegation that it was "a mere series of traps and pitfalls for the unwary").

19. Damon Amyx, *The Toll of* Bell Atlantic Corp. v. Twombly*: An Argument for Taking the Edge Off the Advantage Given Defendants*, 33 VT. L. REV. 323, 324 (2008); *cf.* Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 519–23 (1925) (discussing the history of pleading requirements in Roman times).

Common Bench, the precursor to the Court of Common Pleas, a case could not proceed, regardless of the merits, without all parties properly before the court.[20] To compel a defendant's appearance, plaintiffs would typically have to persuade the court to engage in the "laborious and costly" process of "outlawing" the defendant.[21] By comparison, the "rival" Courts of the Exchequer and King's Bench, which were empowered to issue writs of arrest to facilitate appearances, only marginally improved upon this process.[22] In these courts, plaintiffs would often have to allege fictitious claims that were offenses to the king, such as a complaint of trespass, to secure a pretrial arrest writ.[23] After the courts obtained jurisdiction, these empty claims would be dropped and the real civil claims added so the matter could be adjudicated.[24]

When they arrived at the starting line, plaintiffs encountered a confining labyrinth of formality. Courts of law functioned according to a strict writ system. Here, a plaintiff needed to obtain a writ from the court before filing a claim, and, for the court to have jurisdiction, that claim had to fit within a specific form of action.[25] Writs were also "strictly limited to cases where precedents existed."[26] After obtaining a writ for a specific form of action, a plaintiff could expect to encounter very different procedures, depending on the form of action selected.[27] A "science of special pleading"[28] thus de-

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20. EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW 169–70 (1913); Amyx, *supra* note 19, at 325.

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

22. *Id.*

23. *Id.* at 170–72 (explaining the use of trespass and a "Writ of Quominus," which created the legal fiction that the plaintiff owed money to the king to secure a defendant's arrest).

24. *Id.* at 170.

25. ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 545 (3d ed. 2009); Matthew A. Josephson, *Some Things Are Better Left Said: Pleading Practice after* Bell Atlantic Corp. v. Twombly, 42 GA. L. REV. 867, 872 (2007) ("For the common law plaintiff to prevail, he was forced to fit his claim into one of eleven established categories . . . ."); *see also* William H. Lloyd, *Pleading*, 71 U. PA. L. REV. 26 (1922).

26. Clark, *supra* note 19, at 527 ("The practice of the clerks in chancery of *forming* new writs had ceased by the middle of the thirteenth century.").

27. *See* JENKS, *supra* note 20, at 349–50.

28. Clark, *supra* note 19, at 526; *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *305–06; William Searle Holdsworth, *The New Rules of Pleading of the Hilary Term, 1834*, 1 CAMBRIDGE L.J. 261, 262 (1923) (quoting nineteenth-century legal writer

veloped, with the entire process "resembl[ing] an obscure game of chance,"[29] pitting claimants against the system as much as against each other.

Courts of equity were only marginally easier to navigate. They did not have forms of action; however, equitable pleadings required very detailed and lengthy explanations of both law and fact.[30] The original pleading, in effect, provided the entire basis on which to determine a case. Facts were sworn to and generally could not be amended, and "rules of law were proposed, discussed, and approved or disapproved at the level of pleading."[31] A formal civil trial with witnesses did not become commonplace until relatively modern times.[32] Thus, this one-shot deal represented a considerable risk for plaintiffs, and placed tremendous pressure on the litigants to construct comprehensive, artful pleadings.[33]

By the end of the fourteenth century, these rigid common law pleading requirements had become fixed and would largely stay that way until the nineteenth century.[34] Some efforts were made to lend greater flexibility to the law, but oftentimes they did not function to aid those burdened in bringing an action. For example, during the eighteenth century more courts began to allow defendants to plead the "general issue," meaning that a defendant could respond with a general denial of the plaintiff's allegations and defend specific allegations at trial, rather than separately addressing each statement in the com-

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Frederick William Maitland referring to common law pleading as "[t]he most exact, if the most occult, of the sciences" (footnote omitted)).

29. JENKS, *supra* note 20, at 350.

30. Clark, *supra* note 19, at 528; Mark D. Robins, *The Resurgence and Limits of the Demurrer*, 27 SUFFOLK U. L. REV. 637, 641 (1993).

31. Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and* Conley v. Gibson, 52 HOW. L.J. 73, 76 (2008).

32. Clark, *supra* note 19, at 528; *see also* Josephson, *supra* note 25, at 874 ("The pleading contest was the primary source of dispute resolution, with the 'trial itself as something of an afterthought.'" (footnote omitted)).

33. *See, e.g.*, Jason G. Gottesman, Comment, *Speculating as to the Plausible: Pleading Practice After* Bell Atlantic Corp. v. Twombly, 17 WIDENER L.J. 973, 976–78 (2008) (discussing the early pleading standards' impact of reducing the likelihood of resolution on the merits of cases).

34. *See* Clark, *supra* note 19, at 527–30; *see also* Holdsworth, *supra* note 28, at 265 ("[B]oth the system of pleading and the system of procedure in which it played so important a part tended to grow more elaborate and more rigid as time went on.").

plaint.[35] Common law courts still insisted, however, that each of the plaintiff's allegations be whittled down to a single issue, divided into questions of law for the judge and questions of fact for the jury, and ruled on at the pleading stage.[36] Not until the wide adoption of code pleading would the common law finally shed some of its enduring arcane formalities and begin allowing for a more level playing field.

2. *Code Pleading*

Beginning in the early nineteenth century, frustrations with the rigidity and injustice of common law pleading led to the formation of the "code pleading" system. This system was predicated on a set of legislatively adopted rules intended to promote greater clarity and uniformity in pleading requirements, prevent unfair surprise to parties, and reduce costs.[37] The system was designed to accomplish these ends by streamlining cases and replacing technical pleading requirements with a requirement to plead operative facts.[38] Legal conclusions were not to be pled, enabling the court to narrow efficiently the issues in a case.[39]

In practice, the difficulty in distinguishing between operative facts, evidentiary facts, and legal conclusions made code pleading a spectacular failure. Like its common law predecessor, code pleading proved immensely technical, and uncertainty in what needed to be pled to give sufficient notice to a party quickly devolved into an overly-inclusive approach to pleading.[40] In the end, the system was "excruciatingly slow, expensive, and unworkable."[41]

The Hilary Rules of 1834 provide an archetypal example of the code pleading experience. The Hilary Rules were created pursuant to the Civil Procedure Act of 1833, which authorized

35. *See* Amyx, *supra* note 19, at 328.

36. *See* Ward, *supra* note 1, at 896.

37. *See* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 305 (1938) [hereinafter Clark, *Handmaid of Justice*]. *See generally* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 21–31 (2d ed. 1947) [hereinafter CLARK, HANDBOOK].

38. *See* JAMES GOULD, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 173–74 (4th ed. 1887).

39. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 574 (2007) (Stevens, J., dissenting).

40. *See* Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 260–68 (1926) (arguing that distinctions between law, facts, and evidence were often meaningless).

41. 5 WRIGHT & MILLER, *supra* note 17, § 1202.

courts to adopt their own procedural rules. Their purpose was to reduce entire controversies to one defined issue.[42] Their implementation introduced "a period of the strictest pleading ever known,"[43] as the rules required far more particularity to mold a case than the common law had. Only extremely proficient drafters could navigate the rules and avoid potential traps.[44] Litigation solely concerning procedural matters clogged the court system, leaving the actual merits of cases to take a backseat to artful pleading.[45] Failing to achieve any measure of improvement over the common law, and in fact exacerbating the pleading process, the Hilary Rules were completely abandoned within a few decades.[46] Nevertheless, this "disastrous mistake"[47] proved pivotal in changing attitudes regarding how pleadings should function, signaling the end of formalistic pleading requirements in the English common law system.

The United States, meanwhile, gained valuable insight from the early problems with the English code pleading system and set out to construct an improved pleading process. In 1848, New York, under the leadership of David Dudley Field, became the first state to develop a purported solution in its adoption of the "Field Code."[48] The Field Code merged actions in the American courts of law and equity into a single action, known as the "civil action."[49] It abolished common law forms of action, and in place of technical pleading language simply required that the complaint contain "[a] statement of the facts

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42. *See* Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520 (1957).

43. Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458–59 (1943).

44. *See id.* at 459.

45. *See* Weinstein & Distler, *supra* note 42, at 520; Clarke B. Whittier, *Notice Pleading*, 31 HARV. L. REV. 501, 507 (1918) (stating that one in four cases was dismissed at the pleading stage as compared with one in six under the common law).

46. The Hilary Rules were officially ended with the enactment of the Supreme Court of Judicature Act of 1873, which combined the English courts of law and equity into a single body. *See* CLARK, HANDBOOK, *supra* note 37, at 14.

47. Clark, *supra* note 43, at 459 (quoting Holdsworth, *supra* note 28, at 271).

48. Judge Clark, the chief draftsman of the Federal Rules of Civil Procedure, suggested that much of the Field Code in fact emanated from Edward Livingston's Louisiana Code of Civil Procedure drafted in 1805. *See* Clark, *Handmaid of Justice*, *supra* note 37, at 305.

49. Gottesman, *supra* note 33, at 977 (quoting CLARK, HANDBOOK, *supra* note 37, at 23).

constituting the cause of action, in ordinary and concise language, without repetition."[50]

By several accounts, the Field Code represented an improvement over an American common law system still stifled by England's common law formalities. First, claimants gained easier access to the courthouse, and were no longer bounced between courts of law and equity. Second, the removal of forms of action opened avenues by which recovery was available. Finally, the novel concept of an "ordinary and concise" statement helped to liberalize pleading rules and eliminate frequent pleading traps.[51] These advances led over half of the states to adopt the Field Code as their procedural guide.[52]

The Field Code's ultimate goal of simplifying the pleading process, however, failed to materialize.[53] The practical difficulty in distinguishing between allegations of ultimate fact, which were appropriate for pleadings, and legal conclusions, which were inappropriate at that stage, left claimants mired in the same highly technical attention to detail present under the common law.[54] The rules were also rigidly enforced.[55] Even simple pleading requirements, such as the detail required to show negligence, were liable to trigger procedural defects.[56] Thus, on balance, the Field Code left in place a system that still inhibited rather than promoted the resolution of claims on the merits.

3. *Notice Pleading*

By the early twentieth century, grudging acceptance of code pleading's serious flaws and aggravation with hundreds of years of stagnant common law development combined to pro-

50. 1848 N.Y. Laws 521.

51. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 934 (1987).

52. CLARK, HANDBOOK, *supra* note 37, at 14 (stating that by 1928 "twenty-eight states and two territories" had adopted the Field Code).

53. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438 (1986).

54. *See id.*

55. Gottesman, *supra* note 33, at 977–78.

56. *See* Marcus, *supra* note 53, at 438 (stating that "the detail needed to allege negligence was regularly recalibrated").

duce a breaking point.[57] The last straw was that by the 1930s, federal courts ran according to a "strange mixture" of procedure.[58] For actions at law, Congress's passage of the Conformity Act in 1872 required that federal district courts follow the procedure of the state in which the court sat, which varied between common law and code pleading.[59] For actions at equity, Congress's vesting of rulemaking authority in the United States Supreme Court resulted in adoption of the Federal Equity Rules in 1912, which delineated an entirely distinct set of procedures.[60] By the early 1930s it had become clear that only radical change would finally put an end to this fragmented, mystifying, and oppressive procedural system.[61]

As legal scholar John Frank later noted: "Just as the ship that is in the water too long becomes encrusted with barnacles, so legal proceedings may become encrusted with tradition; and some of them may from time to time need to be scraped off."[62] In 1934, Congress enacted the Rules Enabling Act,[63] authorizing the Supreme Court to promulgate uniform rules governing practice and procedure in the federal courts. Four years later, the Federal Rules of Civil Procedure were born and with them the era of notice pleading.[64] The term "notice pleading" articulates a fundamental philosophical change in the new pleading rules that cast away formal and fact-intensive pleadings in fa-

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57. *See* Charles E. Clark & James W. Moore, *A New Federal Civil Procedure II: Pleadings and Parties*, 44 YALE L.J. 1291, 1295 (1935).

58. FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 1.8 (5th ed. 2001); *see also* Charles E. Clark & James W. Moore, *A New Federal Civil Procedure I: The Background*, 44 YALE L.J. 387, 393 (1935).

59. Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 10–11 (2008); *see also* Clark & Moore, *supra* note 58, at 406–07.

60. Campbell, *supra* note 59, at 10–11; *see also* Wallace R. Lane, *Twenty Years Under the Federal Equity Rules*, 46 HARV. L. REV. 638, 638, 643 (1933).

61. *See* Richard A. Epstein, Bell Atlantic v. Twombly: *How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 62 (2007) (stating that the new Federal Rules of Civil Procedure were embraced "with great fanfare" and viewed as "an obvious advance over the earlier rules of procedure that were embodied in the standard codes"). *But see* Subrin, *supra* note 51, at 976–77, 983–84 (describing disagreement over liberal pleading among Advisory Committee members and resistance to it after 1938).

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

63. Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2006)).

64. *See* Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 380 (1992).

vor of merely providing a party "notice" that a lawsuit involving an incident or event was being brought.

Before "notice pleading" became established in legal parlance,[65] however, the drafters referred to their new procedural philosophy as "simplified pleading."[66] Pleadings still needed to incorporate the elements of a claim that were required under the common law or code pleading, but they merely had to state them in a concise manner, untethered from any formal guidelines.[67] Rule 8(a)(2) of the Federal Rules of Civil Procedure embodies this major shift in approach, requiring a plaintiff to provide only "a short and plain statement of the claim showing that the pleader is entitled to relief."[68]

A guiding policy behind simplified pleading was that it would be more efficient, in terms of both cost and expediency, to resolve disputes using discovery rather than successive technical pleadings.[69] The drafters believed that the discovery system would screen less meritorious cases, encourage just settlements, and, overall, provide a superior means of early dispute resolution.[70] Looking back over the past seventy years of legal history, it is obvious that the drafters were seriously mistaken on this point, as discovery expenses have long represented the lion's share of litigation costs and have not effectively provided a means of early dispute resolution.[71] Rather

65. *See infra* notes 81–85 and accompanying text.

66. *See* Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 272 (1942); 5 WRIGHT & MILLER, *supra* note 17, § 1202. Judge Clark, in fact, vigorously opposed the term "notice pleading" as a "vague abstraction." Charles E. Clark, *To an Understanding Use of Pre-Trial*, 29 F.R.D. 454, 457 (1962).

67. *See* Sherwin, *supra* note 31, at 77.

68. FED. R. CIV. P. 8(a)(2); *see also* Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) (stating that the new pleading rules require "a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result").

69. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 575–76 (2007) (Stevens, J., dissenting); R. David Donoghue, *The Uneven Application of* Twombly *in Patent Cases: An Argument for Leveling the Playing Field*, 8 J. MARSHALL REV. INTELL. PROP. L. 1, 5 (2008).

70. *See Twombly*, 550 U.S. at 575 (Stevens, J., dissenting); Donoghue, *supra* note 69, at 5.

71. *See* Paul V. Niemeyer, *Report of the Advisory Committee on Civil Rules*, 192 F.R.D. 354, 357 (1999) (stating that "discovery represents approximately 50% of the [federal] litigation costs in all cases, and as much as 90% of the litigation costs in the cases where discovery is actively employed"); *see also* COMM. FOR ECON. DEV., BREAKING THE LITIGATION HABIT: ECONOMIC INCENTIVES FOR LEGAL RE-

than acting as a screen against cases without merit, discovery has become a magnet to attract them.

Nevertheless, in the context of the 1930s when the Federal Rules of Civil Procedure were enacted, the drafters' judgment was justifiable. Litigation was comparatively small.[72] Many lawyers practiced in localized settings in which they might be one of only a few practitioners, or perhaps the only attorney in town.[73] It was also not uncommon for attorneys to have personal and professional relationships with local judges.[74] This close-knit environment fostered greater mutual respect among counsel, leading to fewer antagonistic tactics and fewer unnecessary delays and costs.[75] In addition, cases typically involved simple, straightforward issues, so that discovery might only entail fairly inexpensive measures, such as taking witness statements.[76] The evolution of the large law firm with national, or even international, practices and greater incentives to aggressively litigate matters (and risk offending small-town sensibilities) was still many decades away.[77] Most forms of com-

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FORM 5 (2000) ("Discovery alone is estimated to comprise 80 percent of the cost of a fully litigated case.").

72. *See* Daniel J. Meador, *A Perspective on Change in the Litigation System*, 49 ALA. L. REV. 7, 8–9 (1997) (describing the substantial increase in the volume and complexity of litigation since the Federal Rules were enacted).

73. Professor Arthur Miller summarized the changes in the legal community since the Federal Rules were enacted:

> The culture of the law and the legal profession itself are far different. Long gone are the days of a fairly homogeneous community of lawyers litigating relatively small numbers of what today would be regarded as modest disputes involving a limited number of parties. The federal courts have become a world unimagined in 1938 . . . .

Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 11 (2009) (statement of Arthur R. Miller, Professor, New York University School of Law) [hereinafter Miller Statement].

74. *See* Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 895–97 (2009) (discussing changes in the practice of law since adoption of the Federal Rules).

75. *See* Meador, *supra* note 72, at 13–14; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 523–24 (1986).

76. *See* Bone, *supra* note 74, at 896 (noting that in 1938 "[m]any cases were rather small affairs").

77. *See* Miller Statement, *supra* note 73, at 11 ("Opposing counsel [today] compete on a national and even a global scale, and attorneys on both sides employ an array of litigation tactics often intended to wear out or deter opponents.").

plex litigation were also decades away.[78] Hence, in the 1930s, as throughout legal history until that time, formalistic pleading requirements, not discovery, represented the most costly and burdensome aspect of the civil justice system.

The Supreme Court, eager to protect the important gains resulting from the dismantling of antiquated common law and code pleading barriers, issued a series of opinions over the ensuing decades that broadened the meaning and impact of simplified pleadings. The high-water mark came in 1957 when the Court, in *Conley v. Gibson*, delivered its broadest interpretation of federal pleading standards: "[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."[79] The Court, for the first time, also adopted the term "notice pleading,"[80] further signaling its vision of pleading standards as meaning something broader than a simplified pleading.[81] According to one legal scholar, the new standard after *Conley* set such a low threshold that a party essentially had to "[plead] himself out of court."[82]

For the next fifty years, the Supreme Court appeared to embrace this broad view of pleading requirements. On a number of occasions, the Court cautioned lower courts that judges could not depart from the liberal notice pleading standard, even where circumstances might appear to warrant a heightened standard.[83] Tension, meanwhile, continued to build in some lower federal courts over specific types of cases where there were serious concerns about frivolous and fraudulent

78. *See* Henderson & Eisenberg, *supra* note 14, at 480.

79. 355 U.S. 41, 45–46 (1957) (emphasis added). *Conley* was a class action suit brought by African-American railroad employees against their union. *Id.* at 42. The employees alleged in the complaint that the union did not protect their jobs in the same way that the union protected the jobs of white employees. *Id.* at 46.

80. *Id.* at 47.

81. *See* Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 111 (2009) ("*Conley* quickly became the dominant case interpreting modern pleading doctrine.").

82. Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998).

83. *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512–13 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993); *see also* Paul J. McArdle, *A Short and Plain Statement: The Significance of* Leatherman v. Tarrant County, 72 U. DET. MERCY L. REV. 19 (1994); Spencer, *supra* note 4, at 436–37.

lawsuits.[84] Nevertheless, the Supreme Court rejected changing the rules of the game with regard to select actions, ultimately opting instead to reexamine the policy and place of notice pleading in the modern world of civil litigation.

B. *The* Twombly *and* Iqbal *Decisions*

In 2007, the Supreme Court in *Bell Atlantic Corp. v. Twombly* shook the foundations of notice pleading for the first time.[85] Here, John Frank's comment about legal proceedings growing "encrusted with tradition" and needing to be "scraped off" appears particularly relevant.[86] The Court, with little fanfare or warning, retired *Conley*'s broad "no set of facts" standard and announced a new, more exacting standard for pleading "plausibility."[87] Integral to the Court's new direction was that the public policy underlying traditional notice pleading no longer provided the appropriate balance necessary to promote justice and curb frivolous or highly speculative litigation.[88]

Twombly involved a consumer class action brought against a variety of local telephone carriers for allegedly conspiring to inflate charges and to inhibit market entry of rival firms in violation of federal antitrust law.[89] Specifically, the plaintiffs main-

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84. *See, e.g.*, Cash Energy, Inc. v. Weiner, 768 F. Supp. 892, 897–900 (D. Mass. 1991) (explaining the trend toward "higher standards of particularity"); Campbell, *supra* note 59, at 18–21 (discussing the "guerilla attacks" against notice pleading during the 1950s and the Federal Rules Advisory Committee's response); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988–89 (2003) (discussing judicially imposed heightened pleading standards in various areas of law); Marcus, *supra* note 53, at 445 (describing judges engaged in "something bordering on a revolt" over existing liberal pleading requirements); Koan Mercer, Comment, *"Even in These Days of Notice Pleadings": Factual Pleading Requirements in the Fourth Circuit*, 82 N.C. L. REV. 1167, 1167 (2004) (describing judges as "defying clear and unanimous Supreme Court precedent" by demanding heightened standards); Recent Development, *Adequacy of Notice Pleading Reasserted in Second Circuit Private Antitrust Suits*, 58 COLUM. L. REV. 408, 408 (1958).

85. 550 U.S. 544 (2007).

86. *See* FRANK, *supra* note 62 and accompanying text.

87. *See Twombly*, 550 U.S. at 560–64.

88. *See id.* at 558–59.

89. The defendant companies, collectively called "Incumbent Local Exchange Carriers" (ILECs), were each formerly part of AT&T, but spun off following a 1982 consent decree to settle an antitrust case brought by the United States. That breakup of AT&T left in place regional monopolies, which Congress more than a decade later acted to eliminate through passage of the Telecommunications Act of 1996. Under the terms of the Act, ILECs must provide access to "competitive local exchange carriers" (CLECs). Despite these efforts, plaintiffs alleged that these

tained that based on a "compelling common motivatio[n]" to thwart competitive efforts of other local telephone and Internet service carriers, the defendant carriers "engaged in parallel conduct" in their service areas to prevent and frustrate the growth of competition.[90] The defendant carriers' actions "allegedly included making unfair agreements with [other non-defendant carriers] for access to . . . networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage [other local carriers'] relations with their own customers."[91] The complaint did not point to any specific agreements or arrangements among the defendant carriers, rather it argued that such agreements could be inferred from the defendants' "common failure meaningfully to pursue attractive business opportunities in contiguous markets where they possessed substantial competitive advantages."[92] The complaint also argued that a conspiracy could be inferred from a statement of the CEO of one of the defendant carriers that competing in an area formerly within a competitor's monopoly "might be a good way to turn a quick dollar but that doesn't make it right."[93]

A federal district court initially dismissed the complaint, finding that "simply stating that defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement," did not state a valid claim.[94] On appeal, a unanimous Second Circuit panel vacated the district court's judgment.[95] The court reasoned that because Rule 9 of the Federal Rules of Civil Procedure already sets forth the actions that must be pled with factual particularity, and does not include antitrust actions, no more exact pleading was required.[96] Rather, the circuit court recited the traditional notice pleading rhetoric to find that the complaint was "sufficient to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[97]

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companies' anticompetitive conduct persisted, harming consumers through increased fees for telephone and Internet services. *See id.* at 549–50.

90. *Id.* at 550–51.

91. *Id.* at 550.

92. *Id.* at 551 (citation omitted) (internal quotation marks omitted).

93. *Id.*

94. Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 180 (S.D.N.Y. 2003).

95. Twombly v. Bell Atl. Corp., 425 F.3d 99, 102 (2d Cir. 2005).

96. *Id.* at 107–09.

97. *Id.* at 118–19 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

The Supreme Court reversed and remanded the case. The Court stated that although parallel anticompetitive conduct may be "consistent with conspiracy," plaintiffs must ultimately prove that the defendant carriers actually agreed not to compete, and this proof requires "more than labels and conclusions."[98] As the Court explained: "Factual allegations must be enough to raise a right to relief above the speculative level."[99] In the present case, that meant "a complaint with enough factual matter (taken as true) to suggest that an agreement was made."[100] The Court held that the facts and level of specificity pled by the plaintiffs, in contrast, were "just as much in line with a wide swath of rational and competitive business strategy."[101]

Rather than limiting its holding to the facts of the case—something the Court could have done very easily—the Court went a step further, overruling *Conley* and articulating a "plausibility" analysis for courts to perform. In chronicling problems with the "no set of facts" language,[102] the Court implicitly adopted Professor Geoffrey Hazard's position that "[l]iteral compliance with *Conley v. Gibson* could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment."[103] The Court therefore concluded that *Conley* was "best forgotten as an incomplete, negative gloss on an accepted pleading standard," which had "earned its retirement."[104]

The Court then interpreted the pleading standards of the Federal Rules of Civil Procedure as requiring "enough facts to state a claim to relief that is plausible on its face."[105] Although the Court, perhaps purposefully, left some ambiguity as to what constituted a plausible pleading, it did make clear what was not a plausible pleading. First, the Court explained that a "formulaic recitation of the elements of a cause of action" would not meet the plausibility standard.[106] Second, the Court

98. *Twombly*, 550 U.S. at 554–55.

99. *Id.* at 555.

100. *Id.* at 556.

101. *Id.* at 554.

102. *See id.* at 561–63 (stating that "*Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough").

103. Hazard, *supra* note 82, at 1685; *see also Twombly*, 550 U.S. at 562 (citing Professor Hazard).

104. *Twombly*, 550 U.S. at 563.

105. *Id.* at 570.

106. *Id.* at 555.