RUMORS OF *CONLEY*'S DEMISE HAVE BEEN GREATLY EXAGGERATED: THE IMPACT OF *BELL ATLANTIC CORPORATION V. TWOMBLY* ON PLEADING STANDARDS IN ENVIRONMENTAL LITIGATION

BY

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Environmental claims are often complex, subject to scrutiny at the pleadings stage, and "disfavored" by some courts. As a result, pleading standards in federal court are of special importance to the environmental practitioner. In Bell Atlantic Corporation v. Twombly*, the Supreme Court changed its pleading standards language, potentially creating a new "plausibility" standard and generating much confusion for courts and litigators alike. Subsequently, in* Ashcroft v. Iqbal*, the Court announced that* Twombly*'s discussion of pleading standards is applicable in all civil cases, and* Twombly *has been cited in well over 12,000 civil decisions to date.*

This Note examines the Twombly *decision and its application to civil environmental claims, arguing that the decision does not create a new pleading standard under the Federal Rules, but instead redefines the elements that a plaintiff must plead to state a claim for relief in a Sherman Act section 1 conspiracy case grounded on a theory of conscious parallelism. Although* Twombly *blurred the line between antitrust substance and procedure while clarifying the language of* Conley v. Gibson*, it did not modify pleading standards in federal court.*

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I. INTRODUCTION

> If *Conley*'s "no set of facts" language is to be interred, let it not be without a eulogy.[1]

If there was truth in the assertion that *Conley v. Gibson*[2] rang the death knell of pleadings practice in federal courts,[3] the Supreme Court's decision in *Bell Atlantic Corporation v. Twombly* has allayed any such fears. In *Twombly*, the Court abrogated *Conley*'s venerable "no set of facts" language[4] and dismissed the plaintiffs' Sherman Act[5] claim because they had not "nudged their claims across the line from conceivable to plausible."[6] In doing so, the Court cast doubt on what plaintiffs must plead to survive a motion to dismiss for failure to state a claim upon which relief can be granted, and revived what was perhaps becoming a lost art—the pleadings practice.

Or did it? The *Twombly* court itself claimed no intention to elevate pleading standards above those required by the Federal Rules,[7] which mandate only a "short and plain statement showing that the pleader is entitled to relief."[8] Nor, in fact, could it. As the Court admits, a modification of generally applicable civil pleading standards can occur only through congressional amendment of the Federal Rules.[9] Nonetheless, by announcing a shift away from the *Conley* Court's liberal interpretation of Rule 8(a), the

1 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 577 (2007) (Stevens, J., dissenting).

2 355 U.S. 41 (1957).

3 Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 434 (1986).

4 *Twombly*, 550 U.S. at 562–63.

5 15 U.S.C. §§ 1–7 (2006).

6 *Twombly*, 550 U.S. at 570.

7 *Id.* at 569 n.14.

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

9 *Twombly*, 550 U.S. at 569 n.14.

Court has potentially created what is variously referred to as a new "plausibility"[10] or "notice-plus"[11] standard for pleading in federal courts. This possibility is magnified by the Court's recent decision in *Ashcroft v. Iqbal*,[12] which declares that *Twombly*'s discussion of pleading standards is applicable to all civil cases.[13] One thing is certain: With over 12,000 citations by lower courts in the year following the decision, in a wide range of contexts,[14] *Twombly* merits consideration by the cautious litigator.

Caution is especially warranted in the environmental law arena. Although *Twombly* was a Sherman Act antitrust case, the procedural nature of the decision leaves the door open to its application in other substantive areas.[15] The primary prudential concerns driving the *Twombly* majority were the threat of costly discovery and judicial efficiency,[16] factors that are highly relevant in complex environmental claims where causation is at issue. Past decisions also indicate a judicial tendency to place environmental claims alongside antitrust and civil rights claims in that unhappy cadre of cases periodically subjected to elevated pleading standards.[17]

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10 *See, e.g.*, *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 305–15 (2007) [hereinafter *The Supreme Court*].

11 Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. BRIEF 135, 140 (2007), *available at* http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf.

12 129 S. Ct. 1937 (2009).

13 *Id.* at 1953 ("Our decision in *Twombly* expounded the pleading standard for all civil actions . . . ." (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 554)).

14 *See, e.g.*, *In re* Elevator Antitrust Litig., 502 F.3d 47, 50 (2d Cir. 2007) (dismissing plaintiff's Sherman Act monopolization and price fixing claims because they had not "allege[d] facts that would provide 'plausible grounds to infer an agreement'" (quoting *Twombly*, 550 U.S. at 556)); *In re* Motor Fuel Temperature Sales Practices Litig., 534 F. Supp. 2d 1214, 1237–38 (D.Kan. 2008) (applying *Twombly* to consumer class action civil conspiracy claims); Raytheon Aircraft Co. v. United States, 501 F. Supp. 2d 1323, 1325, 1327 (D. Kan. 2007) (applying *Twombly*'s plausibility standard to dismiss Comprehensive Environmental Response, Compensation and Liability Act claims); Abbatiello v. Monsanto Co., 522 F. Supp. 2d 524, 534 n.3, 541 (S.D.N.Y. 2007) (applying *Twombly* to plaintiff's nuisance, trespass, toxic tort, and Rule 9 fraud claims).

15 This is made explicit by the Court in *Iqbal*:

> Though Twombly determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard "in all civil actions and proceedings in the United States district courts." Our decision in Twombly expounded the pleading standard for "all civil actions," and it applies to antitrust and discrimination suits alike.

Iqbal, 129 S. Ct. at 1953 (citations omitted).

16 *Twombly*, 550 U.S. at 550; *see also The Supreme Court*, *supra* note 10, at 307 (discussing Justice Souter's discovery burden rationale).

17 *See, e.g.*, Cash Energy, Inc. v. Weiner, 768 F. Supp. 892, 897, 898 (D. Mass. 1991) (elevating pleading standards for plaintiffs bringing a claim under the Comprehensive Environmental Response, Compensation, and Liability Act, citing as authority a series of civil rights cases); *see also* Marcus, *supra* note 3, at 447–51 (discussing the tendency of courts to impose fact pleading standards in antitrust and civil rights cases). *See generally* Howard M. Wasserman, Iqbal*, Procedural Mismatches, and the Evolution of Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. (forthcoming Feb. 2010) (manuscript at 10, on file with author) (discussing the disfavored nature of civil rights claims at the pleadings stage).

This Note examines the *Twombly* decision and its application to civil environmental claims, arguing first that the decision does not create a new general pleading standard under the Federal Rules, but instead redefines the elements that a plaintiff must plead to state a claim for relief in a Sherman Act section 1 conspiracy case grounded on a theory of conscious parallelism. Second, even if the Court did indicate a shift in its interpretation of pleading standards in certain cases, the prudential concerns underlying antitrust claims do not extend to the environmental context because environmental plaintiffs have fewer incentives to file unmeritorious claims, and because both statutory and common law claims have well-defined elements that are amenable to limited discovery and early summary judgment motions, in sharp contrast to the highly generalized language and broad mandate of the Sherman Act. Ultimately, this Note concludes that the liberal interpretation given to Rule 8(a) by the *Conley* court retains vitality, and that a single pleading standard exists for plaintiffs bringing statutory or common law environmental claims in federal courts.

II. PLEADING STANDARDS: PURPOSE AND EVOLUTION

The primary function of a pleading made under Rule 8(a)(2) is to provide defendants with notice of the claim against them.[18] However, pleadings also aid in framing the dispute for judicial case management and discovery,[19] and elucidate the legal grounds for relief that are subject to attack by defensive motions made under Rule 12[20]—most often a motion to dismiss for "failure to state a claim upon which relief can be granted."[21] In complex civil cases that are factually intensive and promise to impose a heavy discovery and litigation burden on plaintiffs, defendants, and the judiciary alike, early disposal of unmeritorious claims is particularly appealing.[22] However, the historical success of Rule 12(b) motions is limited,[23] placing the liberal pleading standards of Rule 8(a) in tension with the need for managing complex cases.[24] Accordingly, there are recurring

18 CHARLES A. WRIGHT & MARY K. KANE, LAW OF FEDERAL COURTS § 68, at 471 (6th ed. 2002).

19 *Id.* (observing that although the primary function of a pleading is to provide notice of a claim, Rule 8(a) also interacts with the other rules to govern pretrial procedure).

20 FED. R. CIV. P. 12. Included in Rule 12(b) are affirmative defenses that a defendant must assert in their responsive pleading, as well as seven distinct defenses that are preserved for filing by motion at the defendant's discretion and need not appear within the responsive pleading. In addition, Rule 12 authorizes judgment on the pleadings, FED. R. CIV. P. 12(c), and allows motions to strike from pleadings "any redundant, immaterial, impertinent, or scandalous matter," FED. R. CIV. P. 12(f). *See also* WRIGHT & KANE, *supra* note 18, § 66, at 464 (identifying Rule 12 motions as authorizing "a variety of motions attacking pleadings").

21 FED. R. CIV. P. 12(b)(6); WRIGHT & KANE, *supra* note 18, § 66, at 464 ("The most familiar motion is a motion to dismiss under Rule 12(b).").

22 *See, e.g.*, Marcus, *supra* note 3, at 441 (discussing the costs of defending litigation born by defendants and the impact of a "mountain of litigation" on the judiciary).

23 WRIGHT & KANE, *supra* note 18, § 66, at 464–65 (observing that 12(b) motions succeed in "fewer than 2% of all cases"); Marcus, *supra* note 3, at 445.

24 *See* RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 121 (5th ed. 2009) (describing the potential conflict between the desire to define disputes early and the necessity

judicial efforts to impose heightened pleading standards in certain fields of substantive law.[25] Notably, antitrust and environmental claims often bear the brunt of these efforts.[26] Understanding modern pleading requirements thus becomes of vital importance to the environmental law practitioner who wishes to avoid dismissal for failure to state a claim. To fully comprehend the current state of the law and the impact of *Twombly*, it is first helpful to analyze the evolution of the federal pleading standards, early interpretation of Rule 8(a), and historic judicial efforts to elevate pleading standards in complex civil litigation.

A. Evolution of the Federal Pleading Standards

Rule 8 is the "keystone" that begins and supports the civil litigation process by setting out the ground rules for pleading a claim.[27] Under Rule 8, a "Claim for Relief" requires a "short and plain statement of the claim showing that the pleader is entitled to relief"[28] that "must be construed so as to do justice."[29] The apparent liberality of Rule 8 reflects its origins and an effort to simplify the pleading process and decide cases on their merits, rather than on procedural grounds.[30]

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of allowing flexible development claims); Edward Brunet & David J. Sweeney, *Integrating Antitrust Procedure and Substance After Northwest-Wholesale*, 72 VA. L. REV. 1015, 1066–67 (1986) (noting that the judicial management movement and *Manual for Complex Litigation* assume the need for "special processing techniques" in complex cases that are "inconsistent with the spirit of notice pleading").

25 *See* Brunet & Sweeney, *supra* note 24, at 1068–71 (discussing judicial imposition of elevated pleading standards in antitrust cases and in standing disputes in the environmental litigation context); Marcus, *supra* note 3, at 447–51 (describing how the common factors of litigation proliferation, complexity, and potential abuse of discovery have caused courts to elevate pleading standards in securities, civil rights, and conspiracy cases). Evidence of this propensity is also found in the existence of Rule 9, which requires that circumstances supporting claims of fraud and mistake "must [be] stat[ed] with particularity," imposing a heightened pleading requirement on at least some complex claims. FED. R. CIV. P. 9(b); *see also* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 463 (1943) (noting that Rule 9 "probably states only what courts would do anyhow").

26 *See* Brunet & Sweeney, *supra* note 24, at 1071–74 (antitrust); *id.* at 1068–70 (environmental). Civil Rights cases are a third area where courts seek to elevate pleading standards, often due to similar prudential concerns. *See* Wasserman, *supra* note 17 (manuscript at 11 & nn.59–60).

27 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004); WRIGHT & KANE, *supra* note 18, § 68, at 470.

28 FED. R. CIV. P. 8(a)(2). Rule 8(a) also contains the threshold requirement of a "short and plain statement" of jurisdiction. FED. R. CIV. P. 8(a)(1). A party may challenge an opposing party's claim of jurisdiction. FED. R. CIV. P. 12(b)(1) (allowing challenge for lack of subject matter jurisdiction); FED. R. CIV. P. 12(b)(2) (allowing challenge for lack of personal jurisdiction). A party must also demand relief. FED. R. CIV. P. 8(a)(3).

29 FED. R. CIV. P. 8(e).

30 MARCUS ET AL., *supra* note 24, at 125.

Prior to the advent of the Federal Rules in 1938,[31] the common law placed great faith in the ability of pleadings to distill a claim to a single, essential question that would decide the case at trial.[32] As a result, common law pleadings were expected to provide notice of the claim, contain a statement of the facts, narrow the issues in dispute, and provide a mechanism for disposing of "sham" claims and defenses.[33] Because pleadings served so many simultaneous functions, the result was a labyrinth of ritualized procedure and specialized forms of action that proved "slow, expensive, and unworkable."[34] Pleadings therefore limited the ability of a common litigant to obtain a decision on the merits.[35] Failure to include an "essential allegation" or fact often amounted to a fatal defect, resulting in a quick death for the plaintiff's claim.[36] The societal response was a protracted fight "against the tyranny of inherited legal traditions,"[37] reflective of a populist movement to gain access to the courts by ending legal formalism.[38] Reform, although slow to arrive, was inevitable.[39]

The American reform experience largely mirrored that in England.[40] Beginning in 1848, early U.S. reformers sought to simplify the common law morass of special pleading rules by creating a system of "code pleading."[41] The codes abolished specialized forms of action and the ritual of complex

31 Congress granted the Supreme Court rulemaking authority by passing the Rules Enabling Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–2077 (2006)). A standing Advisory Committee of the Judicial Conference of the United States advises the Supreme Court as to the content of the Federal Rules of Civil Procedure, Judicial Improvement and Access to Justice Act, 28 U.S.C. §§ 2073, 2077 (2006), which are effective only after submission to Congress, *id.* § 2074. For a contemporaneous and comprehensive discussion of the Rules Enabling Act, see generally Charles E. Clark & James W. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387 (1935).

32 WRIGHT & KANE, *supra* note 18, § 68, at 470.

33 *Id.*

34 *Id.* at 471. Within this system, scores of specialized forms of action developed that sought to rigidly define the requirements for pleading various types of claims. However, difficulty arose when a claim did not fit neatly within a form of action, and choosing the wrong form of action was a fatal error. *See* MARCUS ET AL., *supra* note 24, at 117. It is also worth observing that while specialized forms of action dominated, general forms of action such as "general assumpsit" remained available for the disposition of "ordinary court business." Clark, *supra* note 25, at 458.

35 WRIGHT & KANE, *supra* note 18, § 68, at 471; *see also* MARCUS ET AL., *supra* note 24, at 117 (describing common law pleading as an "arduous process" that resulted in "frustration of the merits").

36 WRIGHT & KANE, *supra* note 18, § 68, at 471.

37 Edson R. Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725, 727 (1926).

38 *Id.* at 727–31. Sunderland comprehensively details the English struggle for reform, which the Edinburgh Review began in 1802. *Id.* at 728–29. The Westminster Review joined the fray in 1824, vigorously attacking the technicality of the English legal system and declaring in 1833 that due to its monopolistic adherence to tradition, the legal profession "is a century behind all others" and that the lawyers of England had become "mere technical hacks." *Id.* at 729, 732.

39 *See* Clark, *supra* note 25, at 458–59 (observing that although the deficiencies of the common law pleading system were "obvious," procedural reform was delayed by the bar, which deflected the reform attempts of laymen for over 50 years).

40 MARCUS ET AL., *supra* note 24, at 118.

41 *Id.* The first such effort was the New York Code of Civil Procedure, passed in 1848 and commonly referred to as the "Field Code" in honor of its eponymous author, David Dudley Field. *Id.*

procedure, and limited the wrangling over pleadings to a complaint, an answer, a reply, and "demurrers."[42] However, by retaining the common law requirement that a pleading contain facts—albeit "dry, naked and actual facts"—code pleading failed to remove fully the intricacies of common law pleadings.[43] Under the fact pleading standard of the codes, a plaintiff faced the prospect of dismissal (through a demurrer) if they failed to plead *enough* facts.[44] Pleading the "right amount" of facts to satisfy a particular claim was difficult and perilous, as it tied the plaintiff to those facts alone during trial, and to the particular theory that they described.[45] The natural tendency, then, was for plaintiffs to overplead and to include within the complaint any factual allegation that might later prove useful.[46] At the same time, the codes sought to draw lines between "ultimate facts," "evidence," and "conclusions," allowing only the inclusion of "ultimate facts."[47] Because this is not an easy line to draw, allegations within a pleading were therefore subject to attack as mere evidence or conclusions.[48] Rather than simplifying pleading requirements, the fact pleading standard of the codes ultimately caused uncertainty and a reversion to complex and detailed pleadings that caused "frightful expense, endless delay and an enormous loss of motion" as litigants and the Court sought to refine sprawling claims in advance of trial.[49]

The experience of code pleading informed the drafters of the Federal Rules and reinforced the "necessity of procedural rules which enforce the mandate of simplicity and directness."[50] As a procedural device, pleadings had proven an inefficient and inadequate mechanism for vetting claims in advance of trial.[51] Accordingly, the drafters of the Federal Rules of Civil Procedure sought to remove from the purview of pleadings the functions of factual development, narrowing of issues, and disposal of "sham" claims and defenses.[52] Instead, the new Rules provided the more efficient mechanisms of discovery, trial management, and summary judgment to address these

42 *Id.* Demurrers at common law are often analogized to the modern motion to dismiss, and allowed a party to file a general demurrer (similar to a motion to dismiss for failure to state a claim) or a special demurer (attacking procedural deficiencies in the form of the pleading). *Id.* at 117.

43 WRIGHT & KANE, *supra* note 18, § 68, at 471–72.

44 *Id.*

45 *Id.* at 472.

46 *Id.*

47 WRIGHT & MILLER, *supra* note 27, § 1202, at 84 nn.2–3, 91.

48 *Id.* at 88, 90–91; *see also Twombly*, 550 U.S. 544, 574 (2007) (Stevens, J., dissenting). The *Iqbal* majority seeks to make similar distinctions between "bare assertions" and other allegations entitled to a presumption of truth. *Iqbal*, 129 S. Ct. 1937, 1951 (2009). But the dissent makes it clear that such distinctions are difficult to draw. *Id.* at 1960–61 (Souter, J., dissenting) (declaring that the majority erred by "looking at the relevant assertions in isolation" and concluding that "there is no principled basis for the majority's disregard of the allegations").

49 WRIGHT & MILLER, *supra* note 27, § 1202, at 92 (quoting Thomas E. Skinner, *Pre-Trial and Discovery Under the Alabama Rules of Civil Procedure*, 9 ALA. L. REV. 202, 204 (1957)).

50 Clark, *supra* note 25, at 460.

51 *Id.*

52 WRIGHT & KANE, *supra* note 18, § 68, at 470–72.

concerns.[53] Charles E. Clark, Reporter of the Advisory Committee and a driving force behind the development of the Federal Rules,[54] observed that

> [e]xperience has shown . . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect 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. . . . Moreover, through the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate function.[55]

The Rules were designed to reach decisions on the merits of a claim—not on its procedural failings.[56]

Clark's observations reflect the "liberal ethos" of the Advisory Committee, which avoided any reference to "facts" or a "cause of action" as it recast pleading standards under Rule 8, retaining instead the provision of notice as the central purpose of pleading under the Federal Rules.[57] Although the concept of notice pleading serves as a general paradigm for understanding the new rule, the drafters eschewed the term itself.[58] The term "notice" was excluded on the premise that "too much attention to the means is undesirable, as well as unnecessary," as the rules should provide a broad "directive," rather than a "definitive mandate."[59] Despite providing convenient shorthand for the primary function of the new pleading standard, "content must still be given to the word 'notice.'"[60] As envisioned by the drafters, the concept of notice did not require a description of "all the details

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53 *Id.*; *see also* FED. R. CIV. P. 26–37, 56. For a thorough discussion of the interaction of Rule 8 with the other Federal Rules, see generally Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 992–94 (2003) (discussing the interaction of Rule 8 with the discovery and summary judgment process); WRIGHT & MILLER, *supra* note 27, § 1203, at 99–100, 104 (describing the interaction of Rule 8 with the other rules, in particular Rule 12).

54 Marcus, *supra* note 3, at 433. Charles E. Clark was the Dean of Yale Law School from 1929 until 1939, when he was appointed to the Second Circuit. *Id.* at 433 n.2. He served as a judge on the Second Circuit until his death in 1963, and as Chief Judge from 1954 to 1959. *Id.* Serving as Reporter to the Advisory Committee for over 20 years, from 1935 until 1956, Clark was the "principal architect" of the Rules and an advocate for the liberalization of pleading standards. *Id.* at 433 & n.2.

55 Charles E. Clark, *The New Federal Rules of Civil Procedure*, 23 A.B.A. J. 976, 977 (1937).

56 WRIGHT & KANE, *supra* note 18, § 68, at 470; Fairman, *supra* note 53, at 994; Marcus, *supra* note 3, at 44.

57 *See* MARCUS ET AL., *supra* note 24, at 132; *see also* WRIGHT & KANE, *supra* note 18, § 68, at 470; Marcus, *supra* note 3, at 433.

58 *See* FED. R. CIV. P. 8 (containing no explicit reference to the word or concept of "notice"); *see also* Clark, *supra* note 25, at 460–62 (discussing the necessary avoidance of the term "notice" and preference for a broad, flexible pleading standard that could conform to the plaintiff's claim and litigation strategy); WRIGHT & KANE, *supra* note 18, § 68, at 475 (noting that the drafters of the rules rejected the term "notice" as a "pure abstraction" that without context does nothing to clarify pleading standards).

59 Clark, *supra* note 25, at 461.

60 *Id.* at 460.

of the parties' claims."[61] Rather, pleading under the Federal Rules was designed to elicit enough information to allow the opposing party to distinguish the litigated claim "from other acts or events," and provide the Court with "the broad outlines of the case."[62] Reinforcing the liberality of this standard, Clark even opposed the inclusion of motions attacking the pleadings, promoting instead the broad new discovery and summary judgment processes as better suited to the resolution of claims on their merits.[63] By emphasizing function over form, the drafters sought to avoid the trap of specificity that codes fell into with their strict requirement of pleading facts.[64]

Against this backdrop, some commentators lament the label of "notice pleading," and observe that adoption of the term resulted in "unnecessary criticism" of the rules.[65] Although the new liberal pleading standard was subject to occasional early attack as courts and lawyers adjusted to the change,[66] the Supreme Court stated in 1947 that the rules "restrict the pleadings to the task of general notice-giving."[67] Moreover, when amending the rules in 1955, the Advisory Committee made no meaningful changes to the pleading standard, and reaffirmed the premise that

> [t]he intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement. . . .
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> . . . .

61 *Id.*

62 *Id.* at 460–61.

63 MARCUS ET AL., *supra* note 24, at 132. Clark may have lost this argument on paper, as the Advisory Committee ultimately included Rule 12, which affords an opponent numerous vehicles by which to attach the sufficiency of a pleading. FED. R. CIV. P. 12. However, the liberal standard of Rule 8 allows most claims to escape dismissal under Rule 12. *See supra* note 21 and accompanying text. The inclusion of Rule 9(b) (which requires that claims of fraud or mistake "must be stated with particularity") further reinforces the notice pleading concept because these types of claims are by their nature vague, and additional specificity is required to afford the opposing party fair notice and an opportunity to respond. FED. R. CIV. P. 9(b); Fairman, *supra* note 53, at 991–92.

64 Clark, *supra* note 25, at 461; *see also* WRIGHT & MILLER, *supra* note 27, § 1202 (discussing the necessity of permitting increased generality in pleadings); Marcus, *supra* note 3, at 439 ("'Ancestor worship in the form of ritualistic pleadings has no more disciples.'" (quoting Judge John Minor Wisdom's opinion in *Thompson v. Allstate Ins. Co.*, 476 F.2d 746, 749 (5th Cir. 1973))).

65 WRIGHT & MILLER, *supra* note 27, § 1202, at 92–93.

66 MARCUS ET AL., *supra* note 24, at 125.

67 Hickman v. Taylor, 329 U.S. 495, 501 (1947).

> . . . [The rule] requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.[68]

With this statement, the Advisory Committee entrenched the liberal ethos of the rules[69] and set the stage for a decision by the Supreme Court that many thought would end debate over pleading standards in the federal courts.[70]

B. Conley v. Gibson*: A Landmark Decision*

In *Conley v. Gibson*,[71] the Supreme Court issued a brief, unanimous opinion that affirmed Rule 8's highly permissive standard and declared that "the purpose of pleading is to facilitate a proper decision on the merits."[72] In *Conley*, the issue was whether the plaintiffs' class action stated a claim upon which relief could be granted within the meaning of Rule 12(b)(6).[73] The claim, brought by minority railroad workers against their union, alleged that the union failed to adequately represent them in labor negotiations with the railroad.[74] The plaintiffs further alleged that this failure resulted in the dismissal of forty-five minority workers, whose positions were subsequently filled by white employees.[75] The complaint alleged discrimination by the union and thereby a violation of the Railway Labor Act,[76] which guarantees fair representation by bargaining agents.[77] In reply, the defendants argued that because the complaint "failed to set forth specific facts to support its general allegations," they were entitled to dismissal.[78]

First, the Court addressed the interaction of Rule 12(b)(6) and Rule (8), famously stating, "[T]he accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle

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68 WRIGHT & MILLER, *supra* note 27, § 1201, at 86–87 n.11 (quoting 1955 REPORT OF THE ADVISORY COMMITTEE PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS (1955), *reprinted in* 12A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE app. F, at 634, 644–65 (2009)).

69 *Id.* § 1201, at 86–87.

70 *See* Marcus, *supra* note 3, at 434 (noting that after the decision of *Conley v. Gibson*, "commentators lost interest in pleading").

71 355 U.S. 41 (1957).

72 *Id.* at 48.

73 *Id.* at 45. Before reaching consideration of the defendant's motion to dismiss for failure to state a claim, the court addressed the questions of whether dismissal was proper on grounds of lack of jurisdiction, or for the plaintiffs' failure to join an indispensable party, deciding both questions in favor of the plaintiffs and refusing to dismiss on either ground. *Id.* at 43–45.

74 *Id.* at 43.

75 *Id.*

76 45 U.S.C. §§ 151–188 (2006).

77 *Conley*, 355 U.S. at 43.

78 *Id.* at 47.

him to relief."[79] Under this standard, if allegations in a complaint, taken as true, could satisfy the elements of any legally cognizable claim, dismissal is improper.[80] Second, the Court held the plaintiffs' general allegations of discrimination sufficient to state a claim under the Railway Labor Act.[81] Squarely rejecting the defendant's demand that the complaint contain factual detail, the Court stated the "decisive answer" is that the rules

> do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a "short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests. . . . Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.[82]

It is significant that the *Conley* Court relied on the same logic employed by Clark and the Advisory Committee in drafting the rules: Discovery and other pretrial procedures[83] are the proper mechanisms for vetting the factual sufficiency of a claim, not pretrial motions made under Rule 12.[84]

In essence, the *Conley* decision addressed two sequential issues. First, the Court identified the proper role of 12(b)(6) motions to dismiss for failure to state a claim, affirming the premise that Rule 12(b)(6) motions properly test the *legal* sufficiency of a pleading, not its factual content.[85] Next, the Court identified what a claimant must plead to meet the legal standards of Rule 8(a), holding that general allegations are sufficient, and that claims do not need to include specific facts in support of those allegations.[86]

What *Conley* did *not* do is remove entirely the obligation of a plaintiff to assert, however generally, some minimal level of detail to fulfill the notice-

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79 *Id.* at 45–46; *see* WRIGHT & KANE, *supra* note 18, § 68, at 474 (noting that the *Conley* court's "any set of facts" language has been cited "literally thousands of times").

80 WRIGHT & KANE, *supra* note 18, § 68, at 474.

81 *Conley*, 355 U.S. at 47–48.

82 *Id.*

83 *Id.* at 47–48, 48 n.9. Namely, this refers to summary judgment, Rule 56, and pretrial management, Rule 16. FED. R. CIV. P. 16, 56.

84 Compare the court's conclusions in *Conley* with the logic employed by the Advisory Committee in drafting the Federal Rules. *See supra* Part II.A (discussing the history and purpose of Rule 8). Other commentators have reached similar conclusions. *See, e.g.*, Brunet & Sweeney, *supra* note 24, at 1065; Fairman, *supra* note 53, at 995.

85 *See* WRIGHT & MILLER, *supra* note 27, § 1215, at 172–73 (describing the legal standard of Rule 8 as enabling a response from the opposing party, in fulfillment of the Rule's notice function). If additional factual matters are considered, the court must treat the 12(b)(6) motion as one for summary judgment. FED. R. CIV. P. 12(b), 12(c), 56; *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.32 (2004) ("The legal insufficiency of a claim or defense may be raised by motion for failure to state a claim or for partial judgment on the pleadings."). Because Rule 12 allows attacks on pleadings made under Rule 8(a), the two rules are interdependent, with decisions made on the basis of Rule 12(b)(6) driving pleading standards under Rule 8(a). WRIGHT & MILLER, *supra* note 27, § 1203, at 100.

86 *Conley*, 355 U.S. at 47.

giving function of Rule 8(a).[87] Rather, the decision confirmed what many suspected—that instead of doing away with facts altogether, Rule 8(a) simply moved from requirements of specific facts meeting all elements of a particular claim[88] to a generalized and permissive standard that required neither a particular theory nor particular facts.[89] In that sense, *Conley* was unremarkable and merely affirmed the trend in pleading standards from the particularized to the general. However, combining *Conley*'s indeterminate level of permissible generality with the fact that the requisite elements of a claim are not always clear, it is plain that even after *Conley* defendants had room for arguing dismissal under Rule 12(b)(6).

*C. Post-*Conley *Judicial Efforts to Elevate Pleading Standards in Complex Fields*

After *Conley*, fact pleading—the "bête noir of the codes"—underwent a revival.[90] Litigation became more complex and more frequent.[91] The low price of entry, expanded role of discovery, advent of class actions, and potential for abuse of the litigation process to raise the settlement value of a claim all conspired to increase the volume of litigation in federal courts.[92] Efforts to manage the increased volume of litigation began early, with the Warren Court's commissioning in 1955 of a special panel to develop the *Manual for Complex Litigation*.[93] While certain changes to the Federal Rules, such as the additional case management under Rule 16 and restraints on discovery in Rule 26, did increase protection against abusive litigation,[94] the

87 WRIGHT & MILLER, *supra* note 27, § 1202, at 89. Even Clark "insisted that there were limits to the generality of pleading allowed under the Federal Rules." Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 917–18 (1976).

88 The Federal Rules also abolished the cause of action requirement of pleading under the codes, establishing that "[t]here is one form of action—the civil action." FED. R. CIV. P. 2.

89 WRIGHT & KANE, *supra* note 18, § 68, at 473.

90 Marcus, *supra* note 3, at 435. The term "bête noir" translates literally to "black beast" in French and serves as a shorthand description for something particularly disfavored and avoided. AMERICAN HERITAGE COLLEGE DICTIONARY 136 (4th ed. 2002). I borrow the term "revival" from the title of Marcus's article. Marcus, *supra* note 3, at 433.

91 Marcus, *supra* note 3, at 441–43. For a comprehensive analysis of the increase in civil litigation in federal courts, see David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65 (1981). Between 1961 and 1980, every administration saw double-digit increases in the number of civil filings (Kennedy, 31%; Johnson, 13%; Nixon, 18%; Carter, 29%). *Id.* at 100 tbl.5. Between 1974 and 1980 alone, civil filings increased from 103,530 to 168,789 per year. *Id.* at 143 tbl.20. Courts struggled to keep up with the volume; while 107,230 civil cases were pending in federal district courts at the end of 1974, 186,113 were pending at the end of 1980. *Id.*

92 Marcus, *supra* note 3, at 441–43.

93 *Id.* at 441. Arguably, the manual is inconsistent with some aspects of liberal pleading standards because it encourages courts to use a heavy hand in pretrial case management and the refinement of issues. Brunet & Sweeney, *supra* note 24, at 1067 (discussing the second version of the manual published in 1985). However, revisions to the manual now encourage the use of discovery (as opposed to pleadings) to refine issues, while criticizing pretrial motions practice. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 85, § 11.33, at 45.

94 Marcus, *supra* note 3, at 441–43.

Advisory Committee repeatedly declined invitations to modify Rule 8.[95] Because obtaining early dismissal under Rule 12(b)(6) remained difficult in light of the permissive pleading standards of Rule 8(a), defendants and courts seeking to avoid the discovery process began an effort to elevate pleading standards for certain types of claims.[96] As Clark observed in 1957, "[W]e moderns have neither the zest nor the guts . . . to make our pleadings rules stick."[97]

1. Antitrust Litigation

An early "revolt" against liberal pleading standards began in certain districts that challenged the adequacy of "notice pleading" in antitrust cases.[98] In addition to the specter of treble damages, antitrust claims are often complex, due in part to the generalized nature of the Sherman Act, which reads more like a broad constitutional provision than a statute.[99] Initial allegations of conspiracy (a required element of many antitrust claims) are often necessarily vague, can impose "massive" discovery burdens, and may subject courts to a lengthy and demanding litigation process.[100] As a result, there are clear incentives for courts and defendants to rapidly dispose of antitrust claims. However, a dichotomous standard—where pleading requirements are dependent on the type of claim—is not only improper under the Federal Rules, but actually serves to delay meritorious decisions in "big" cases.[101] Engaging in protracted disputes over antitrust pleadings content "does not appreciably lessen the cares and woes of either the defendants or the court" because the specificity sought is often derivative of discovery and is simply not available at the pleadings stage.[102] Despite the logic of this position, courts continued to require fact-specific complaints in antitrust cases even as they simultaneously evolved other mechanisms for more rapid resolution of antitrust claims.[103]

95 *See* WRIGHT & MILLER, *supra* note 27, § 1201, at 86 n.11 (documenting the history of Rule 8).

96 *See* Brunet & Sweeney, *supra* note 24, at 1018–19 (discussing early attack on the trans-substantive nature of the Federal Rules and efforts to elevate pleading standards in complex cases).

97 Charles E. Clark, *Special Pleading in the Big Case*, 21 F.R.D. 45, 51 (1957).

98 *Id.* at 49.

99 *Accord* United States v. U.S. Gypsum Co., 438 U.S. 422, 439 (1978); *see* Sherman Act, 15 U.S.C. §§ 1–7 (2006); *see also* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933) ("[T]he [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.").

100 *See* Brunet & Sweeney, *supra* note 24, at 1071–72 (discussing early drivers of elevated pleading standards in antitrust cases).

101 *See* Clark, *supra* note 97, at 50 (reinforcing the roles of discovery and summary judgment as the proper mechanisms for refining and disposing of claims prior to trial).

102 *Id.*

103 *See* Brunet & Sweeney, *supra* note 24, at 1073–74. In addition to imposing a fact-pleading standard in some antitrust cases, courts developed the "per se" and quick-look doctrines as devices to shorten litigation when a claim fits within a particular fact pattern. *See id.* at 1016–20 (discussing the opposing "rule of reason" and "per se" approaches to antitrust litigation). *Twombly* represents the next step in this progression, as discussed below.

2. Civil Rights Claims

Claims alleging civil rights violations form another category of cases disfavored by courts in the post-*Conley* era.[104] The Civil Rights Act of 1871[105] created a private cause of action for violations of constitutional rights occurring "under color of any statute, ordinance, regulation, custom, or usage of any State."[106] Although the statute saw little action at first, the number of civil rights claims brought in federal courts increased during the 1960s and 1970s, and then exploded[107] following the decision in *Monell v. Department of Social Services*[108] in 1978. Citing concerns over the volume of litigation, potential costs of such suits, discovery burden, and potential for abuse,[109] some courts began imposing heightened pleading standards in § 1983 claims.[110] However, divergent standards persisted[111] until the Supreme Court decided *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*.[112] In *Leatherman*, plaintiffs brought § 1983 claims against local law enforcement officers for violating their civil rights.[113] The district court dismissed the suit under Rule 12(b)(6), citing Fifth Circuit case law that imposed a heightened pleading standard in § 1983 claims.[114] The Fifth Circuit affirmed,[115] but the Supreme Court reversed, observing that it is "impossible to square the 'heightened pleading standard' as applied by the Fifth Circuit with the liberal system of 'notice pleading' set up by the Federal Rules."[116] The court went on to affirm the *Conley* decision and denounce

104 Marcus, *supra* note 3, at 471.

105 42 U.S.C. §§ 1983–1986 (2006).

106 *Id.* § 1983.

107 Eric Harbrook Cottrell, *Civil Rights Plaintiffs, Clogged Courts, and the Federal Rules of Civil Procedure*, 72 N.C. L. REV. 1085, 1085 n.1 (1994) ("Although only 270 federal civil rights actions were filed in 1961, more than 30,000 § 1983 actions were commenced in 1981.").

108 436 U.S. 658 (1978). *Monell* abrogated the former absolute immunity of municipalities and imposed on them civil liability for claims brought under § 1983. *Id.* at 701; *see also* Cottrell, *supra* note 107, at 1090–91 (discussing the *Monell* decision).

109 *See, e.g.*, Valley v. Maule, 297 F. Supp. 958, 960 (D. Conn. 1968) (dismissing plaintiff's § 1983 suit and creating a fact pleading "exception" to *Conley*-style notice pleading for § 1983 civil rights claims because of concerns about litigation volume and the "considerable expense, vexation and perhaps unfounded notoriety" borne by defendants in § 1983 suits); Elliott v. Perez, 751 F.2d 1472, 1473, 1479 (5th Cir. 1985) (reversing lower court's dismissal of plaintiff's § 1983 claim, while instructing the district court, on remand, to apply a fact-pleading standard, citing discovery burden and public policy as justifying the elevated pleading standard).

110 Cottrell, *supra* note 107, at 1094–96.

111 *Id.* at 1098.

112 507 U.S. 163, 164 (1994) (granting certiorari "to decide whether a federal court may apply a 'heightened pleading standard'—more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure—in civil rights cases alleging municipal liability" under § 1983).

113 *See id.* at 164–65. Plaintiffs alleged that in two separate incidents police, while executing search warrants at the plaintiffs' home, assaulted plaintiffs and shot their dogs. *Id.*

114 *See id.* at 165.

115 *See id.*

116 *Id.* at 168.

claim-specific elevation of pleading standards as inconsistent with the inclusion of Rule 9(b) in the Federal Rules.[117]

A similar outcome occurred in *Swierkiewicz v. Sorema N.A.*[118] In *Swierkiewicz*, a unanimous court rejected the argument that an employment discrimination claim brought under the Civil Rights Act of 1964[119] must include specific facts that demonstrate the existence of a prima facie case.[120] Relying on the logic of *Leatherman* and *Conley* and identifying motions for a more definite statement, discovery, and summary judgment as the proper tools for clarifying and testing claims, the *Swierkiewicz* Court soundly rejected any claim-specific imposition of elevated pleading requirements.[121] In doing so, the Court carefully distinguished the substantive elements of a prima facie case from procedural pleading requirements, noting that "the precise requirements of a prima facie case can vary depending on the context," and "may be difficult to define" before "discovery has unearthed relevant facts and evidence."[122] Conversely, the Court observed, pleading standards are unitary and liberal, and the definition of Rule 8(a) does not change depending on context.[123] Because the elements of a prima facie case operate as "a flexible evidentiary standard" that is difficult to define prediscovery, transposing a prima facie evidentiary standard onto a "rigid pleading standard" is improper.[124]

Most recently, the Court decided *Ashcroft v. Iqbal*,[125] holding that the plaintiff's civil rights claim, per *Bivens v. Six Unknown Named Agents*,[126] failed to satisfy Rule 8(a) because it did "not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind."[127] At first glance, this language[128] may suggest a heightened pleading standard. But before reaching its conclusion, the Court modified the substantive elements

117 *Id.* The court also observed that while elevated pleading standards may be desirable in certain contexts,

> that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.

Id. at 168–69.

118 534 U.S. 506 (2002).

119 42 U.S.C. §§ 2000a–2000h-6 (2006).

120 *Swierkiewicz*, 534 U.S. at 515.

121 *Id.* at 512–14.

122 *Id.* at 512.

123 *Id.* at 513.

124 *Id.* at 512.

125 129 S. Ct. 1937 (2009).

126 403 U.S. 388 (1971) (establishing an implied cause of action for civil rights claims against federal officers).

127 *Iqbal*, 129 S. Ct. at 1952.

128 The term "plausibly" is adopted from *Twombly*. *See* discussion *infra* Part III.

of a *Bivens* claim by discarding "supervisor liability"[129] and requiring plaintiffs to show "purpose rather than knowledge" in order to "overcome [the] qualified immunity" of the petitioners.[130] By altering the liability standard for *Bivens* claims where the defendants have qualified immunity, the Court also influenced what a plaintiff must plead in such a case. Because Iqbal failed to allege even general facts in support of a discriminatory purpose,[131] his claim did not contain the minimal level of detail to fulfill the notice-giving function of Rule 8(a).[132] This is consistent with *Conley*'s requirement that at least some factual detail must support each necessary element of a claim. In *Iqbal*, the unique and prominent role of the defendants' qualified immunity[133] made careful case management and limited discovery impracticable,[134] and the Court did not purport to overrule the standards set forth in *Leatherman* and *Swierkiewicz*.[135] Separating substance and procedure in *Iqbal* is difficult due to the highly sensitive nature of the case, demonstrating again how prudential concerns are often couched within procedural holdings.

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129 *Iqbal*, 129 S. Ct. at 1949; *see also id.* at 1957 (Souter, J., dissenting) ("Lest there be any mistake . . . the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely.").

130 *Id.* at 1949 (majority opinion). Although Iqbal originally filed claims against a broad range of defendants, the only petitioners in the case on appeal to the Supreme Court were former Attorney General John Ashcroft and Robert Mueller, the Director of the Federal Bureau of Investigation. *Id.* at 1942.

131 *Id.* at 1951. The *Iqbal* Court disregarded certain allegations that it considered mere legal conclusions and therefore not entitled to a presumption of truth. *Id.* There is room for debate as to whether the majority is correct in this regard, or whether Iqbal's allegations did indeed contain sufficient facts, as argued in dissent. *Id.* at 1959 (Souter, J., dissenting); *see infra* note 230.

132 *Iqbal*, 129 S. Ct. at 1952; *see supra* note 87 and accompanying text (discussing the notice-giving function of Rule 8(a) after *Conley*). The *Iqbal* dissent objected to the majority's disregard for petitioner's admissions as to liability standards and the subsequent modification of those standards. *Iqbal*, 129 S. Ct. at 1956–58 (Souter, J., dissenting). The dissent also criticized the majority as misapplying *Twombly*'s "plausibility" language in its rejection of certain allegations as "conclusory" and not entitled to a presumption of truth. *Id.* at 1959–60; *see infra* Part III.B (discussing *Twombly*).

133 A central feature of the case was the qualified immunity of Ashcroft and Mueller, which undoubtedly influenced the Court's discussion of liability standards and its determination of the pleading's sufficiency under Rule 8(a). *See Iqbal*, 129 S. Ct. at 1954 ("[W]e are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties."); *see also* Wasserman, *supra* note 17 (manuscript at 7) (discussing the "substance/procedure mismatch" in *Iqbal* and the effect of that mismatch on the outcome of the case).

134 *Iqbal*, 129 S. Ct. at 1953 ("Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity.").

135 The Court discusses neither case in *Iqbal*. *See* Wasserman, *supra* note 17 (manuscript at 19) ("[B]ecause *Iqbal* did not purport to overturn either *Swierkiewicz* or *Leatherman*, all three cases remain good law and lower courts must reconcile them." (citing Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming 2010))). Indeed, *Iqbal* is arguably limited to cases where qualified immunity is at stake. *See id.* (manuscript at 16 & n.94) (citing Smith v. Duffey, 576 F.3d 336, 340 (7th Cir. 2009)).

3. Environmental Law

In *Cash Energy, Inc. v. Weiner*,[136] Judge Keeton[137] imposed a heightened pleading requirement on plaintiffs who brought a cost recovery action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[138] Plaintiffs alleged that individual defendants were liable for cleanup costs of a contaminated site as "owner[s] and operator[s]."[139] Defendants moved to dismiss for failure to state a claim, describing plaintiff's allegations as "bald non-specific assertions."[140] Relying heavily on prior decisions that required factual specificity in the civil rights context,[141] Judge Keeton dismissed the claim because plaintiffs failed "utterly to state or outline the facts beneath their allegations."[142] As support for imposing an elevated pleading standard in CERCLA cases, Judge Keeton relied on the now-familiar concerns over abusive litigation, potential imposition of high damages on defendants, and the need for busy courts to quickly dispose of frivolous claims.[143] While recognizing the generally liberal pleading standard of Rule 8(a), Judge Keeton found support for an elevated pleading standard in the structure of the rules, asserting that "the seeds of a countervailing tendency are sown" within the rules.[144] Relying on the inclusion of Rule 9(b) and its requirement of particularity in cases alleging fraud, the availability of a motion for a more definite statement under Rule 12(e), and the inclusion of Rule 8(f)'s mandate that claims "shall be construed so as to do substantial justice," Judge Keeton saw the movement toward claim-specific pleading standards as justified and necessary.[145] Noting the "drastic nature"[146] of

136 768 F. Supp. 892 (D. Mass. 1991).

137 Before his appointment to the bench, Robert E. Keeton taught at Harvard Law School from 1953 to 1979, where he served as Dean from 1973 to 1979. Harvard Law School, Recent News and Spotlights, http://www.law.harvard.edu/news/2007/07/03_keeton.php (last visited Jan. 24, 2010). At the time of the *Cash Energy* decision, Judge Keeton was the Chair of the Committee on Rules of Practice and Procedure of the Judicial Conference, a post equivalent to that held by Charles E. Clark. Carl W. Tobias, *Elevated Pleading in Environmental Litigation*, 27 U.C. DAVIS L. REV. 357, 361 (1994).

138 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2006); *Cash Energy*, 768 F. Supp. at 900.

139 *Cash Energy*, 768 F. Supp. at 895. For a period of years defendant corporations occupied and contaminated a site in North Andover, Massachusetts, prior to plaintiffs' acquisition and development of commercial condominiums on the site. *Id.* at 893. Finding environmental contamination, plaintiffs then sought to impose liability for cleanup costs on both defendant corporations and individual corporate officers. *Id.* at 893, 895.

140 *Id.* at 896 (quoting Motion to Dismiss at 3, *Cash Energy*, 768 F. Supp. 892 (D. Mass. 1991) (No. 90-12624)).

141 *See id.* at 898 (citing favorably a string of civil rights cases imposing heightened pleading standards).

142 *Id.* at 896.

143 *Id.* at 898.

144 *Id.* at 897.

145 *Id.*; *see also* Tobias, *supra* note 137, at 361–64 (discussing Judge Keeton's rationale in *Cash Energy*).

146 *See Cash Energy*, 768 F. Supp. at 899 (quoting United States v. Pole No. 3172, 852 F.2d 636, 638 (1st Cir. 1988)).

remedies in antitrust cases that impose treble damages, Judge Keeton viewed the "substantial justice" requirement of Rule 8(f) as a two-way street, operating to protect defendant's due process concerns in cases where damages or the cost of litigation are high.[147] Thus, relying primarily on the prudential concerns raised in civil rights and antitrust contexts, Judge Keeton predicted that the trend towards elevated pleading standards would extend to CERCLA claims.[148]

However, the problems with the reasoning in *Cash Energy* became evident in the subsequent decisions of *Leatherman* and *Swierkiewicz*, which abrogated elevated pleading standards in the civil rights context and repudiated reliance on prudential concerns as a valid justification for elevating pleading standards.[149] Furthermore, Judge Keeton's decision would create an uncertain claim-dependent pleading standard with plaintiffs forced to guess as to the level of detail required in their pleadings, an outcome that is inconsistent with the trans-substantive nature of the rules. This confusion is evident in decisions contemporaneous with *Cash Energy*, with some courts imposing heightened pleading requirements in CERCLA claims, and others explicitly rejecting the invitation and affirming the liberal notice standard of *Conley*.[150] While *Cash Energy* was never explicitly reversed, the *Leatherman* decision substantially weakened its foundation by casting into doubt the permissibility of elevating pleading standards on a claim-specific basis, especially in situations where information asymmetry exists between injured plaintiffs and defendants.[151] Nonetheless, as *Cash Energy* and its companion cases indicate, there is strong incentive and temptation to elevate pleading standards for CERCLA plaintiffs.

Although CERCLA is a common target of elevated pleading standards, the issue also arises in other types of environmental litigation. In the context of standing, as applied in environmental citizen suit cases, courts have required plaintiffs to plead injury in fact with particularity in order to survive

147 *Id.* at 897.

148 *Id.* at 897, 900.

149 *See* Tobias, *supra* note 137, at 363–64 (observing that "the principal difficulty with the [*Cash Energy*] opinion is that Judge Keeton premised his decision almost exclusively on public policy considerations" relevant to litigation costs and volume, while ignoring competing public concern for a clean environment). Lower courts have recognized the post-*Leatherman* weakening of *Cash Energy*. *See, e.g.*, Warwick Admin. Group v. Avon Prods., Inc., 820 F. Supp. 116, 121 (S.D.N.Y. 1993) ("[*Leatherman*] expressly overturned the line of civil rights cases requiring heightened specificity which . . . *Cash Energy* relied upon as its principal example of 'the trend toward specificity.' Therefore, in light of the *Leatherman* decision, we hold that a heightened pleading standard does not apply to CERCLA cases.").

150 *See* Tobias, *supra* note 137, at 364–67 (discussing cases imposing and rejecting heightened pleading standards in CERCLA claims).

151 *See id.* at 369–71. Like civil rights plaintiffs, many environmental plaintiffs lack vital information held exclusively by defendants and are often comparatively less economically "powerful," as individuals and citizen's groups bring claims against much larger corporations—a situation which perpetuates information asymmetry and can operate to keep plaintiffs out of court if heightened pleading standards are imposed. *Id.* at 373 & n.104.

a motion to dismiss for failure to state a claim.[152] However, the standing cases indicate a refinement of the prima facie elements of standing, rather than an explicit elevation of pleading standards.[153] Although this has a necessary impact on pleading because plaintiffs must allege injury in fact as a component of standing, very generalized or attenuated allegations will suffice.[154] Thus, while early decisions modified what prima facie elements a plaintiff must satisfy in order to state a claim of standing, this did not change the liberal standard of Rule 8(a), as demonstrated by subsequent implementation of standing in federal courts and the current ability of plaintiffs to plead elements of standing with broad generality.

4. Distinguishing Procedure, Substance, and Prudential Concerns

As the above scenarios indicate, a relatively small set of prudential concerns drive the judicial imposition of heightened pleading standards in complex civil litigation. Typically, a combination of increased discovery burden, litigation volume, and high potential damages serve as justification for the elevation of pleading standards.[155] Secondarily, because these factors can raise the incremental settlement value of a suit, courts caution against the strong probability of unmeritorious claims in situations where they are combined.[156] Early dismissal, it is argued, therefore saves judicial resources while ensuring fairness for the innocent defendant who may otherwise pay a settlement equivalent to the "nuisance value" of a claim.[157] Often used as cover by courts seeking to dismiss disfavored claims and manage crowded dockets, this pretext is repeatedly rejected as impermissible, only to resurface later.[158]

152 *See* Brunet & Sweeney, *supra* note 24, at 1068–70 (discussing standing pleading standards in environmental claims).

153 *See id.*

154 *See, e.g.*, Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 521–25 (2007) (finding that Massachusetts had standing to bring a claim challenging a decision by the United States Environmental Protection Agency to deny a petition for rulemaking to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act, when injury in fact is widely shared and attenuated, causation is incremental, and only partial redress is available); *see also* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 184 (2000) (granting standing to plaintiffs who alleged only conditional injury in fact based on their foregone use of the North Tyger River out of fear of contamination from defendant's hazardous waste incinerator facility); Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990) (stating that to satisfy the causation prong of standing in a Clean Water Act citizen suit, "plaintiffs need only show that there is a 'substantial likelihood' that defendant's conduct caused plaintiffs' harm" (quoting Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 75 n.20 (1978))).

155 *See, e.g.*, *Cash Energy*, 768 F. Supp. 892, 898–99 (D. Mass. 1991) (discussing the influence of escalating litigation costs, heavy case loads, and potential for treble damages in antitrust cases on the trend of imposing pleading standards).

156 *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740–43 (1975).

157 *E.g.*, Fairman, *supra* note 53, at 1014 ("Dismissal at the pleading stage would conserve resources for courts and litigants alike.").

158 This is manifest by decisions in the civil rights context, and the subsequent impact of those decisions on other substantive areas. *See supra* Part II.C.2–3.

In other applications, prudential justifications simply overlay evolving judicial interpretations of broad statutory language or flexible prima facie elements, as courts refine the elements of a claim in a given scenario.[159] Because modifying the substantive elements of a claim necessarily impacts what a plaintiff must plead to state a claim for relief under that theory, procedure and substance are intrinsically linked. However, they are not the same. In evaluating pleading standards decisions it is important—and often difficult—to separate procedure and substance. Once this is accomplished, it is clear that when courts properly refine the substantive requirements of a claim, the procedural requirement of "notice" as defined by Rule 8(a) remains intact. This observation greatly aids in parsing Justice Souter's opinion in *Bell Atlantic v. Twombly*.

III. *BELL ATLANTIC V. TWOMBLY*

The plaintiffs in *Bell Atlantic v. Twombly* sought what earlier plaintiffs had failed to obtain:[160] victory in a Sherman Act antitrust suit against Incumbent Local Exchange Carriers (ILECs) created by the divestiture of AT&T in 1984.[161] For over a decade, the ILECs (or more familiarly, the "Baby Bells") maintained legal regional monopolies on local telephone service.[162] Then, seeking to spur competition for local telephone services, Congress passed the Telecommunications Act of 1996,[163] which withdrew sanction of the ILEC monopolies and imposed on them "a host of duties intended to facilitate market entry" by competitors.[164] Apparently, the resulting degree of competition dissatisfied the plaintiffs in *Twombly* who claimed two distinct violations of the Sherman Act by the ILECs. First, they alleged that the ILECs "engaged in parallel conduct" to prevent Competitive Local Exchange

159 The evolution of standing requirements in environmental cases provides a good example, as does the continually evolving standard in Sherman Act conspiracy claims. *See supra* Parts II.C.1, .3.

160 *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP (*Trinko*), 540 U.S. 398, 410–11 (2004) (dismissing plaintiffs' Sherman Act antitrust suit against ILECs for failing to state a claim of monopolization under section 2 of the Sherman Act). Likely observing the low probability of success of section 2 claims in light of *Trinko*, the *Twombly* plaintiffs instead brought a Sherman Act section 1 claim alleging an illegal conspiracy in restraint of trade. *Twombly*, 550 U.S. 544, 550 (2007). Thus, in many ways *Twombly* is the second round of the unsuccessful case against the ILECs begun in *Trinko*.

161 *Twombly*, 550 U.S. at 550.

162 *Id.* at 549.

163 Pub. L. No. 104-104, 110 Stat. 56, 56 (codified as amended primarily in scattered sections of 47 U.S.C.) ("[An Act] [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."). This Act completely revised the Communications Act of 1934. *See id.* § 1(b), 110 Stat. at 56 ("Except as otherwise expressly provided, whenever in the Act an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).").

164 *Twombly*, 550 U.S. at 549 (quoting AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999)).

Carriers (CLECs) from entering their respective markets.[165] Second, the plaintiffs alleged that the ILECs agreed not to compete, as evidenced by a lack of ILECs pursuing business in each other's territory.[166] Both allegations rested on a theory of consciously parallel anticompetitive conduct by the ILECs.[167]

A. Conscious Parallelism Evidentiary Standards

In relevant part, section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[168] This provision "seeks to promote competition by preventing collusion among competitors,"[169] which Justice Scalia deemed "the supreme evil of antitrust."[170] In order to prove a section 1 violation, plaintiffs must demonstrate both a restraint on trade and an agreement within the meaning of the Sherman Act.[171] Allegations of conspiracy are provable either by direct evidence or by inference under a theory of conscious parallelism,[172] which arose in response to challenges encountered when conspiracy is by tacit agreement and direct evidence is impossible or very difficult to acquire.[173] For example, in *Interstate Circuit,*

165 *Id.* at 550. The complaint alleged that the ILECs had a "'compelling common motivatio[n]' to thwart the CLECs' competitive efforts" and bar them from entering territories formerly held by the ILECs as monopolies. *Id.* at 551 (alteration in original) (quoting Consolidated Amended Class Action Complaint at 19, Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 CIV. 10220 (GEL))).

166 *Id.*

167 *Id.*

168 Sherman Act, 15 U.S.C. § 1 (2006).

169 C. PAUL ROGERS III ET AL., ANTITRUST LAW: POLICY AND PRACTICE 225 (4th ed. 2008).

170 *Trinko*, 540 U.S. 398, 408 (2004).

171 "Agreement" is shorthand for a contract, combination, or conspiracy. *See* 15 U.S.C. § 1 (2006).

172 *See, e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221–23 (1939) (affirming district court's finding of conspiracy based on circumstantial evidence when plaintiffs relied on inferences drawn from defendant's conduct and no "persuasive explanation" existed, "other than agreed concert of action," for parallel anticompetitive conduct of defendants).

173 *Id.* The theory of conscious parallelism is especially important in resolving the oligopoly problem, because it is often the case that a small number of firms may conspire tacitly, preventing proof of agreement by direct evidence, while engaging in the same degree of anticompetitive conduct as they could with an express agreement. *See generally* ROGERS ET AL., *supra* note 169, at 395–98. This is the result of oligopoly discipline, whereby members of an oligopoly use market signals, such as price changes, to communicate with other members rather than forming express agreements by contract or conversation. Violators are "punished" by concerted action of the other members. As a result, oligopolies can screen what is in reality a section 1 violation by avoiding the creation of evidence indicating the necessary agreement. Permitting the inference of conspiracy from conscious parallelism thus levels the playing field and allows plaintiffs to bring claims when confronted with anticompetitive conduct perpetuated in concentrated industries or oligopolies. *Id.* (discussing conscious parallelism in the context of oligopoly markets). The ILECs were arguably an oligopoly, or at least a concentrated industry capable of signaling tacit agreement, as they were few in number when plaintiffs filed claims against them in both *Trinko* and *Twombly*. *See Twombly*, 550 U.S. 544 (2007); *Trinko*, 540 U.S. at 398. Therefore, it was no stretch for the *Twombly* plaintiffs to rely on a conscious parallelism theory to support the agreement prong of section 1.

Inc. v. United States, Interstate, a large movie theatre company, demanded that film distributors impose certain price and other restrictions on the showing of movies within Interstate's territory, allegedly to restrain competition from other movie theatres.[174] All distributors acquiesced to the demands.[175] Despite a lack of direct evidence of agreement among the distributors, the Court reasoned that clearly parallel conduct created permissible inferences of conspiracy through concerted action when the record contained no other "persuasive explanation" for the parallel conduct.[176]

However, conscious parallelism alone is insufficient to raise an inference of an agreement because valid, independent business decisions may drive parallel conduct by multiple entities.[177] In *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, the plaintiff alleged that defendant movie distributors had conspired to restrict first-run movies showings to downtown theatres, disadvantaging plaintiff's suburban operations.[178] Because valid economic motivations existed to support independent action by each distributor,[179] the Court refused to allow an inference of conspiracy drawn from consciously parallel conduct alone.[180] While conscious parallelism provides circumstantial evidence in support of a conspiracy, it "has not yet read conspiracy out of the Sherman Act entirely."[181] As *Theatre Enterprises* confirms, courts require circumstantial proof of conspiracy that goes beyond consciously parallel behavior.[182] Inferences of conspiracy drawn from parallel behavior are necessary but not sufficient to support a theory of conscious parallelism, and additional circumstantial evidence supporting the existence of an agreement is often referred to as a "plus factor" requirement.[183]

174 *Interstate Circuit*, 306 U.S. at 215–16.

175 *Id.* at 218.

176 *Id.* at 226; *accord* United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1984).

177 Theatre Enters., Inc. v. Paramount Film Dist. Corp., 346 U.S. 537, 540–41 (1954). Converging market forces often compel similar action by competitors, and courts must distinguish between agreements and independent, market-driven behavior. *See Twombly*, 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003), *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007) (discussing second circuit decisions supporting the plus factor requirement).

178 *Theatre Enters.*, 346 U.S. at 538–39.

179 *Id.* at 540.

180 *Id.* at 541.

181 *Id.*

182 *See* ROGERS ET AL., *supra* note 169, at 371 (discussing the need for "plus factors" in conjunction with allegations of conscious parallelism).

183 *Twombly*, 550 U.S. 544, 556–57 (2007). The Court uses the term "plus factor" only twice: once while quoting the Second Circuit decision and once while quoting the *Twombly* plaintiff's brief. *Id.* at 553, 569. However, the term appears repeatedly in both the Second Circuit opinion and the District Court opinion cited with approval by the Court. *See Twombly*, 313 F. Supp. 2d 174, 179–82 (S.D.N.Y. 2003), *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007); *Twombly*, 425 F.3d 99, 104–06, 113–14, 115 n.9, 116, 118 n.15 (2d. Cir. 2005), *rev'd*, 550 U.S. 544 (2007). It was used at least 16 times during oral argument, by both plaintiff's counsel and by Justice Souter, Justice Ginsberg, and Justice Scalia, indicating the Court's familiarity with the term and its relation to conscious parallelism evidentiary requirements. Transcript of Oral Argument at 30, 34, 39, 46, 49–50, *Twombly*, 550 U.S. 544 (2007) (No. 051126), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1126.pdf. It also appears frequently in the parties' briefs, with the *Twombly* plaintiffs arguing against the use of the term

In *Twombly*, the Court upheld the requirement that Sherman Act section 1 conspiracy claims relying on allegations of conscious parallelism must *also* contain additional evidence that tends to "exclude independent self-interested conduct as an explanation for defendant's parallel behavior."[184] The *Twombly* plaintiffs sought to demonstrate a conspiracy in two ways. First, the complaint alleged that a conspiracy to thwart CLEC entry into ILEC markets was demonstrable by the "common motives" to hamper market entry by CLECs.[185] However, as the district court observed, "[t]his theory does not posit any motivation independent of defendant's individual economic interests."[186] Because each defendant was motivated independently by economic factors to protect its market from entry by CLECs, the court held that allegations of "common motive" did nothing to advance claims of conspiracy.[187]

Second, the complaint alleged that the ILECs conspired not to compete by refraining from entering each other's markets as CLECs.[188] While this claim presented a harder question for the court, it again found that because the complaint lacked any allegations tending to rebut independent parallel conduct, it failed to state a claim of conspiracy.[189] Here, the plaintiffs argued that entering another ILEC's territory is "an attractive business opportunity" because of the same factor that drives ILECs to exclude other CLECs—the mandate of the Telecommunications Act that ILECs supply CLECs with certain services and network elements at low, wholesale costs.[190] The complaint further alleged that in light of compelling reasons to compete for market share, the parallel absence of competition indicated a "classic conspiracy to divide territories."[191] However, the district court noted that this

as overly rigid. Brief for Respondents at 38–39, *Twombly*, 550 U.S. 544 (2007) (No. 051126). Given the history of the term, its vague definition, and potential for confusion, its absence from Justice Souter's opinion is not surprising in light of the ultimate refinement of the evidentiary standard for allegations of conscious parallelism. *See infra* Part III.D. This Note will employ the term "plus factor" as shorthand for allegations and evidence going beyond a showing of mere parallel behavior.

184 *Twombly*, 550 U.S. at 552 (quoting the district court opinion, *Twombly*, 313 F. Supp. 2d at 179, which relied on Apex Oil Co. v. DiMauro, 822 F.2d 246, 253–54 (2d Cir. 1987)).

185 *Twombly*, 313 F. Supp. 2d at 183–84.

186 *Id.* at 184.

187 *Id.* at 183–84. In particular, the structure of the Telecommunications Act required the ILECs to provide services to CLECs at wholesale costs; the pricing scheme encouraged the ILECs to resist "subsidizing" their competitors and provided an independent economic motivation similar to that in *Theatre Enterprises*. *See id.* at 184 (discussing economic drivers); *Theatre Enters.*, 346 U.S. 537, 541–42 (1954). The economic factors at work here are also similar to those relied on by the defendants in *Trinko* to successfully rebut claims of monopolization, since they had valid procompetitive justifications for not facilitating market entry by their competitors because antitrust law does not generally impose a duty on competitors to cooperate with rivals. *See Trinko*, 540 U.S. 398, 408–09 (2004) (discussing the refusal to deal with competitors in the context of *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985)).

188 *Twombly*, 313 F. Supp. 2d at 184.

189 *Id.* at 184–85.

190 *Id.* at 184.

191 *Id.* at 185.

proposition relied on unwarranted assumptions about market conditions, since it ignored the differences between ILEC and CLEC operations[192] and assumed that competing as a CLEC in an ILEC territory is a profitable endeavor.[193] Relying on the allegations contained in support of the first count of conspiracy—that ILEC behavior discourages market entry by CLECs—the court found strong independent justifications for the lack of competition between ILECs.[194] After analyzing Second Circuit antitrust law, the district court determined that plaintiffs must allege facts distinguishing independent parallel conduct from a conspiracy, and that "[p]laintiffs may satisfy this standard by establishing at least one 'plus factor' that tends to exclude independent self-interested conduct as an explanation for defendants' parallel behavior."[195] Because the plaintiffs failed to allege such plus factors, the district court again found that the plaintiffs failed to state a claim of conspiracy within the meaning of section 1 of the Sherman Act.[196]

The Second Circuit reversed, holding that the pleading of plus factors is not required in antitrust claims grounded on conscious parallelism, and that to dismiss a claim of conspiracy "a court would have to conclude that . . . no set of facts . . . would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."[197] The Second Circuit further observed that although plus factors are required at the summary judgment phase, "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal."[198] The Second Circuit reasoned that while antitrust law does not prohibit conduct that is merely parallel, such allegations provide defendants with "fair notice" of a conspiracy claim, thus satisfying Rule 8(a).[199]

192 ILECs are self-sufficient, whereas CLECs use a different business model, purchasing services from ILECs and selling them to retail customers. *Id.*

193 *Id.* at 187.

194 *Id.* at 188.

195 *Id.* at 179. The court further defined plus factors as "an expression of the longstanding rule that 'a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal.'" *Id.* at 180 (quoting Heart Disease Research Found. v. Gen. Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972)).

196 *Id.* at 189. An interesting problem potentially arises here, because plaintiffs are permitted to plead in the alternative, even if those alternatives are mutually exclusive. FED. R. CIV. P. 8(d)(2); WRIGHT & KANE, *supra* note 18, § 68, at 474. Here, it is possible to view the district court's reliance on allegations in the first count of conspiracy as rebutting allegations in the second claim as inconsistent with the concept of pleading in the alternative. *Twombly*, 313 F. Supp. 2d at 187. However, the district court also relied extensively on a structural analysis of the Telecommunications Act and prevailing economic conditions to find the alleged parallel conduct potentially justified by independent economic concerns of the ILECs. *Id.* at 185–89 (discussing market conditions).

197 *Twombly*, 425 F.3d 99, 114 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007).

198 *Id.*

199 *Id.* at 116. An allegation of parallel activity that is contrary to self-interest is a recognized plus factor since it tends to rebut the presumption of independent market-based behavior. *Id.* at 118 n.15. The Second Circuit concluded that because the "plaintiffs appear to be able to [allege against-interest conduct, it is] particularly difficult to conclude that the allegations contained in the complaint are insufficient to state a claim." *Id.* As discussed below, the Supreme Court

Recognizing the function of notice pleading and the tension between the costs of litigation and the liberal standard of Rule 8(a) as defined by *Conley*, the Second Circuit held that the complaint provided adequate notice and vacated the district court's dismissal.[200]

The Supreme Court reversed again, effectively affirming the district court's dismissal of both conspiracy claims for failing to plead plus factors.[201] Recognizing the long-standing view that conscious parallelism alone does not establish a permissible inference of conspiracy in the context of the Sherman Act, the Court observed that "parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior."[202] Because parallel conduct is often explained by unilateral "rational and competitive business strategy,"[203] the Court expressed concern for the possibility of "false positives" occurring in antitrust cases grounded on parallel conduct alone.[204] Citing examples of the plus factor requirement at the trial, directed verdict, and summary judgment stages, the Court noted the importance of additional evidence in any finding of conspiracy founded on a theory of conscious parallelism.[205] Relying on logic substantially similar to that employed by the District Court, the Court then found "that antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint" because each allegation was explained by independent market-based activity.[206]

Thus, it is clear that plaintiffs wishing to demonstrate a conspiracy on grounds of conscious parallelism must demonstrate both parallel behavior *and* evidence tending to rebut the possibility of independent behavior.[207] In light of over fifty years of consistent jurisprudence, this two-prong analytic framework is far from revolutionary.[208]

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disagreed with this conclusion, finding no allegations of contrary-interest behavior within the *Twombly* plaintiff's complaint. *Twombly*, 550 U.S. 544, 566 (2007).

200 *Twombly*, 425 F.3d at 118–19. The Second Circuit recognized the risk of "fishing expeditions" and corresponding discovery burden on defendants, but reasoned that because discovery may uncover plus factors or direct evidence of a conspiracy, the discovery burden did not affect the adequacy of notice afforded by a claim of parallel activity. *Id.* at 114–16.

201 *Twombly*, 550 U.S. at 553.

202 *Id.* at 554.

203 *Id.*

204 *Id.* (quoting RICHARD A. EPSTEIN, AEI-BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, MOTIONS TO DISMISS ANTITRUST CASES: SEPARATING FACT FROM FANTASY 4 (2006)).

205 *Id.*

206 *Id.* at 569. The Court evaluated each allegation of parallel conduct, comparing it with the other allegations within the complaint and prevailing market conditions to determine whether the conduct was potentially against the interest of the ILECs. *Id.* at 564–68. In all instances, the court found no support for conspiracy because "defendant's allegedly conspiratorial actions could equally have been prompted by lawful, independent goals." *Id.* at 566–67. The Court even found that allegations of a lack of CLEC profitability actually *bolstered* the conclusion that the parallel lack of ILEC competition was an independent market-driven decision, and that while "Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, . . . disappointment does not make conspiracy plausible." *Id.* at 568–69.

207 *Id.* at 556–57.

208 In affirming the necessity of a two-prong inquiry, the *Twombly* Court relies on a line of cases going back to the *Theatre Enterprises* decision in 1954. *Id.* at 553–54.

B. Clarifying Pleading Standards Under Conley

In *Twombly*, Justice Souter recognized the "tension between *Conley*'s 'no set of facts' language and its acknowledgement that a plaintiff must provide the 'grounds' on which his claim rests."[209] *Conley* did not obviate the need for plaintiffs to provide at least a minimal level of detail in a pleading to fulfill the liberal mandate of Rule 8(a) while providing "the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[210] Even under the liberal standards of Rule 8(a), a plaintiff retains the burden of providing enough information in a complaint to indicate the "grounds" of the claim.[211] Because Rule 8 requires a "showing that the pleader is entitled to relief,"[212] *Conley*'s "grounds" requirement is also termed the "entitlement requirement" of pleading under Rule 8.[213] Accordingly, Justice Souter dismisses the "no set of facts" phrase as "an incomplete, negative gloss on an accepted pleading standard."[214] In doing so, the *Twombly* majority sensibly concludes that instead of requiring courts or defendants to conjure hypothetical facts that could satisfy the entitlement requirement, Rule 8 demands a "showing [of] any set of facts consistent with the allegations in the complaint."[215] Rather than announcing a new pleading standard, *Twombly* merely clarifies the entitlement requirement of Rule 8 and resolves latent tension within the *Conley* decision.

Despite protestations by Justice Stevens in dissent,[216] this clarification is entirely consistent with the Federal Rules. For example, Form 9 provides that a plaintiff may adequately plead a claim of negligence by asserting "[o]n June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."[217] Thus, even a basic claim of negligence must include a modicum of factual detail sufficient to put the defendant on notice as to why the plaintiff is entitled to relief. With its "grounds" language, *Conley* affirmed the entitlement requirement of Rule 8 as an essential component of providing notice. At the same time, *Conley* stands for the proposition that a plaintiff may assert those grounds with broad generality, refusing to impose a "minimum standard" of factual detail on Rule 8(a) pleadings.[218] *Twombly* does nothing to change this principle,

209 *Id.* at 562.

210 *Conley*, 355 U.S. 41, 47 (1957); *see also supra* Part II.B (discussing *Conley*).

211 *Twombly*, 550 U.S. at 555.

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

213 *Twombly*, 550 U.S. at 557.

214 *Id.* at 563.

215 *Id.*

216 *Id.* at 577–78 (Stevens, J., dissenting).

217 FED. R. CIV. P. Form 9 (1994) (repealed 2007); *see also Twombly*, 550 U.S. at 565 n.10 (contrasting the content of Form 9 with the lack of factual allegation in the *Twombly* plaintiffs' complaint).

218 *Twombly*, 550 U.S. at 563; *see also supra* Part II.B (discussing *Conley*).

with Justice Souter writing that "we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of" the Federal Rules.[219]

Subsequent decisions affirm this premise. Two weeks after announcing the decision in *Twombly*, the Supreme Court issued a per curium opinion in *Erickson v. Pardus*[220] that reversed the Tenth Circuit's dismissal of a prisoner's civil rights claim for failure to state a claim.[221] The Court cited *Twombly* as upholding *Conley*'s requirement that Rule 8 "requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[222]

Recently, in *Ashcroft v. Iqbal*, the Court affirmed that *Twombly* is broadly applicable in all civil cases as a clarification of Rule 8(a) pleading standards.[223] Citing *Twombly*, the Court held that while "detailed factual allegations" are not required, a claim is insufficient "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"[224] The Court then described a two-step framework.[225] First, legal conclusions are not entitled to a presumption of truth, and may be disregarded at the pleadings stage.[226] Second, the remaining factual allegations are evaluated to "determine whether they plausibly give rise to an entitlement to relief."[227] This second step grafts *Twombly*'s plausibility language onto the entitlement requirement of Rule 8(a).[228]

Twombly and *Iqbal* contain similar interactions of substance and procedure. In each case, the Court first clarified a substantive state-of-mind element.[229] Next, the Court found that the plaintiffs failed to allege facts that distinguished that state-of-mind element from ordinary, lawful conduct.[230] In

219 *Twombly*, 550 U.S. at 569 n.14.

220 551 U.S. 89 (2007).

221 *Id.* at 90.

222 *Id.* at 93 (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 555).

223 *Iqbal*, 129 S. Ct. 1937, 1953 (2009).

224 *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 557).

225 *Id.* at 1949–50; *see also* Wasserman, *supra* note 17 (manuscript at 1–2) (describing the two-step approach taken by the *Iqbal* Court).

226 *Iqbal*, 129 S. Ct. at 1949–50.

227 *Id.* at 1950.

228 *Id.* at 1949 ("[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Twombly*, 550 U.S. at 570)).

229 The Court clarified the state-of-mind element as conscious parallelism in *Twombly* (akin to knowledge), 550 U.S. at 552–53, and a discriminatory purpose in *Iqbal*, 129 S. Ct. at 1949.

230 In *Iqbal*, the Court first discards a large set of Iqbal's allegations as conclusory and "not entitled to the assumption of truth" before finding the remaining factual allegations insufficient to state a claim. *Iqbal*, 129 S. Ct. at 1950–51. It is the Court's analysis at this first step that the dissent critiques, rather than the framework in general. *See id.* at 1960–61 (Souter, J., dissenting) ("I do not understand the majority to disagree with this understanding of 'plausibility' under *Twombly*. Rather, the majority discards the allegations discussed above with regard to Ashcroft and Mueller as conclusory, and is left considering only two statements in the complaint."); *see also id.* at 1961 ("[T]he majority's holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory."). The dissent also disagrees with the majority's modification of substantive

other words, both cases held that "neutral" allegations[231] are insufficient to withstand a motion to dismiss when state-of-mind is at issue, with the Court observing that "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."[232] Whether a claim shows that the "pleader is entitled to relief"[233] is necessarily a context-specific task, and different claims will require different degrees of factual detail in order to provide fair notice and satisfy the entitlement requirement of Rule 8(a).[234]

Both *Twombly* and *Iqbal* represent instances where the permissible level of generality in the pleadings was indeterminate and subject to attack by the defendants due to uncertainty surrounding the underlying substantive standards.[235] While Justice Souter's discussion of pleading standards in *Twombly* is clear and succinct, it brackets a detailed application of Rule 8(a) to Sherman Act section 1 conspiracy claims.[236] As used by the *Twombly* Court, plausibility relates only to the particular requirements of Sherman Act section 1 conspiracy claims, and not to the general entitlement requirement of Rule 8(a)(2).[237] But some commentators and courts have read a heightened "plausibility" requirement into the pleading standards portion of the opinion.[238] This is unnecessary, and probably a mistake. *Twombly* clarifies *Conley*, but does not modify its liberal pleading standard or the notice-giving function of Rule 8(a). In turn, *Iqbal* borrows the term "plausible" to describe *Twombly*'s analysis of Rule 8(a).[239]

liability standards under *Bivens*, given certain admissions by the petitioners and a lack of briefing on the issue. *Id.* at 1956–58. There is room for debate as to how much discretion a court has, or should have, in determining whether an allegation is "conclusory," but the sensitive nature of the case and the overarching issue of qualified immunity cloud this debate in *Iqbal*.

231 *Id.* at 1949 (majority opinion); *see also* Wasserman, *supra* note 17 (manuscript at 13–14, 17) (discussing the insufficiency of neutral allegations).

232 *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

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

234 *Iqbal*, 129 S. Ct. at 1950.

235 Just as *Twombly* was a failed antitrust claim, *Iqbal* is a failed *Bivens* claim, with each lacking factual allegations in support of a key element. *Twombly*, 550 U.S. at 553; *Iqbal*, 129 S. Ct. at 1948–49.

236 *Twombly*, 550 U.S. at 552–61.

237 *See supra* Part III.A.

238 *See, e.g.*, John H. Bogart, *The Supreme Court Decision in Twombly*, UTAH B.J., Sept.–Oct. 2007, at 20, 22 ("Some commentators believe that *Twombly* marks a dramatic change in the standards for pleading.") (confining *Twombly* to the antitrust context); Allison T. Burtka, *Supreme Court Redefines Pleading Standard*, TRIAL, Aug. 2007, at 16 (noting lower court applications of *Twombly* outside of antitrust); Dodson, *supra* note 11, at 138 (noting that the "best reading" of *Twombly* is that Rule 8 now requires notice-plus pleading for all cases); *The Supreme Court*, *supra* note 10, at 312–15 (discussing "plausibility" in relation to Rule 8); *see also* Wasserman, *supra* note 17 (manuscript at 1 & n.3) (observing that after *Iqbal* "most ommentators are not encouraged" by the potential elevation in pleading standards). *But see* Bogart, *supra*.

239 *See Iqbal*, 129 S. Ct. at 1950–51 ("Under *Twombly*'s construction of Rule 8, we conclude that respondent's complaint has not 'nudged [his] claims' of invidious discrimination 'across the line from conceivable to plausible.'" (quoting *Twombly*, 550 U.S. at 570)).

This blurs procedural and substantive terminology, but does not change the meaning of the Rules.

C. The Interaction of Antitrust Substance and Procedure

As Justice Stevens points out in *Twombly*'s dissent, "this is a case in which there is no dispute about the substantive law."[240] While partly correct, that statement ignores the very real dispute over the proper integration of antitrust substantive law and federal civil procedure, which dictates when and how a party must satisfy the plus factor requirement to prevail in a claim of conspiracy.[241] Finding an "agreement" by inference is necessarily a fact-intensive inquiry, and early courts were wary of granting directed verdicts or summary judgment in Sherman Act section 1 cases.[242] Conscious parallelism and the plus factor requirement are nebulous concepts, but as courts gained familiarity with them the reluctance to use the valuable tool of summary judgment eroded.[243] Thus, when it decided *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* (*Matsushita*),[244] the Court "appears to have put to rest any argument . . . that summary judgment should be used sparingly in antitrust cases."[245] In *Matsushita*, American television manufacturers alleged that Japanese competitors had conspired to fix prices at artificially low levels in order to drive American firms from the market.[246] The case was "extremely complex,"[247] but the district court granted summary judgment for the defendants because the plaintiffs' allegations of parallel conduct failed to rebut a "plausible inference" that the defendant's conduct was not a conspiracy, but rather independent, competitive conduct.[248]

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240 *Twombly*, 550 U.S. at 571.

241 *See, e.g.*, Dodson, *supra* note 11, at 136 (noting that prior to *Twombly*, the court had not defined what role plus factors and "'parallel conduct' allegations might play at the pleading stage"). The parties argued this point extensively. *See* Petition for Writ of Certiorari at 19, *Twombly*, 550 U.S. 544 (2007) (No. 051126) ("Substantive antitrust standards require that the complaint allege facts supporting the conclusory allegation of conspiracy."); Brief in Opposition at 7–8, *Twombly*, 550 U.S. 544 (2007) (No. 051126) (plaintiffs pleading section 1 conspiracy claims "need not specifically allege 'plus factors'").

242 *Theatre Enters.*, 346 U.S. 537, 540–41 (1954) (upholding district court's denial of directed verdict when allegations of parallel conduct "together with other testimony of an explanatory nature, raised fact issues requiring the trial judge to submit the issue of conspiracy to the jury"); Poller v. Columbia Broad. Sys., Inc. 368 U.S. 464, 473 (1962) ("Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles."). Many decisions subsequently cited *Poller* as authority when denying summary judgment in antitrust litigation. *See* EDWARD J. BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 9:3, at 309–11 (3d ed. 2006) (discussing *Poller* and collecting cases); *see also* ROGERS ET AL., *supra* note 169, at 373 (discussing *Poller*).

243 ROGERS ET AL., *supra* note 169, at 373–74.

244 475 U.S. 574 (1986).

245 BRUNET & REDISH, *supra* note 242, § 9:3, at 311.

246 *Matsushita*, 475 U.S. at 577–78.

247 BRUNET & REDISH, *supra* note 242, § 9:3, at 311. The published district court opinions, alone, "would fill an entire volume of the Federal Supplement," and over 40 volumes of appendices were submitted to the Supreme Court. *Matsushita*, 475 U.S. at 577.

248 *Matsushita*, 475 U.S. at 578–79.

Twombly represents the next step in a process that *Matsushita* began. Since *Theatre Enterprises*, courts have gained experience with the theory of conscious parallelism and determining when inferences of conspiracy are permissible. Still, the plus factor requirement remained somewhat vague.[249] When Justice Souter wrote that the *Twombly* plaintiffs "have not nudged their claims across the line from conceivable to plausible,"[250] he used a term that visits antitrust opinions often, especially in connection with Sherman Act section 1 conspiracy claims.[251] In doing so, the Court clarified the substantive definition of conscious parallelism: It is an allegation of consciously parallel behavior accompanied by "further factual enhancement" that renders a conspiracy plausible by separating the alleged parallel conduct from independent business behavior in light of prevailing market conditions.[252] "Plausibility" simply provides convenient shorthand for this restatement of the long-standing plus factor requirement, while providing plaintiffs with a yardstick by which to measure their claim. If conscious parallelism defines *what* a party may claim to show a conspiracy, the "plausibly requirement" describes *how* they must claim it.[253]

During oral argument, Justice Breyer expressed a concern that, without more, allegations of parallel conduct are an unfounded "ticket to discovery."[254] The Court revisited this theme in its opinion as it discussed the potential discovery burden on defendants in complex antitrust litigation.[255] Because antitrust claims present a "potentially massive factual controversy," the Court expressed concern for both judicial efficiency and the economic burden on defendants.[256] That burden, the Court noted, has the potential to incrementally raise the *in terrorem* settlement value and "push cost conscious defendants to settle even anemic cases."[257] However, *Twombly*'s prudential discussion is largely confined to the antitrust context, serving to justify the substantive aspect of the Court's decision as to what plus factor allegations create a plausible claim of conspiracy.[258] In the context of Rule

249 *See* BRUNET & REDISH, *supra* note 242, § 9:6, at 329 (observing that, after *Matsushita*, courts "continue to grapple with the definition of 'implausible' claims").

250 *Twombly*, 550 U.S. 544, 570 (2007).

251 *See, e.g.*, *Matsushita*, 475 U.S. 574 *passim* (using the term "plausible" or a derivative at least 13 times in addressing plaintiffs' allegations of conspiracy); Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530, 1536 (11th Cir. 1987) (reversing summary judgment for defendant when plaintiff's evidence gives rise to a plausible inference of conspiracy); *see also* United States v. Microsoft Corp., 147 F.3d 935, 951 (D.C. Cir. 1998) (granting a writ of mandamus to lift an injunction when Microsoft made a "plausible claim that [tying a browser to an operating system] brings some advantage" to consumers); BRUNET & REDISH, *supra* note 242, § 9:6, at 324–27 (discussing the use of the term "plausible" in relation to *Matsushita*).

252 *Twombly*, 550 U.S. at 557.

253 Just as the tort theory of negligence requires allegations of duty, breach, causation, and injury, so too does the conspiracy theory of conscious parallelism require allegations of parallel market behavior and plausible plus factors. *See id.* at 553–57.

254 Transcript of Oral Argument, *supra* note 183, at 33.

255 *Twombly*, 550 U.S. at 558–59.

256 *Id.*

257 *Id.* at 557–59.

258 *Id.* at 557, 559.

8(a), the Court simply affirms the premise that "when the allegations taken in a complaint, however true, could not raise a claim of entitlement to relief," dismissal is proper.[259] This is consistent with the Court's treatment of *Conley* and Rule 8(a)'s entitlement requirement, and indicates that any prudential considerations bear properly on the *application* of the Court's strengthened conscious parallelism standard under Rule 8(a), and not to the requirements of Rule 8(a) itself.[260]

Recognizing the parallel trends towards a well-defined theory of conscious parallelism and the increased use of summary procedures, the Court noted that "it is time for a fresh look at adequacy of pleading when a claim rests on parallel action."[261] In dissent, Justice Stevens is critical of requiring plausible allegations of conspiracy, writing that this is inconsistent with *Swierkiewicz* as an impermissible transposition of prima facie elements onto the liberal pleading standard of Rule 8(a).[262] However, this argument somewhat misses the point. In dismissing the claim, the Court did not demand any particular level of factual detail in the pleading, but observed that the pleading *in toto* lacked any allegations rendering a conspiracy plausible.[263] Requiring some level of detail is consistent with the entitlement requirement of Rule 8(a) as described by *Conley*, since effective notice cannot exist without a plaintiff pointing out the "grounds" of his claim.[264] Moreover, those "grounds" will necessarily vary with the substantive claim, along with the degree of generality adequate to provide notice[265]—pleading a conspiracy in the context of a Sherman Act section 1 violation is a more complex matter than pleading negligence in a traffic accident.[266]

In expressing concern over an evaluation of plus factors at the pleadings stage, Justice Stevens further quotes that "in antitrust cases, where the proof is largely in the hands of the alleged conspirators,

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259 *Id.* at 558.

260 As discussed, the Court has repeatedly rejected the use of prudential factors to modify generally applicable pleading standards, which only Congress can accomplish. *See supra* Part I. Thus, this conclusion is the only one that squares with the prior interpretation of Rule 8(a) in *Swierkowitcz* and with the Court's reliance on Form 9. *But cf.* Dodson, *supra* note 11, at 138 (discussing the alternative explanation—that plausibility extends beyond the antitrust context—and the resulting conflicts with prior precedent).

261 *Twombly*, 550 U.S. at 561 n.7.

262 *See id.* at 586 (Stevens, J., dissenting).

263 *Id.* at 564–66, 569 n.14 (majority opinion). Recall that the *Swierkiewicz* defendants demanded *specific* facts because they were dissatisfied with the complaint's generalized allegations of discrimination. *See Swierkiewicz*, 534 U.S. 506, 514 (2002).

264 *Twombly*, 550 U.S. at 562.

265 *See* WRIGHT & MILLER, *supra* note 27, § 1218, at 273 ("No more precise test can be stated because the appropriate level of generality for a pleading depends on the particular issue in question or the substantive context of the case before the court.").

266 Like a claim of negligence, a claim of conspiracy must contain some content beyond a conclusory assertion of "conspiracy." *See Twombly*, 550 U.S. at 565 & n.10. As discussed, this necessitates allegations of "plus factors" when a plaintiff asserts a theory of conscious parallelism. *See supra* Part III.A. By way of analogy, the existence of plus factors can be compared to the date and time contained in Form 9—details that allow the defendant to narrow the scope of possible scenarios and have notice of the grounds on which the plaintiff's claim rests.

. . . dismissal prior to . . . discovery should be granted very sparingly."[267] However, some consideration of plus factors is appropriate at all stages of litigation. While summary judgment demands "consideration of facts,"[268] a motion to dismiss tests only the legal sufficiency of a claim[269] and whether allegations in the complaint state a claim that provides adequate notice to the defendant.[270] As such, evaluating the notice function of a pleading does no violence to the roles of discovery and summary judgment.[271] Before *Twombly*, it was unclear what type of allegations satisfied the plus factor requirement of conscious parallelism. However, as that standard is refined it becomes less difficult for courts and parties to consider plus factors, first during summary judgment and now at the pleadings stage.

D. Parsing Twombly

Courts are seemingly uncomfortable to declare substantive changes to antitrust law, and often couch them "in the guise of procedural changes."[272] As a result, parsing antitrust decisions is perhaps more difficult than necessary—such is the case with the *Twombly* Court's analysis of conscious parallelism. However, once *Twombly* is broken into constituent parts, several things are clear. First, while plaintiffs may ground Sherman Act section 1 claims on allegations of conscious parallelism, that alone is insufficient and additional evidence must tend to preclude the existence of competitive justifications for the alleged parallel behavior. Thus, *Twombly* clarifies the substantive requirements of a prima facie case of a Sherman Act section 1 violation based on a theory of conscious parallelism by defining the heretofore vague "plus factors" as a plausibility requirement that permits an inference of conspiracy.[273] Second, because the context is within a motion to dismiss, the Court addresses the function of Rule 8(a), upholds notice as a core function of pleadings in federal courts, and clarifies *Conley* while reiterating the premise that Rule 8(a) permits pleading allegations with broad generality, as opposed to requiring specific facts.[274] Third, the Court

267 *Twombly*, 550 U.S. at 586–87 (internal quotation marks omitted) (quoting Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746 (1976)).

268 BRUNET & REDISH, *supra* note 242, § 6:1, at 122.

269 *See supra* Part II.B.

270 *See supra* Part II.B.

271 Rule 15 provides a plaintiff with the opportunity to amend a complaint "when justice so requires" to correct any deficiencies. FED. R. CIV. P. 15(a). Furthermore, if a defendant raises additional factual matters in a 12(b)(6) motion that are not contained within the pleading, the court must treat the motion as one for summary judgment. FED. R. CIV. P. 12(d)(2). And, because summary judgment procedure contains a time-out provision that enables a party to conduct discovery before responding to a motion for summary judgment, FED. R. CIV. P. 56(f), consideration of plus factors at the pleading stage does not risk exposing plaintiffs to a premature factual inquiry.

272 ROGERS ET AL., *supra* note 169, at 373.

273 *Twombly*, 550 U.S. 544, 557 (2007).

274 *Id.* at 562–63; *see also id.* at 565 n.10 (discussing the importance of notice as a function of Rule 8).

outlines prudential concerns that justify the necessity of adhering to this evidentiary standard in order to avoid "false positives" in antitrust litigation.[275] Last, the Court applies its strengthened analysis of conscious parallelism's plausibility requirement under the clarified *Conley* standard to find that because the *Twombly* plaintiffs failed to include any allegations of plus factors or other evidence beyond that of consciously parallel activity, they did not state a Sherman Act section 1 claim.[276]

Because the decision interweaves procedure, substance, and the same prudential concerns formerly relied upon as justification for impermissibly elevating pleading standards, it has generated no small degree of confusion.[277] However, the *Twombly* Court did nothing to change federal pleading standards under Rule 8(a), nor did it overrule *Conley*.[278] Instead, *Twombly* strengthens the substantive requirements of conscious parallelism under the cover of procedure[279] and clarifies *Conley*'s internal inconsistency by replacing "no set of facts" with "any set of facts" as the standard for measuring the adequacy of a claim under Rule 12(b)(6).[280] Notice pleading is intact, along with the liberal breadth afforded plaintiffs in showing that they are entitled to relief. Nonetheless, because experience has shown a judicial tendency to impose heightened pleading standards in complex litigation,[281] plaintiffs should consider *Twombly* when bringing environmental claims in federal court.

IV. THE IMPACT OF *TWOMBLY* ON ENVIRONMENTAL LAW PRACTICE AND PROCEDURE

Twombly presents a challenge to environmental plaintiffs for three distinct reasons. First, its prudential concerns analogs may tempt judges to erroneously apply a heightened pleading standard to complex environmental claims that promise to impose a high discovery burden or otherwise raise the *in terrorem* settlement value.[282] Second, some courts treat *Twombly* (and

275 *See id.* at 554, 556 (quoting RICHARD A. EPSTEIN, AEI-BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, MOTIONS TO DISMISS ANTITRUST CASES: SEPARATING FACT FROM FANTASY 4 (2006) (discussing the risk of false positives due to the inadequacy of parallel conduct alone to demonstrate conspiracy, and the potential impact of those false positives when unmeritorious claims are filed).

276 *Id.* at 569.

277 *See generally* Robert G. Bone, *Twombly, Pleading Rules and the Regulation of Court Access*, 94 IOWA L. REV. 873, 877 (2009) (discussing the "startling" amount of scholarly comment on *Twombly*, and subsequent cases attempting to clarify *Twombly*'s holding).

278 *Twombly*, 550 U.S. at 569 n.14; *Erickson*, 551 U.S. 89, 98–99 (2007); Iqbal v. Hasty, 490 F.3d 143, 156 (2d Cir. 2007), *rev'd on other grounds sub nom.*, *Iqbal*, 129 S. Ct. 1937 (2009).

279 *Twombly*, 550 U.S. at 556–59.

280 *Id.* at 562–63.

281 *See* discussion *supra* Part II.C.

282 *See, e.g.*, Ford Motor Co. v. Edgewood Props., Inc., Nos. 06-1278, 06-4266, 2007 WL 4526594, at *4 (D.N.J. Dec. 18, 2007) (applying a plausibility standard to CERCLA claims); OBG Technical Servs., Inc. v. Northrop Grumman Space & Mission Sys. Corp., 503 F. Supp. 2d 490, 502 (D. Conn. 2007) (holding that "*Twombly* did not intend to require a universal standard of heightened fact pleading, but instead requir[es] a flexible plausibility standard, which obligates

Iqbal) as a redefinition of generally applicable pleading standards under Rule 8(a), requiring "plausibility" in all complaints.[283] Third, as demonstrated by *Twombly* in the antitrust context, courts sometimes employ procedure to mask shifts in their interpretation of substantive requirements of certain types of claims.[284] Although courts have cited *Twombly* in a range of environmental contexts, three scenarios merit discussion for their distinct concerns.

CERCLA claims present an obvious target for elevating pleading standards because CERCLA claims often impose high discovery burdens and the potential for heavy liability, raising the *in terrorem* value of a claim that survives a motion to dismiss.[285] A second category of claims arising under the so-called command-and-control statutes also merits discussion. While these claims confer a substantially lower discovery burden and less risk of abusive litigation, they are at times complex and as such targets of a generally elevated pleading standard.[286] Last, common law claims are subject to all three concerns, as courts look for ways to manage their dockets, dispose of complex litigation, and refine the substantive requirements of evolving common law doctrines.

A. CERCLA Claims

Courts considering Rule 12(b)(6) motions to dismiss CERCLA claims are inconsistent in their application of *Twombly*. Some courts cite the decision as creating a heightened "plausibility" pleading standard,[287] while

a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render a claim *plausible*" and dismissing CERCLA, nuisance, and contract claims (internal quotation marks omitted) (alteration in original) (quoting *Iqbal*, 490 F.3d at 155)); Raytheon Aircraft Co. v. United States, 501 F. Supp. 2d 1323, 1327 (D. Kan. 2007) (applying a plausibility standard to dismiss a CERCLA claim).

283 For example, the District Court of New Jersey has applied an elevated "plausibility" pleading standard in a wide array of cases. *See, e.g.*, Langan Eng'g. & Envtl. Servs., Inc. v. Greenwich Ins. Co., No. 07-2983 (JAG), 2008 WL 940803, at *4 (D.N.J. Apr. 7, 2008) (holding in an insurance indemnity claim that a "motion to dismiss should be granted only if the plaintiff is unable to articulate enough facts to state a claim to relief that is plausible on its face" (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 570)); Dewey v. Volkswagen AG, 558 F. Supp. 2d 505, 512 (D.N.J. 2008) (plaintiffs bringing class action defect claims against automobile manufacturers "must allege facts sufficiently detailed to raise a right to relief above the speculative level, and must state a claim to relief that is plausible on its face" (internal quotation marks omitted) (quoting ProNational Ins. Co. v. Shah, No. 07-1774, 2007 WL 2713243, at *1 (E.D. Pa. Sept. 17, 2007))); *Ford Motor Co.*, 2007 WL 4526594, at *4 (applying a plausibility standard to plaintiff's CERCLA claims).

284 *See* discussion *supra* Part III.D.

285 *See supra* Part II.C.3 (discussing *Cash Energy*).

286 *See infra* Part IV.B.

287 *See, e.g.*, Sensient Colors, Inc. v. Kohnstamm, 548 F. Supp. 2d (D. Minn. 2008) (citing *Twombly* for the proposition that a pleading must contain "enough facts to state a claim to relief that is plausible on its face" and denying a Rule 12(b)(6) motion to dismiss because plaintiff pled enough facts to render each CERCLA claim plausible (quoting *Twombly*, 550 U.S. at 547)); *Ford Motor Co.*, 2007 WL 4526594, at *4 ("A complaint must contain enough facts to state a claim to relief that is plausible on its face, and the factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the

others cite *Twombly* as an affirmation of the Rule 8(a)(2) entitlement requirement and the "grounds" language of *Conley v. Gibson*.[288] Other courts seem confused and interpret *Twombly* as creating a fact-driven plausibility standard *without* elevating pleading standards for CERCLA plaintiffs.[289] Thus, CERCLA plaintiffs currently face uncertain standards when defending a motion to dismiss.

Several factors increase this uncertainty. CERCLA claims create prudential concerns similar to those created by Sherman Act conspiracy claims, both of which may tempt judicial elevation of pleading standards.[290] Both statutes provide for private enforcement, with substantial damages and attorney fees at stake.[291] Like claims of conspiracy, CERCLA claims are often

complaint are true." (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 555, 570)); Rhodia Inc. v. Bayer Cropscience Inc., No. 04-6424 (GEB)(MF), 2007 WL 3349453, at *6 (D.N.J. Nov. 7, 2007) (concluding that *Twombly* abrogated *Conley v. Gibson* and created a plausibility standard before dismissing plaintiff's CERCLA contribution claim); *OBG Technical Servs.*, 503 F. Supp. 2d at 522 (citing *Twombly* for creating a plausibility standard and dismissing plaintiff's state-law contamination claims because they failed to provide "[f]actual allegations" that "raise a right to relief above the speculative level," and finding CERCLA claim time-barred (quoting *Twombly*, 550 U.S. at 555)).

288 *See, e.g.*, Montville Twp. v. Woodmont Builders, LLC, 244 F. App'x 514, 517 (3d Cir. 2007) ("In considering whether the complaint survives a motion to dismiss, we review whether it 'contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory.'" (alteration in original) (quoting *Twombly*, 550 U.S. at 562)); United States v. Halliburton Energy Servs., Inc., No. H-07-3795, 2008 WL 656475, at *2, 4 (S.D. Tex. Mar. 6, 2008) (citing *Twombly* as support for requiring some facts in a pleading to satisfy the entitlement requirement of Rule 8(a)(2), but affirming the premise that there is no heightened pleading standard in CERCLA claims and denying defendant's motion to dismiss); Innis Arden Golf Club v. Pitney Bowes, Inc., 514 F. Supp. 2d 328, 331–32, 336 (D. Conn. 2007) (applying *Twombly* as affirmation of notice function of Rule 8 and declining to dismiss CERCLA and nuisance claims).

289 *See, e.g.*, City of Gary v. Shafer, No. 2:07-CV-56-PRC, 2007 WL 3019918, at *2 (N.D. Ind. Oct. 4, 2007) (interpreting *Twombly* as affirming the "grounds" language of *Conley* and the entitlement requirement of Rule 8(a)(2), while also requiring plaintiffs to "raise the possibility of relief above a 'speculative level'" (quoting Equal Employment Opportunity Comm'n v. Concentra Health Servs., Inc., 496 F.3d 773, 776 (7th Cir. 2007))); Veolia Es Special Servs., Inc. v. Techsol Chem. Co, No. 3:07-0153, 2008 WL 706689, at *1–3 (S.D.W. Va. Mar. 14, 2008) (interpreting *Twombly* as establishing a plausibility standard that does not elevate pleading standards, while dismissing CERCLA claims because plaintiff failed to allege sufficient facts).

290 *See* Fairman, *supra* note 53, at 1022–25 (discussing heightened pleading standards in CERCLA cases in relation to high response and litigation costs that may raise the settlement value of some claims).

291 *See* Antitrust Procedural Improvements Act of 1980, 15 U.S.C. § 15(a) (2006) (providing for private enforcement of antitrust laws, including the availability of treble damages and attorney fees); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9659 (2006) (providing private enforcement of CERCLA and attorney fees to the prevailing party). CERCLA also provides for private cleanup cost recovery and contribution actions. *Id.* §§ 9607(a)(4)(B), 9613(f); *see also* Jason Nichols, *Resolving the Federal Court Conflict Over CERCLA Cost Recovery for Potentially Liable Parties—Some Suggestions for Giving Order to Post-*Aviall *Section 107 Jurisprudence and for Encouraging Voluntary Cleanup of Environmental Site Contamination*, 74 TENN. L. REV. 275, 278–81 (2007) (discussing CERCLA's cost-shifting provisions). In addition, CERCLA is a strict liability statute, raising the stakes for defendants. *See generally* M. STUART MADDEN & GERALD W. BOSTON, LAW OF ENVIRONMENTAL AND TOXIC TORTS 632 (3d ed. 2005) (discussing the strict liability standard in CERCLA).

complex and costly,[292] potentially elevating the *in terrorem* settlement value of the claim. As a result, and because *Cash Energy* was never expressly reversed, there is potential for a judicial elevation of pleading standards in CERCLA claims based on concerns for efficiency, discovery burden, and fairness.[293]

However, several important observations reduce this uncertainty and support the conclusion that an elevated pleading standard in CERCLA cases is unjustified and impermissible. First, CERCLA is a comprehensive and well-defined statute, supported by extensive regulations.[294] This eliminates much of the uncertainty surrounding the prima facie elements of CERCLA claims and allows courts to decide seemingly complex claims on narrow factual issues at the summary judgment stage.[295] Accordingly, CERCLA claims are well suited for active judicial management, limited discovery, and summary judgment motions that reduce burdens on the judiciary and the parties alike.[296] Second, although there is similar private enforcement of CERCLA, there is no treble-damages windfall for plaintiffs, who recover only actual response costs from defendants.[297] Thus, there is no "bonus" for bringing these claims, reducing the likelihood of unmeritorious suits. Third, while *Cash Energy* still stands, subsequent decisions in *Leatherman* and *Swierkowitz* severely undermine its logic, and courts should not apply the decision to elevate pleading standards.[298] As a result—and despite the initial confusion in lower courts—CERCLA plaintiffs face no elevated pleading standard under *Twombly*.

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292 *See* Jon Niermann, *Alternative Dispute Resolution in CERCLA Settlement*, 17 J. ENVTL. L. & LITIG. 389, 413 (2002) ("[CERCLA] litigation frequently generates disproportionate transaction costs, and in an alarming number of cases the transaction costs equal or exceed the expenditures for site study and remediation.").

293 *See supra* Part II.C.3 (discussing *Cash Energy*); *see also* Fairman, *supra* note 53, at 1024–27 (discussing judicial application of *Cash Energy*).

294 As noted above, the Sherman Act is much like a constitutional provision with broad room for judicial interpretation. *See supra* note 99 and accompanying text. Conversely, CERCLA is a lengthy statute that comprehensively defines critical terms, such as who are "covered persons" subject to liability. 42 U.S.C. § 9607(a) (2006). Similarly, regulations detail how parties may establish certain key defenses, such as landowner liability protection. *See* 40 C.F.R. pt. 312 (2009) (detailing "all appropriate inquiries" standards for establishing the innocent landowner defense, prospective purchaser liability protection, and contiguous property owner liability protection).

295 *See* MADDEN & BOSTON, *supra* note 291, at 689–90, 753 (discussing prima facie elements of a private cost recovery and contribution actions).

296 *See* Tobias, *supra* note 137, at 374 (arguing that summary judgment and judicial case management are more suitable tools for managing CERCLA claims than an elevating pleading standard).

297 *See supra* note 291.

298 *See supra* notes 149–51 and accompanying text (discussing the weakness of *Cash Energy* after *Leatherman* and the refusal of some lower courts to follow the decision).

B. Command and Control Statutes

In considering claims brought under environmental statutes other than CERCLA, courts have generally rejected any interpretation of *Twombly* that elevates pleading standards. Several decisions reinforce the premise that *Twombly* simply clarified *Conley*'s "no set of facts" language while affirming the entitlement provision and notice function of Rule 8(a).[299] Other decisions simply refuse any consideration of *Twombly*, limiting it to the antitrust context.[300] In a sense, both views are correct. *Twombly* is primarily an antitrust decision and its discussion of "plausibility" was constrained to the context of allegations of conspiracy and conscious parallelism.[301] However, *Twombly* does contain a helpful clarification of the interaction of *Conley*'s liberal pleading standard with the entitlement provision of Rule 8(a)(2),[302] and the term "plausibility" was used in *Iqbal* to describe this clarification.[303] Regardless of the form of analysis the outcome is the same, and courts thus far appear to decline to impose a heightened pleading standard on plaintiffs bringing environmental claims under statutes other than CERCLA.

If anything, there are even fewer prudential concerns to drive an elevation of pleading standards in command and control litigation. Like CERCLA, other environmental statutes are comprehensive and detailed, thus

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299 Ohio Valley Envtl. Coal., Inc. v. Apogee Coal Co., 531 F. Supp. 2d 747, 753–54 (S.D.W. Va. 2008) (declining to dismiss plaintiff's Clean Water Act claims and holding that *Twombly* did not create a "heightened standard for the pleading of specific facts" but instead clarified Conley's no set of facts language and affirmed the importance of providing the "defendant fair notice of what the claim is and the grounds upon which it rests" (quoting *Twombly*, 550 U.S. at 555)); Vill. of Riverdale v. 138th St. Joint Venture, 527 F. Supp. 2d 760, 765–66 (N.D. Ill. 2007) (refusing to apply a generally elevated pleading standard to plaintiff's claims under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2006) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)), and observing that *Twombly* "is merely instructing that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled," and affirming the liberal notice-giving function of Rule 8 (internal quotation marks omitted) (quoting Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663 (7th Cir. 2007))); S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., No. S-06-2845 LKK/JFM, 2007 WL 3034887, at *4 (E.D. Cal. Oct. 16, 2007) (denying in part defendant's motion to dismiss an Endangered Species Act claim and citing *Twombly* for the proposition that a court "may not dismiss the complaint if there is a reasonably founded hope that the plaintiff may show a set of facts consistent with the allegations"); *In re* Katrina Canal Breaches Consol. Litig., No. 05-4182, 2007 WL 3270768, at *4 n.6 (E.D. La. Nov. 2, 2007) (holding in a citizen suit brought under the Resource Conservation and Recovery Act that although *Twombly* abrogated the "no set of facts" language of *Conley*, "the *Twombly* court reads *Conley* as standing for the proposition that once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," thus affirming the "breadth of opportunity to prove what an adequate complaint claims" (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. 544, 546 (2007))).

300 Kersenbrock v. Stoneman Cattle Co., LLC, No. 07-1044-MLB, 2007 WL 2219288, at *2 n.2 (D. Kan., July 30, 2007) (limiting *Twombly* to the antitrust context and refusing to apply it to a standing challenge to a Clean Water Act claim).

301 *See* discussion *supra* Part III.D.

302 *See* discussion *supra* Part III.D.

303 *Iqbal*, 129 S. Ct. 1937, 1949 (2009).

allowing a reduction in any potential discovery burden through active case management under Rule 16 and the use of summary judgment.[304] Moreover, unlike antitrust or CERCLA claims, command and control statutes do not provide damages to private parties, rewarding private enforcement through citizen suits with, at most, attorney's fees.[305] This reduces incentive to file unmeritorious claims and also reduces the potential damages awards and corresponding *in terrorem* value of claims brought under command and control statutes. Finally, Congress indicates a preference for private enforcement of environmental laws, which necessitates affording private plaintiffs with limited access to information an opportunity to remedy this asymmetry through the discovery process.[306] As a result, there is little incentive and less justification for elevating pleading standards for statutory environmental claims, a conclusion reinforced by current lower court treatment of *Twombly*.

C. Common Law Claims and Toxic Torts

Toxic tort claims are potentially sprawling, complex, and costly to defend—factors that in combination with the specter of open-ended damages awards create strong settlement pressure on defendants.[307] Further, common law environmental claims frequently require judicial interpretation of claim elements, with the potential for a reinterpretation of those substantive elements to occur under the guise of procedure.[308] As a result, this category of claims presents a close analog to the antitrust claims in *Twombly* and the potential for judicial extension of an elevated pleading standard.

However, the liberal standard and notice function of Rule 8 has historic ties to the common law claim of negligence, and courts have generally declined to require a heightened pleading standard for tort claims.[309] Instead of elevating pleading standards, courts have evolved rigorous evidentiary

304 *See supra* note 294. *See generally* Federal Water Pollution Control Act, 33 U.S.C. § 1319 (2006) (detailing enforcement provisions of the Clean Water Act); Clean Air Act of 1963, 42 U.S.C. § 7413 (2006) (detailing enforcement provisions of the Clean Air Act); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6928 (2006) (detailing enforcement provisions of the Resource Conservation and Recovery Act).

305 *See, e.g.*, 33 U.S.C. § 1365(d) (2006) (providing for the award of litigation costs to the prevailing party in Clean Water Act citizen suits); 42 U.S.C. § 7604(d) (2006) (providing for the award of litigation costs to the prevailing party in Clean Air Act citizen suits). While private plaintiffs may typically bring claims for civil penalties as well as injunctive relief, any penalties awarded are paid to the United States Treasury. *See, e.g.*, 42 U.S.C. § 7604(g) (2006) (providing that penalties awarded in Clean Air Act citizen suits paid into a special fund in the United States Treasury for use in air quality compliance and enforcement activity).

306 *See* Tobias, *supra* note 137, at 373–74 (discussing congressional purpose in enacting citizen suit provisions and the need for judges to facilitate private enforcement of environmental laws by "liberally granting plaintiffs' discovery requests" and being "solicitous of the needs of environmental plaintiffs").

307 MADDEN & BOSTON, *supra* note 291, at 990–94 (discussing settlement pressures and processes in toxic tort litigation).

308 *See* discussion *supra* Parts II.C.3–4, III.D.

309 Fairman, *supra* note 53, at 1048.

and case management mechanisms for expediting the resolution of complex toxic tort claims.[310] As is the case with many citizen suits brought under command and control statutes, the necessity of this approach is reinforced by the information asymmetry that exists between plaintiffs and defendants at the pleadings stage and the need to allow at least some discovery before further testing a toxic tort claim.[311] Moreover, the Supreme Court has warned against improper judicial manipulation of the federal rules to meet the exigencies of complex toxic tort litigation, declaring that it is "of overriding importance, [that] courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. . . . Courts are not free to amend a rule outside the process Congress ordered."[312] So far, at least some lower courts have taken this advice in regard to *Twombly* and have declined to apply an elevated pleading standard to toxic tort claims.[313]

V. CONCLUSION

Conscious parallelism is a judicially created theory that ameliorates difficulties in demonstrating a Sherman Act section 1 conspiracy when only circumstantial evidence of an agreement is available. As such, *Twombly* represents a permissible judicial modification of that theory, clarifying the requirement that in addition to parallel conduct a plaintiff must also allege

310 For example, causation is a required element of any tort litigation, and courts often use *Daubert* hearings to ascertain the validity of causation evidence and expert testimony in advance of trial. MADDEN & BOSTON, *supra* note 291, at 4, 494–95. Similarly, courts employ "Lone Pine orders," issued under the authority of Rule 16(c)(12), that require a plaintiff to prove up the prima facie elements of their case early in the discovery process. James P. Muehlberger & Boyd S. Hoekel, *An Overview of Lone Pine Orders in Toxic Tort Litigation*, 71 DEF. COUNS. J. 366, 368 (2006). Lone Pine orders provide an effective tool for refining the claims and managing the discovery process, thereby limiting the burden on defendants and disposing of unmeritorious claims with minimal expenditure of judicial time and resources. *See generally id.* at 366–73 (discussing the origin and application of Lone Pine orders in complex toxic tort litigation); MADDEN & BOSTON, *supra* note 291, at 980–90 (discussing Lone Pine orders and judicial management of toxic tort litigation). Other barriers to recovery, such as federal preemption, state law statutes of limitations, damages caps enacted under "tort reform" legislation, long latency periods for disease caused by toxic exposure, and the costs of building a case of causation all serve as practical limiters on the scope of toxic tort litigation and address many of the concerns often employed to justify the elevation of pleading standards. *See* Anthony Z. Roisman et al., *Preserving Justice: Defending Toxic Tort Litigation*, 15 FORDHAM ENVTL. L. REV. 191, 192, 203–08 (2004) (discussing barriers to toxic tort litigation); MADDEN & BOSTON, *supra* note 291, at 4–8 (describing common characteristics of toxic tort claims).

311 *See* Tobias, *supra* note 137, at 371 (analogizing environmental litigants to civil rights plaintiffs, both of which often have "relatively few resources and comparatively little access to information relevant to their cases").

312 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997).

313 *See, e.g.*, *Innis Arden Golf Club*, 514 F. Supp. 2d 328, 331–32, 337 (D. Conn. 2007) (declining to dismiss plaintiff's nuisance, trespass, and CERCLA claims, and holding that *Twombly* did not elevate pleading standards but instead affirmed the Rule 8(a)(2) entitlement provision and a "plaintiff's minimal pleading obligations under the federal rules"); Gamble v. PinnOak Res., LLC, 511 F. Supp. 2d 1111, 1125 (N.D. Ala. 2007) (interpreting *Twombly* as affirming the notice function of Rule 8 and declining to dismiss the plaintiff's nuisance claim even when "the complaint is not a model of clarity").

plus factors creating a plausible inference of agreement, as distinct from the independent market-based behavior of the defendant. Without such allegations, an inference of agreement is impermissible—a conclusion justified by prudential concerns of costs, efficiency, and accuracy. Therefore, the *Twombly* plausibility requirement is an integral component of a claim of conspiracy based on circumstantial evidence of parallel conduct. By failing to identify sufficient plus factors, a plaintiff also fails to identify the grounds upon which a claim of conspiracy rests, satisfying neither *Conley* nor the entitlement provision of Rule 8(a). It is clear that while *Twombly* clarified the interaction of antitrust substance and procedure, the decision did not modify generally applicable pleading standards in federal courts.

However, even if the Court did announce a shift in pleading standard jurisprudence, the prudential concerns underlying *Twombly* have less probity in an environmental context. First, federal environmental statutes do not offer the same treble-damages jackpot as Sherman Act antitrust claims, reducing the likelihood that weak claims will coerce settlement from innocent defendants. Second, the Sherman Act is a broad statute with sweeping language, under which the substantive law is driven primarily by judicial opinion and contemporaneous economic policy. Conversely, environmental statutes such as CERCLA are extraordinarily detailed and descriptive, and are supported by comprehensive administrative regulations. As a result, prima facie elements are clear and these claims well suited to active case management, limited discovery, and summary judgment motions. In the torts context, other judicial tools provide efficient mechanisms to vet the factual sufficiency of a claim. Finally, courts have generally declined to extend *Twombly* or elevate pleading standards in statutory and common law environmental claims alike given the wide information disparity between plaintiffs and defendants that only discovery can ameliorate. These significant differences between antitrust and environmental claims militate against any extension of *Twombly* to an environmental context.

While the cautious plaintiff will heed the language of *Twombly*, if only to recognize a likely source of attack, defendants ought not invest much hope in obtaining dismissal based on arguments for an elevated pleading standard. Like many prior decisions, *Twombly* blurs substance and procedure, momentarily confusing a clear pleading standard. However, it is clear that in federal courts, the rules mean what they say. To adequately state a claim upon which relief can be granted and satisfy the liberal requirements of Rule 8(a), a plaintiff need only put his adversary on notice that the match has begun.