A "PLAUSIBLE" SHOWING AFTER *BELL ATLANTIC CORP. V. TWOMBLY*

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The United States Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*[1] is creating quite a stir. Suddenly gone is the famous loosey-goosey rule of *Conley v. Gibson* "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[2] Now a complaint must provide "enough facts to state a claim to relief that is plausible on its face."[3] Decided in 2007, *Bell Atlantic* was cited in over 6,000 cases in just its first year.[4]

Already being described as a landmark decision,[5] *Bell Atlantic* nonetheless has lawyers and judges scratching their heads over the precise pleading standard to apply in its wake. As the Second Circuit (mildly) put it, "Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in *Bell Atlantic*

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

[2] Conley v. Gibson, 355 U.S. 41, 45–46 (1957), *abrogated by Bell Atl. Corp.*, 127 S. Ct. at 1968–69.

[3] *Bell Atl. Corp.*, 127 S. Ct. at 1974.

[4] Search of Westlaw's Keycite service conducted June 9, 2008, restricting search to judicial opinions dated before May 21, 2008. This figure includes citations in both opinions for the court and in separate opinions by individual judges. By way of comparison, the Court's major abortion decision of 2007, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), was cited in only 39 cases in its first year. *Cf.* Michael C. Dorf, *The Supreme Court Wreaks Havoc in the Lower Federal Courts—Again*, FINDLAW'S WRIT, Aug. 13, 2007, http://writ.news.findlaw.com/dorf/20070813.html (using earlier figures). For an empirical analysis of district court cases citing *Bell Atlantic* in the context of FED. R. CIV. P. 12(b)(6) motions to dismiss, see Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study of the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008).

[5] Janet L. McDavid & Eric Stock, *Bell Atlantic v. Twombly*, NAT'L L.J., July 30, 2007, at 12. *See also* Andrée Sophia Blumstein, *A Higher Standard: 'Twombly' Requires More for Notice Pleading*, TENN. B.J., Aug. 2007, at 12 ("Of all the cases decided this term by the United States Supreme Court, *Bell Atlantic Corp. v. Twombly* may be the case of the most practical, everyday significance."); John Sarratt, *Mr. Micawber's Bad Day: Is Notice Pleading Dead?*, N.C. LAW. WKLY., July 2, 2007; Dorf, *supra* note 4. R

Corp. v. Twombly."[6] Just what is a *plausible* "showing that the pleader is entitled to relief" under Rule 8(a)(2)?[7]

I believe an answer lies in the 27-year-old decision of the Former Fifth Circuit in *In re Plywood Antitrust Litigation*.[8] *Plywood Antitrust* requires, at a minimum, that "a complaint . . . contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory."[9] Already used in more than half the circuits,[10] this standard paraphrases advice found in Professors Wright and Miller's venerable *Federal Practice and Procedure* for nearly forty years.[11] Properly applied, this "all . . . material elements" standard[12] satisfies *Bell Atlantic*'s "plausibility" requirement in all respects.

The *Plywood Antitrust* pleading standard works well after *Bell Atlantic*, first, because the Supreme Court referred to the standard, albeit parenthetically, with approval in *Bell Atlantic*.[13] Second, the standard does much to harmonize the Federal Rules' goal of dispensing with pleading technicalities while still requiring enough general factual information about a pleader's claim to make the notice in "notice pleading" meaningful. Finally, and perhaps most importantly, it gives lawyers, litigants, and courts a standard they can actually use when drafting or assessing the sufficiency of pleadings.

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[6] Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007), *cert. granted sub nom.* Ashcroft v. Iqbal, 128 S. Ct. 2931 (June 16, 2008) (No. 07-1015). *See also* Allan Ides, Bell Atlantic *and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 604 nn. 3, 4 (2006) (noting confusion); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008); Thomas P. Brown & Christine C. Wilson, Bell Atlantic Corp. v. Twombly: *A Tectonic Shift in Pleading Standards (or Just a Tremor)?*, LEGAL BACKGROUNDER, Aug. 24, 2007, *available at* http://www.wlf.org/upload/08-24-07wilson.pdf; Scott Dodson, *Pleading Standards After* Bell Atlantic v. Twombly, 93 VA. L. REV. IN BRIEF 135, 138 (2007), http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf. As the Reporter to the Advisory Committee on Civil Rules put it, "One phrase or another [in *Bell Atlantic*] can be made to point in almost any direction." Edward H. Cooper, *Notice Pleading: The Agenda After Twombly* 3 (2007) *in* Agenda Materials, Advisory Committee on Civil Rules, Washington, D.C., November 8–9, 2007, 268, 270, http://www.uscourts.gov/rules/Agenda%20Books/CV2007-11.pdf.

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

[8] *In re* Plywood Antitrust Litig., 655 F.2d 627 (5th Cir. Unit A Sept. 1981), *cert. dismissed sub. nom* Weyerhaeuser Co. v. Lyman Lamb Co., 462 U.S. 1125 (1983).

[9] *Id.* at 641. (emphasis omitted).

[10] *See infra* notes 212-19 and accompanying text.

[11] *See infra* notes 187–92 and accompanying text.

[12] *See Plywood Antitrust*, 655 F.2d at 641.

[13] *See* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1969 (2007) (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), in turn quoting Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984), in turn quoting *Plywood Antitrust*, 655 F.2d at 641).

I. *BELL ATLANTIC CORP. V. TWOMBLY*

In *Bell Atlantic*, plaintiffs alleged that the "Baby Bells,"[14] also known as Incumbent Local Exchange Carriers (ILECs), were violating section 1 of the Sherman Act[15] in two ways. First, plaintiffs alleged that the ILECs had "'engaged in parallel conduct' in their respective service areas to inhibit the growth of upstart" competitors known as "competitive local exchange carriers" (CLECs), having been "naturally led to form a conspiracy" by "'compelling common motivatio[n].'"[16] Second, the ILECs had allegedly entered into "agreements . . . to refrain from competing against one another."[17]

The district court dismissed the complaint for failure to state a claim[18] because the complaint contained no facts showing that the ILECs' conduct was the product of unlawful conspiracy as opposed to lawful "parallel conduct."[19] On appeal, the Second Circuit vacated the district court's judgment and remanded the case for discovery.[20] The court of appeals applied as part of its standard of review *Conley v. Gibson*'s rule that "[a] complaint should not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"[21] The court concluded that "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal."[22] The court of appeals acknowledged that "the pleaded factual predicate must include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss," but concluded that "to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."[23]

The Supreme Court began its analysis with a concise statement of the substantive question under section 1 of the Sherman Act. Since section 1 only penalizes restraints of trade that are the product of "'contract, combination, or conspiracy,'" the critical issue in *Bell Atlantic* was "whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agree-

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[14] BellSouth Corp., Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. (the successor-in-interest to Bell Atlantic Corp.) *Id.* at 1962 n.1.

[15] 15 U.S.C. § 1 (2006). Section 1 of the Sherman Act forbids any agreement or conspiracy in restraint of interstate or foreign trade.

[16] *Bell Atl. Corp.*, 127 S. Ct. at 1962 (quoting Consolidated Amended Class Action Complaint ¶¶ 47 & 50, Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 Civ. 10220(GEL))).

[17] *Id.*

[18] *See* FED. R. CIV. P. 12(b)(6).

[19] Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003), *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007).

[20] Twombly v. Bell Atl. Corp., 425 F.3d 99 (2d Cir. 2005), *rev'd*, 127 S. Ct. 1955 (2007).

[21] *Twombly*, 425 F.3d. at 106 (quoting Todd v. Exxon Corp., 275 F.3d 191, 197–98 (2d Cir. 2001), in turn quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)).

[22] *Id.* at 114, *quoted in Bell Atl. Corp.*, 127 S. Ct. 1963.

[23] *Id.*, *quoted in Bell Atl. Corp.*, 127 S. Ct. at 1963.

ment, tacit or express.'"[24] Although parallel conduct can be used as circumstantial evidence of an agreement, it is not enough by itself to establish an agreement or violation of section 1 of the Sherman Act.[25] "Even 'conscious parallelism' . . . is 'not in itself unlawful'" under Supreme Court precedent.[26] This is so because "parallel conduct or interdependence, without more" is essentially ambiguous—equally consistent with unlawful conspiracy, on the one hand, or lawful, unilateral business conduct in response to common market conditions, on the other.[27]

The Court accordingly observed that it had "hedged against false inferences from identical behavior at a number of points in the trial sequence," such as holding evidence of only parallel conduct as insufficient to support a plaintiff's motion for directed verdict, requiring proof of conspiracy to "include evidence tending to exclude the possibility of independent action," and requiring a plaintiff to offer such evidence in order to survive summary judgment.[28]

The Court then turned to "the antecedent question of what a plaintiff must plead in order to state a claim under §1 of the Sherman Act."[29] The Court began by using *Conley v. Gibson* to define the requirements of Rule 8(a)(2), noting that the Rule "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[30] Acknowledging that the Rules do not require a complaint to contain "detailed factual allegations," the Court observed that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[31] The Court concluded that "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."[32]

Justice Souter, writing for the majority, rejected Justice Stevens's suggestion "that the Federal Rules somehow dispensed with the pleading of facts altogether," as "greatly oversimplif[ying] matters."[33] Although Rule 8 did away with detailed pleading of facts "for most types of cases," the Court noted that

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[24] *Bell Atl. Corp.*, 127 S. Ct. at 1964 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775 (1984) and Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954)).

[25] *Id.* (citing *Theatre Enters.*, 346 U.S. at 540–41).

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

[27] *Id.* (citing RICHARD A. EPSTEIN, MOTIONS TO DISMISS ANTITRUST CASES: SEPARATING FACT FROM FANTASY, 3–4 (AEI-Brookings Joint Ctr. for Regulatory Studies, Related Publications 06-08 2006). Also *available at* http://www.regmarkets.org/publications/abstract.php?pid=1059.

[28] *Id.* (citing *Theatre Enters.*, 346 U.S. at 537; Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)).

[29] *Id.*

[30] *Id.* (quoting FED. R. CIV. P. 8(a)(2); Conley v. Gibson, 355 U.S. 41, 47 (1957)).

[31] *Id.* at 1964-65 (citations omitted).

[32] *Id.* at 1965 (citation and footnote omitted).

[33] *Id.* at 1965 n.3 (responding to Justice Stevens' dissent at 1979). This summary of the dissent's argument was itself something of an oversimplification, because Justice Stevens acknowledged in response to the Court's footnote three that "[w]hether and to what extent

"Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief."[34] The Court concluded that, "[w]ithout some factual allegation in the complaint," it was difficult to see how a plaintiff could satisfy *Conley*'s requirement to provide the "'grounds' on which the claim rests."[35]

The Court then applied "these general standards" to a claim under section 1 of the Sherman Act, "hold[ing] that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made."[36] The Court characterized this requirement as "[a]sking for plausible grounds to infer an agreement," but stressed that it did "not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[37] According to the Court, because "lawful parallel conduct fails to bespeak unlawful agreement . . . an allegation of parallel conduct and a bare assertion of conspiracy will not suffice."[38]

The Court thought that requiring "allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"[39] In the antitrust context, an allegation of conscious parallel conduct, "without that further circumstance pointing toward a meeting of the minds" to suggest an unlawful conspiracy or agreement, leaves the defendant's conduct in "neutral territory," and "stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'"[40]

Justice Souter expressed deep concern about permitting a complaint that did not allege "entitle[ment] to relief" as required by Rule 8(a)(2) to proceed nonetheless to discovery.[41] According to the Court, "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive."[42] The Court cited the size of the putative class and the size of defendants as making the "potential expense . . . obvious enough in the present case."[43] The Court rejected the dissent's suggestion that groundless claims could "be weeded out early in the discovery process through 'careful case management . . . .'"[44] The Court concluded that it was "[p]robably . . . only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no

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that 'showing' [of entitlement to relief under Rule 8] requires allegations of fact will depend on the particulars of the claim." *Id.* at 1979 n.6 (Stevens, J., dissenting).

[34] *Id.* (quoting *Conley*, 355 U.S. at 47).

[35] *Id.*

[36] *Id.* at 1965 (majority opinion).

[37] *Id.*

[38] *Id.* at 1966.

[39] *Id.*

[40] *Id.* One commentator has described the Court's analysis as creating "three *zones of pleading*" which he illustrates and describes at some length. *See* Spencer, *supra* note 6, at 448–50. **R**

[41] *Bell Atl. Corp.*, 127 S. Ct. at 1966-67.

[42] *Id.* (citation omitted).

[43] *Id.* at 1967.

[44] *Id.* (quoting *id.* at 1975 (Stevens, J., dissenting)).

"'reasonably founded hope that the [discovery] process will reveal relevant evidence"' to support a § 1 claim."[45]

Plaintiffs' principal attack on "the plausibility standard at the pleading stage" was "its ostensible conflict with"[46] *Conley v. Gibson*'s "no set of facts" standard.[47] The Court noted that this language could "be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings" and concluded that the Second Circuit had "read *Conley* in some such way . . . ."[48] Criticizing such an approach, the Court observed that, "[o]n such a focused and literal reading of *Conley's* 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery."[49] The Court thought that such an "approach to pleading would dispense with any showing of a '"reasonably founded hope"' that a plaintiff would be able to make a case; Mr. Micawber's optimism would be enough."[50]

The Court then noted that, "[s]eeing this, a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard."[51] It cited four court of appeals cases[52] and two articles by leading legal scholars.[53] The Court found "no need to pile up further citations to show that *Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough."[54] Accordingly, the Court ruled that, "after puzzling the profession for 50 years, this famous observation has earned its retirement."[55] It advised that "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[56] The Court thus characterized the "no set of facts" language as a description of "the breadth of opportunity to prove what an

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[45] *Id.* (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).
[46] *Id.* at 1968.
[47] Conley v. Gibson, 355 U.S. 41, 45-46 (1957), *quoted in Bell Atl. Corp.*, 127 S. Ct. at 1968.
[48] *Bell Atl. Corp.*, 127 S. Ct. at 1968.
[49] *Id.*
[50] *Id.* at 1969 (quoting *Dura Pharms.*, 544 U.S. at 347, in turn quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, at 741 (1975)). "Mr. Micawber" is a reference to Wilkins Micawber, "a character in Dickens's novel 'David Copperfield', applied *gen*[erally] to a feckless optimist with a habit of 'waiting for something to turn up.'" 9 THE OXFORD ENGLISH DICTIONARY 711 (2d ed. 1989); *see* CHARLES DICKENS, DAVID COPPERFIELD 860-63 (Oxford University Press 1999) (1850).
[51] *Bell Atl. Corp.*, 127 S. Ct. at 1969.
[52] *Id.* (citing Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (9th Cir. 1989); McGregor v. Indus. Excess Landfill, Inc. 856 F.2d 39, 42–43 (6th Cir. 1988); Car Carriers, Inc., v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984); O'Brien v. DiGrazia, 544 F.2d 543, 546 n.3 (1st Cir. 1976)).
[53] *Id.* (citing Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 463–65 (1986)).
[54] *Id.* at 1969.
[55] *Id.*
[56] *Id.*

adequate complaint claims, *not the minimum standard of adequate pleading to govern a complaint's survival*."[57]

Having thus "interred"[58] *Conley*'s "no set of facts" language, the Court applied its "plausibility" requirement to the amended complaint filed by the *Bell Atlantic* plaintiffs, and found it wanting.[59] The Court thought "that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy."[60] It noted that, "[a]part from identifying a seven-year span in which the §1 violations were supposed to have occurred . . . , the pleadings mentioned no specific time, place or person involved in the alleged conspiracies."[61] According to the Court,

> This lack of notice contrasts sharply with the model form for pleading negligence, Form 9, which the dissent says exemplifies the kind of "bare allegation" that survives a motion to dismiss. Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin.[62]

The Court also rejected the plaintiffs' contention that its plausibility analysis was contrary to its unanimous decision in *Swierkiewicz v. Sorema N.A.*[63] In *Swierkiewicz*, the Court held that "a complaint in an employment discrimination lawsuit [need not] contain specific facts establishing a prima facie case of discrimination under the framework set forth . . . in *McDonnell Douglas Corp.* v. *Green*."[64] The Court approved the district court's understanding that "'*Swierkiewicz* did not change the law of pleading, but simply re-emphasized . . . that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements.'"[65] The Court noted that the Second Circuit had rejected Swierkiewicz's complaint "for failing to allege certain additional facts that [he] would need at the trial stage to support his claim *in the absence of direct evidence of discrimination*."[66] This requirement of pleading additional facts—facts that would not be necessary if Swierkiewicz had direct evidence of discrimination—"amounted to a heightened pleading requirement by insisting that

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[57] *Id.* (emphasis added).
[58] *Id.* at 1978 (Stevens, J., dissenting).
[59] *Id.* at at 1970–74.
[60] *Id.* at 1971. As the Court put it elsewhere, "the complaint does not set forth a single fact in a context that suggests an agreement." *Id.* at 1968–69.
[61] *Id.* at 1970 n.10.
[62] *Id.* at 1971 n.10 (citing *id.* at 1977 (Stevens, J., dissenting)). *See* FED. R. CIV. P., Form 9, Complaint for Negligence, 28 U.S.C. app. 285 (2006) (amended 2007).
[63] *Bell Atl. Corp.*, 127 S. Ct. at 1973; Swierkiewicz v. Sorema N.A., 534 U.S. 506, 507 (2006).
[64] *Swierkiewicz*, 534 U.S. at 508 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)), *quoted in Bell Atl. Corp.*, 127 S. Ct. at 1973.
[65] *Bell Atl. Corp.*, 127 S. Ct. at 1973 (quoting Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 181 (S.D.N.Y. 2003)).
[66] *Id.* (emphasis added) (citing *Swierkiewicz*, 534 U.S. at 514).

[he] allege 'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief."[67]

The majority further rejected any suggestion that its opinion embraced "heightened pleading," asserting that it did "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."[68] The Court reversed the Second Circuit, holding that dismissal was necessary "[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible . . . ."[69]

Justice Stevens, joined by Justice Ginsburg (except as to Part IV), wrote a lengthy dissent.[70] Rehearsing the history of common-law and code pleading technicalities,[71] Justice Stevens regarded the Court's decision as a fundamental departure from the philosophy of notice pleading embodied in the Federal Rules of Civil Procedure. "Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial."[72] Quoting Charles E. Clark, the "principal draftsman"[73] of the Federal Rules, Justice Stevens noted:

> Experience 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.[74]

For Justice Stevens, *Conley v. Gibson*'s "no set of facts" standard was hardly "puzzling," as the Court had suggested.[75] Rather, "[i]t reflects a philosophy that, unlike in the days of code pleading, separating the wheat from the chaff is a task assigned to the pretrial and trial process. *Conley*'s language, in short, captures the policy choice embodied in the Federal Rules and binding on the federal courts."[76] He concluded that the Court's new "'plausibility' standard is irreconcilable with Rule 8 and with our governing precedents. As we made clear in *Swierkiewicz* and *Leatherman,* fear of the burdens of litigation does not justify factual conclusions supported only by lawyers' arguments rather than sworn denials or admissible evidence."[77]

The dissent noted that the plaintiffs had expressly alleged agreement or conspiracy on the part of the Baby Bells three times in their complaint.[78] He

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[67] *Id.* at 1973-74 (citing *Swierkiewicz*, 534 U.S. at 508).
[68] *Id.* at 1974.
[69] *Id.*
[70] *Id.* at 1974 (Stevens, J., dissenting). The slip opinion of Justice Stevens's dissent is four pages longer than the opinion of the Court.
[71] *Id.* at 1975 (Stevens, J., dissenting).
[72] *Id.* at 1976.
[73] Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283 (1988).
[74] *Bell Atl. Corp.*, 127 S. Ct. at 1976 (Stevens, J., dissenting) (quoting Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937)).
[75] *Id.* at 1981 (quoting *id.* at 1969).
[76] *Id.* at 1981.
[77] *Id.* at 1983.
[78] *Id.* at 1984.

accused the Court of "circumvent[ing] this obvious obstacle to dismissal by pretending that it does not exist."[79] Moreover, Justice Stevens could not agree with the Court that an agreement by the Baby Bells not to compete with each other and to hinder competition from CLECs was not "plausible."[80] He suggested that an appropriate resolution would be "careful case management, including strict control of discovery," but not dismissal before the defendants had even been required to deny the plaintiffs' allegations of conspiracy to restrain trade.[81]

II. FROM RULE 8 TO *CONLEY V. GIBSON*

In *Bell Atlantic*, the Court seems to have been won over by persistent, if not terribly frequent, criticism of *Conley v. Gibson*'s "no set of facts" standard in academic writings and lower court decisions.[82] In his *festschrift* article honoring the late Charles Alan Wright, which the Court cited in *Bell Atlantic*,[83] Professor Hazard observed:

> Prior to the line of lower court cases that culminated in *Conley v. Gibson*, it was quite possible to interpret Rule 8's requirement of a "short and plain" statement to require, in essence, *a detailed narrative in ordinary language—one setting forth all elements of a claim under applicable substantive law*. That is, the key would have been not that the complaint was to be above all "short," but that *it was to be above all "plain" and showing entitlement to relief as a matter of law*.[84]

The treatise he coauthored similarly states:

> The ambiguity of the Federal Rules' purpose has led to two lines of doctrine about pleading. One line, *which seems more consistent with the drafters' intent*, was that the pleaders did have to allege, if only in sketchy terms, the existence of circumstances that they had reason to believe were true and that, if true, would entitle them to relief of some kind. The other line is that expressed by the Supreme Court in *Conley v. Gibson* . . . .[85]

According to Professor Hazard, a party had to "'[plead] himself out of court'" to fail the Conley "no set of facts" standard.[86] "Literal compliance with Conley v. Gibson could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment."[87] Thus, "Conley v. Gibson turned Rule 8 on its head . . . ."[88] With its renewed insistence on enough

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[79] *Id.* at 1985.
[80] *Id.*
[81] *Id.* at 1975.
[82] *See id.* at 1969.
[83] *See id.*
[84] Hazard, *supra* note 53, at 1685 (emphasis added).
[85] FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 3.6, at 190 (5th ed. 2001) [hereinafter JAMES, HAZARD & LEUBSDORF] (emphasis added) (footnote omitted) (citing Decker v. Massey-Ferguson, Ltd., 681 F.2d 111, 114 (2d Cir. 1982); *see also* Hoshman v. Esso Standard Oil Co., 263 F.2d 499, 501 (5th Cir. 1959)); CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 19, at 146–48 (2d ed. 1947) [hereinafter CLARK, CODE PLEADING (2d ed.)].
[86] Hazard, *supra* note 53, at 1685 (quoting Early v. Bankers Life & Cas. Co., 959 F.2d 75, 79 (7th Cir. 1992)).
[87] *Id.*
[88] *Id.*

"[f]actual allegations . . . to raise a right to relief above the speculative level,"[89] the Supreme Court appears to have agreed with that assessment of the "no set of facts" standard.[90]

A. Rule 8(a)(2) and "Simplified Pleading"

The debate stirred in *Bell Atlantic* began in 1935, when the Supreme Court appointed an Advisory Committee on Rules for Civil Procedure to draft "a unified system of general rules for cases in equity and actions at law,"[91] i.e., the Federal Rules of Civil Procedure. On the Committee, nine lawyers joined five law professors to form "an extremely elite group."[92] As noted, the "principal draftsman"[93] of the Rules was the Advisory Committee's Reporter, Charles E. Clark, Dean of the Yale Law School from 1929 to 1939 and Circuit Judge on the United States Court of Appeals for the Second Circuit from 1939 until his death in 1963.[94]

As every first-year procedure student now learns, the Advisory Committee sought to replace the technicalities of common-law and code pleading in the federal courts with a simpler, easier system of pleading in the Federal Rules of Civil Procedure.[95] As the United States entered the New Deal era, the federal courts continued to maintain a dual system of law and equity.[96] For cases in equity, Congress had long given the Supreme Court rulemaking authority,[97] and the courts were operating under the Federal Equity Rules adopted by the Court in 1912.[98] For actions at law, however, the Conformity Act[99] required

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[89] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007).

[90] *See id.* at 1969 (citing Hazard, *supra* note 53, at 1685).

[91] Appointment Comm. to Draft Unified Sys. of Equity and Law Rules, 295 U.S. 774 (1935) (order appointing Advisory Committee).

[92] Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 971 n.369 (1987). Among the lawyers on the committee were the presidents of the American Law Institute and the American Bar Association, a former U.S. Solicitor General and Attorney General, a former federal district judge, and a former justice of the Supreme Court of California. *See id.* at 971 & n.369, 971–72 & nn.370 & 373; California Supreme Court Historical Society, *History of the California Courts: The Justices*, http://cschs.org/02_history/02_c.html (last visited Oct. 18, 2008) (Warren Olney, Jr.); Federal Judicial Center, History of the Federal Judiciary: Judges of the United States, http://www.fjc.gov/servlet/tGetInfo?jid=634 (last visited Oct. 18, 2008) (George Donworth). The professors were from Harvard, Yale, and the universities of Michigan, Minnesota, and Virginia. Subrin, *supra*, at 971 n.369.

[93] Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283 (1988).

[94] Federal Judicial Center, History of the Federal Judiciary: Judges of the United States, *supra* note 92. Clark was chief judge of the Second Circuit from 1954 to 1959. *Id.*

[95] Justice Stevens provides a brief history in Part I of his dissent. *Bell Atl. Corp.*, 127 S. Ct. at 1975–77 (Stevens, J., dissenting). For more detailed treatments, see JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE §§ 5.1, .7 (4th ed. 2005) [hereinafter FRIEDENTHAL, KANE & MILLER]; JAMES, HAZARD & LEUBSDORF, *supra* note 85, § 3.6 at 187; 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004) [hereinafter WRIGHT & MILLER].

[96] *See generally* Charles E. Clark & James Wm. Moore, *A New Civil Procedure: I. The Background*, 44 YALE L.J. 387 (1935).

[97] *See* 28 U.S.C. § 723 (1934) (amended 1948) (current version at 28 U.S.C. §§ 2071-2073 (2006)). *See also* Clark & Moore, *supra* note 96, at 391–92.

[98] Order Promulgating Rules of Practice for the Courts of Equity of the United States, 226 U.S. 629 (1912), *amended by* 268 U.S. 709 (1925) (amending Rules 10 & 30), also *amended*

federal district courts to follow the procedure of the state in which the court sat.[100] At the time, half of the states and territories had adopted some form of code pleading,[101] leaving the other half with some version of common-law pleading. Thus, as late as the mid-1930s, "federal procedure was a strange mixture"[102] governed by the Federal Equity Rules for cases in equity, and either common-law or code pleading for cases at law, depending on the state.

As Justice Stevens noted in his dissent,[103] in the nineteenth century, common law pleading technicalities had gradually given way to reform as the "Field Codes" sought to replace the common law writs and formulas with a simpler requirement that the pleading state the "facts constituting the cause of action."[104] Unfortunately, code pleading itself fell prey to complexity and technicality as courts sought to distinguish "facts" from evidence on the one hand and legal conclusions on the other, and to define what was meant by a "cause of action."[105]

The Advisory Committee sought to replace pleading technicalities with "a very simple, concise system of allegation and defense."[106] This comported with the Committee's philosophy, espoused most prominently by Clark, "that procedural rules are but means to an end, means to the enforcement of substantive justice . . . ."[107] According to Clark, "in effect, procedure should be the hand-maid and not the mistress of justice. And therefore rules of pleading or practice should at all times be but an aid to an end and not an end in themselves."[108]

Thus, in framing a new pleading standard for the Federal Rules, the Advisory Committee "studiously avoided using the terms 'facts' and 'cause of

by 281 U.S. 773 (1930) (adding Rule 70½), *also amended by* 286 U.S. 570 (1932) (amending Rule 75(b) and adding Rule 61½). *See also* Wallace R. Lane, *Twenty Years Under the Federal Equity Rules*, 46 HARV. L. REV. 638, 643–44 (1933).

[99] Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197 (codified at 28 U.S.C. § 724 (1934)) (repealed 1948).

[100] The Act had its limits, however. *See* Clark & Moore, *supra* note 96, at 406–07 (observing that, subject to the qualification that state procedure could not expand or limit federal jurisdiction, "state practice, by virtue of the Conformity Act, governs the law [of] procedure in federal courts from the commencement of an action up to and through judgment, provided it is not violative of a constitutional right, and provided Congress has not legislated upon a particular matter of practice"). For examples of federal procedural statutes that limited the Conformity Act, see *id.* at 409–11.

[101] *See* Clark & Moore, *supra* note 96, at 393 & n.27 (citing CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING §8, at 19–22 (1928) [hereinafter CLARK, CODE PLEADING (1st ed.)]).

[102] JAMES, HAZARD & LEUBSDORF, *supra* note 85, § 1.8, at 23.

[103] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1975-76 (2007) (Stevens, J., dissenting).

[104] *See generally* FRIEDENTHAL, KANE & MILLER, *supra* note 95, § 5.1; JAMES, HAZARD & LEUBSDORF, *supra* note 85, §§ 3.3–.5, at 184–87; 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 1.02 (3d ed. 2008) [hereinafter MOORE'S FEDERAL PRACTICE].

[105] *See generally* FRIEDENTHAL, KANE & MILLER, *supra* note 95, §§ 5.4–.5; JAMES, HAZARD & LEUBSDORF, *supra* note 85, §§ 3.7–.8; 5 WRIGHT & MILLER, *supra* note 95, §§ 1202, 1218.

[106] Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 552 (1939).

[107] *Id.* at 551.

[108] *Id.* (footnote omitted) (citing *In re* Coles, (1907) 1 K.B. 1, 4 (opinion of Collins, M.R.); Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938)).

action'" because those terms had "given so much trouble in Code Pleading."[109] Instead, the Committee's new standard, ultimately located in Rule 8(a)(2),[110] required a pleading seeking relief to contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[111] Explaining the new standard (then only in Preliminary Draft form) in a speech to the Judicial Conference of the Fourth Circuit in June 1936, Clark observed that

> [t]he old requirement that a party must plead only facts, avoiding evidence on the one hand and law on the other, was logically indefensible, since the actual distinction is at most one of degree only and in actual practice it caused more confusion than any possible worth it might have as admonition.[112]

In a series of institutes and symposia sponsored by the American Bar Association, Clark and the Advisory Committee educated the bench and bar on the new Federal Rules of Civil Procedure. Clark explained that the new Rules "do call for what we should fairly term rather general pleadings."[113] He observed that "there is no question that the rules are based on the theory of a rather general form of pleading" and that there was likewise "no question that the rules can not be construed to require the detailed pleading that was the theory, say, in England in 1830, or that, I think, is the theory in a few of the states now."[114] Beyond that, however, Clark allowed that there would be "some degree of difference of approach," with some judges requiring more detail and some less.[115] Clark, in fact, admitted that his own views about

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[109] Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 263 n.9 (1939); *see also* Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 12 (1938).

[110] The "short and plain" formula was located in Rule 14(2) of the Advisory Committee's Preliminary Draft published in May 1936, where it applied only to the complaint and required "a short and plain statement of the claim showing that the *plaintiff* is entitled to relief." ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA 27 (May 1936) [hereinafter PRELIMINARY DRAFT] (emphasis added). In the Proposed Rules published in April 1937, the Committee moved Rule 14(2) to Rule 8(a)(2), and made its provisions applicable to any "pleading which sets forth a claim for relief;" consistent with this broader applicability, the "plaintiff" in the Preliminary Draft of Rule 14(2) became the "pleader" in the Proposed Rule 8(a)(2). ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PROPOSED RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 22 (Apr. 1937). Other than the substitution of "pleader" for "plaintiff," the final wording of Rule 8(a)(2) as adopted in 1937 was identical to the Preliminary Draft's Rule 14(2). *Compare* PRELIMINARY DRAFT, *supra*, at 27 *with* 28 U.S.C. app. 105 (2006) (amended 2007). For the wording of earlier drafts, see Stephen Subrin, *supra* note 92, at 976. The only change to original Rule 8(a)(2) made by the recent "restyling" of the Federal Rules was typographical—replacing a comma with a semicolon. *Compare* FED. R. CIV. P. 8(a)(2), 28 U.S.C. app. 105 (2006) *with* FED. R. CIV. P. 8(a)(2).

[111] FED. R. CIV. P. 8(a)(2). Of course, the pleading must also contain jurisdictional allegations, if necessary, and a demand for relief. *Id.* at 8(a)(1), (3).

[112] Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 450 (1936).

[113] AM. BAR ASS'N, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OHIO 220 (William W. Dawson ed., 1938) [hereinafter CLEVELAND INSTITUTE].

[114] *Id.* "England in 1830" is a reference to the infamous "Hilary rules," which Clark cited frequently as the epitome of hyper technical, and unjust, pleading standards. *Id.* at 221.

[115] *Id.* at 220.

pleading might "be considered rather extreme," even to some of his fellow Advisory Committee members.[116]

Clark rejected the common perception of common law pleading as always being a hypertechnical form of special pleading aimed at producing "specific narrow issues;" according to Clark, "the most general and most used actions were pretty broad in their allegations."[117] Clark frequently used Form 9 to show that the Federal Rules' illustrative form for a pedestrian's negligence action against the driver of an automobile was copied from "the common law form of the action of trespass on the case" for a horse and carriage collision (via a form in use in Massachusetts).[118] "In other words, these suggested forms are the rather simple but well recognized historical forms of statement of various claims."[119] Thus, Clark presented the Federal Rules and their forms as preserving the best of common law pleading, while jettisoning the technicalities.

As he would throughout his career, Clark discouraged wasting time, as he put it, "trying to polish up the pleadings."[120] Clark observed that "our philosophy is that it is not the function of the pleading to prove your case"[121] nor was it "the function of the pleadings to supply the place of evidence."[122] For Clark, pleadings were meant to serve two purposes: (1) "to distinguish the case from all others so that you can properly send it through the processes of the court;" and (2) "to serve as a basis for the binding force of the judgment, that is, for the application of the principle of *res adjudicata*."[123] If the opposing attorney needed more information, Clark consistently urged the use of discovery rather than extended pleading practice.[124]

Clark did not deny the importance of stating the factual basis for relief under the Rules, however. Asked if the new Rules really meant to dispense with pleading "ultimate facts" as required in Federal Equity Rule 25, Clark responded "that the idea is still continued as an idea of worthwhile pleading, but not as a strict rule for which you should be hung, drawn and crucified when

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[116] *Id.* Clark added:

> [o]f course, I don't think they are myself, but I am perfectly willing to give you that warning . . . .
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> . . . .
>
> So I will give you the warning that maybe I am going a little too far in what I say, but nevertheless I will go that way just the same, because I believe in it . . .
>
> . . . .
>
> [I]f you think I have gone too far you certainly can argue that to any district court.

Id. At 220-221.

[117] *Id.*

[118] *Id.* at 222–23 (citing 2 JOSEPH CHITTY, CHITTY'S TREATISE ON PLEADING AND PARTIES TO ACTIONS 529 (7th ed. 1844); 2 MASS. GEN. LAWS ch. 231, § 147, Form 13 (1932)).

[119] *Id.* at 227.

[120] AM. BAR ASS'N, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 46 (1939) [hereinafter "WASHINGTON INSTITUTE" or "NEW YORK SYMPOSIUM," as applicable].

[121] WASHINGTON INSTITUTE, *supra* note 120, at 40.

[122] *Id.* at 41.

[123] *Id.*

[124] *Id.*

you don't follow it."[125] A judge would not be called upon, under the new Federal Rules, to "formally decide that the pleading states only ultimate facts and that everything else is erroneous,"[126] but the idea of ultimate facts was present "[i]n the sense that good pleading would call for you to state those more general facts . . . ."[127] In Washington, Clark observed that

> you would have to have at least some allegations of fact. As a matter of fact, I think that an allegation such as Form 9 is very definitely an allegation of fact. That Form 9 is the one of the pedestrian walking across the street. If you were to say, even under these rules, "I am suing 'X' because he caused me injury by negligence," I would say that that is more general than is permitted by these rules. But if you say how he injured you, in this case by carelessly driving his car into you, you have your factual allegation.[128]

Advisory Committee member George Donworth, a prominent Seattle lawyer and former federal district judge, similarly told the ABA symposium in New York that the new Federal Rules would still require factual allegations in pleadings. Donworth observed that, in Rule 8(a), (b), and (e), "the word 'facts' does not appear in the designation of what a pleading must contain."[129] This, according to Donworth, was because the term "facts" in the codes and Federal Equity Rules promoted "motions to make definite, motions to strike, and so on. It became a sort of narrowing expression."[130] He stressed, however, that

> the requirement as to what a pleading shall contain does not by any means imply that the facts are not to be stated. In truth, the requirement includes facts—there must be a short and plain statement of the claim showing that the pleader is entitled to relief. *The statement naturally is to be a factual statement*.[131]

So too with the use of the term "averment" "in Rule 8(e)(1), requiring each averment of a pleading to be simple, concise and direct."[132] "The word 'averment' there implies a factual averment."[133]

Both as a judge on the Second Circuit and in his academic writing, Clark continued to advance his pleading philosophy. In the famous case of *Dioguardi v. Durning*,[134] for example, Judge Judge Clark upheld a pro se com-

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[125] CLEVELAND INSTITUTE, *supra* note 113, at 230–31; *see also* H. Church Ford, J., *Federal Rules of Civil Procedure: Pleadings, Motions, Parties and Pre-Trial Procedure*, 1 F.R.D. 315, 315–16 (1940) (discussing Clark's comments in Cleveland and Washington).

[126] CLEVELAND INSTITUTE, *supra* note 113, at 231, *quoted in* Ford, *supra* note 125, at 316.

[127] Id., *quoted in* Ford, *supra* note 125, at 316.

[128] WASHINGTON INSTITUTE, *supra* 120 at 69.

[129] NEW YORK SYMPOSIUM, *supra* note 120, at 307, *quoted in* Ford, *supra* note 125, at 316. Judge Ford quoted Judge Donworth at length in his article on the Rules. Ford, *supra* note 125 at 316–17. The 2007 revisions to the Federal Rules of Civil Procedure redesignated former Rule 8(e) as restyled Rule 8(d). *See* REPORT OF THE ADVISORY COMMITTEE ON THE FEDERAL RULES OF CIVIL PROCEDURE 220 (June 2, 2006, rev. July 20, 2006), *reprinted in* H.R. DOC. NO. 110-27, at 638 (2007).

[130] NEW YORK SYMPOSIUM, *supra* note 120, at 308, *quoted in* Ford, *supra* note 125, at 317.

[131] Id., *quoted in* Ford, *supra* note 125, at 317 (emphasis added).

[132] Id., *quoted in* Ford, *supra* note 125, at 317.

[133] *Id.*, *quoted in* Ford, *supra* note 125, at 317 (emphasis added). The 2007 revisions to the Federal Rules of Civil Procedure substituted "allegation" for "averment" throughout the Rules. *See* REPORT OF THE ADVISORY COMMITTEE ON THE FEDERAL RULES OF CIVIL PROCEDURE, *supra* note 129, at 206, *reprinted in* H.R. DOC. NO. 110-27, at 624.

[134] Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).

plaint by a plaintiff with limited English skills against a Rule 12(b)(6) motion to dismiss for failure to state a claim.[135] Judge Clark observed that, "[u]nder the new rules of civil procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief.'"[136] Clark concluded that "however inartistically they may be stated, the plaintiff has disclosed his claims that the collector [of customs] has converted or otherwise done away with two of his cases of medicinal tonics and has sold the rest in a manner incompatible with" federal law.[137] Critics seized on the rejection of a pleading requirement of "facts sufficient to constitute a cause of action" as virtually a rejection of requiring any factual allegations whatsoever—an overreading of the case that Clark rejected.[138] In a 1945 case, Clark admonished that "the pleader should set forth a 'simple statement in sequence of the events which have transpired' leaving to the court its 'duty to grant the relief to which the prevailing party is entitled.'"[139]

In the second edition of his *Handbook on the Law of Code Pleading*, published in 1947, Judge Clark incorporated extensive discussions of the Federal Rules of Civil Procedure, which he considered an "advanced system[ ] of code pleading."[140] As he had in the first edition of his treatise in 1928, Clark advocated defining a "cause of action" in code jurisdictions as "an aggregate of operative facts as will give rise to at least one right of action, but it is not limited to a single right . . . . The extent of the cause is to be determined pragmatically by the court . . . ."[141] Noting that the Federal Rules "abandoned" the term "cause of action" in favor of "claim for relief," he observed that "[n]evertheless, it is obvious that *in result the rules do stress the factual element in the claims* and thus in substance support the approach to the general problem"[142] of defining a cause of action taken in his treatise. "Hence the federal system," according to Clark, "with the states which follow it, affords definite and well-understood support for the pragmatic factual cause" that he advocated.[143]

Discussing "notice pleading" as used in some code pleading courts, Judge Clark observed that "[u]nder this system the pleading, such as it is, simply

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[135] The plaintiff's amended complaint is reprinted in JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 504 (9th ed. 2005).

[136] *Dioguardi*, 139 F.2d at 775.

[137] *Id.*

[138] *See* ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 19 (Oct. 1955) [hereinafter 1955 REPORT] ("The complaint in [*Dioguardi v. Durning*] stated a plethora of facts and the court so construed them as to sustain the validity of the pleading."), *reprinted in* 12A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE app. F, at 645 (2008) *and* 2 MOORE'S FEDERAL PRACTICE, *supra* note 104, § 8App.01[3].

[139] Charles E. Clark, J., *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 52 (1957) (quoting Gins v. Mauser Plumbing Supply Co., 148 F.2d 974, 976 (2d Cir. 1945)).

[140] CLARK, CODE PLEADING (2d ed.), *supra* note 85, § 2, at 4; *see also id.* § 8, at 24–25 ("[T]he list [of code jurisdictions] was greatly expanded by the vast federal system of courts upon the taking effect of the new Federal Rules of Civil Procedure in 1938.").

[141] *Id.* § 19, at 137.

[142] *Id.* § 19, at 147 (emphasis added).

[143] *Id.* § 19, at 147–48 (emphasis added).

makes a very general reference to the happening out of which the case arose and no attempt is made to state the details of the cause of action."[144] Although that system had "worked well in certain courts," such as municipal courts,[145] Clark thought it "unlikely" to be adopted much more widely. "The prevailing idea at the present time is that *notice should be given of all the operative facts going to make up the plaintiff's cause of action*, except, of course, those which are presumed or may properly come from the other side."[146] Thus, Judge Clark continued to advocate a more moderate form of pleading that disclosed the facts upon which a claim was based.

In the next paragraph, Judge Clark stated that "[t]he above analysis, as it appeared in the first edition, now finds its most complete exemplification in the Federal Rules."[147] This appears to be a reference, at least in part, to the moderate "prevailing idea" of notice pleading as giving notice "of all the operative facts going to make up the plaintiff's cause of action" subject to certain exceptions—which was the final sentence of the "above analysis" in section 38 of the first edition of Clark's treatise.[148] Later in the second edition of his treatise, Clark referred to the Federal Rules' discovery devices as "a necessary adjunct to *the simple form of 'notice pleading' advocated in this book*."[149]

Clark studiously refused to use the old code pleading terminology of "facts" or "cause of action" when discussing pleading under the Rules, however. He viewed the Federal Rules' avoidance of those terms as one of their most significant improvements over code pleading and essential to avoiding a revival of old battles over those terms.[150] Clark also generally avoided calling pleading under the Federal Rules "notice pleading," perhaps because that term might suggest the more extreme form of notice pleading that he thought unlikely to be widely adopted.[151] He instead tended to call pleading under the

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[144] *Id.* § 38, at 240.

[145] *Id.*

[146] *Id.* (emphasis added).

[147] *Id.* § 38, at 241.

[148] *See* CLARK, CODE PLEADING (1st ed.), *supra* note 101, § 39, at 163.

[149] CLARK, CODE PLEADING (2d ed.), *supra* note 85, § 89, at 571–72 (emphasis added).

[150] *See id.* § 38, at 242 ("By omitting any reference to 'facts' the Federal Rules have avoided one of the most controversial points in code pleading."); *id.* § 38, at 225 ("This avoids the former confusing emphasis upon pleading facts alone."); *id.* § 19, at 146 ("The term 'cause of action' is completely abandoned; and where a reference to rules for stating the case is needed, the phrase employed is 'claim for relief.'").

[151] Judge Clark would later tell the Wyoming Bar Association:

> Some people love to say that all the rules require is fair notice, that pleading under the rules is only notice pleading. No member of the Advisory Committee, so far as I know, has ever said that, and of course that isn't the real theory. Notice pleading is a beautiful nebulous thing . . . . I don't use that expression—not that I object to it as such. I think it is something like the Golden Rule, which is a nice hopeful thing; but I can't find that it means much of anything and it isn't anything that we can use with any precision.

Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958). *But see* CLARK, CODE PLEADING (2d ed.), *supra* note 85, § 89, at 572 (referring to "the simple form of 'notice pleading' advocated in this book").

Federal Rules "general"[152] or "simplified"[153] pleading. A decade later, Clark would say "'notice' is not a concept of the Rules."[154]

In his influential treatise, Professor James Wm. Moore, a colleague of Clark's at Yale Law School who served as Chief Research Assistant to the Advisory Committee,[155] and later as a member of the Advisory Committee,[156] observed:

> Perhaps it is not entirely accurate to say, as one court has said, that "it is only necessary to state a claim in the pleadings . . . and not a cause of action." While the Rules have substituted "claim" or "claim for relief" in lieu of the older and troublesome term "cause of action," the pleading still must state a "cause of action" in the sense that it must show "that the pleader is entitled to relief." It is not enough to indicate merely that the plaintiff has a grievance. Sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is asserting, and can see that there is some legal basis for recovery.[157]

Despite these suggestions that the Rules' "claim" was not so entirely different from the codes' "cause of action," federal courts continued to hand down decisions suggesting to critics that there was no requirement of stating a cause of action of any kind.[158] Critics charged that such interpretations read the requirement of a "showing that the pleader is entitled to relief" out of Rule 8(a)(2).[159]

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[152] Charles E. Clark, *Alabama's Procedural Reform and the National Movement*, 9 ALA. L. REV. 167, 173 (1957).

[153] CLARK, CODE PLEADING (2d ed.), *supra* note 85, at 241; *see also* Charles E. Clark, *Simplified Pleading*, *in* THE JUDICIAL ADMINISTRATION MONOGRAPHS: SERIES A (COLLECTED) 100, 100 (1942) (referring to "a simple system of direct allegation, so successful a feature of the Federal Rules of Civil Procedure"), *reprinted in* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 456 (1943); Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 272 (1942) (earlier draft of same monograph).

[154] Clark, *supra* note 139, at 49.

[155] 1 MOORE'S FEDERAL PRACTICE, *supra* note 104 § 1App.104 n.7.

[156] Miscellaneous Orders, 345 U.S. 932, 932-33 (1953) (order appointing James William Moore to Advisory Committee).

[157] 2A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 8.13, at 8–66 to –67 (2d ed. 1996) (footnotes omitted) (quoting Mortensen v. Chicago, Great W. Ry., 2 F.R.D. 121, 121 (S.D. Iowa 1941)). *See also* Hoshman v. Esso Standard Oil Co., 263 F.2d 499, 501 (5th Cir. 1959) (quoting identical text in 2 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE 1653 (2d ed. 1948)). The Supreme Court quoted Professor Moore's observation in Davis v. Passman, 442 U.S. 228, 237–38 n.15 (1979).

[158] *See, e.g.*, Sec. & Exch. Comm'n v. Timetrust, Inc., 28 F. Supp. 34, 41 (N.D. Cal. 1939) ("The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved. A generalized summary of the case that affords fair notice is all that is required."); Sunbeam Corp. v. Payless Drug Stores, 113 F. Supp. 31, 37 (N.D. Cal. 1953) ("[A]ll that Rule 8(a) requires of a complaint is that it indicate generally the type of litigation that is involved; and a generalized summary of the case that affords fair notice is sufficient."); Porter v. Shoemaker, 6 F.R.D. 438, 440 (M.D. Pa. 1947) (same). In particular, Judge Clark's opinion in *Dioguardi* "became a focal point of opposition to the notice pleading of the Federal Rules." FRIEDENTHAL, *supra* note 135, at 504-05.

[159] Moses Lasky, *Memorandum for the Committee on Rule 8*, *in* JUDICIAL CONFERENCE OF THE JUDGES OF THE NINTH CIRCUIT, CLAIM OR CAUSE OF ACTION: A DISCUSSION ON THE NEED FOR AMENDMENT OF RULE 8(A)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE, *reprinted in* 13 F.R.D. 253, 276 (1953) [hereinafter CLAIM OR CAUSE OF ACTION] ("Since the books are now full of decisions reading out of that rule what is there, something may well be added to assure that it is read correctly.").

B. "Guerilla Attacks" on Federal Pleading and the Advisory Committee's 1955 Response

These minimalist interpretations of federal pleading led to "guerilla attacks"[160] on the line of "notice" pleading doctrine that culminated in *Conley*'s "no set of facts" standard. Critics charged that federal courts were "construing 'claim for relief' as no more than a notice of disaffection on the part of the plaintiff,"[161] and had effectively "adopted a procedure so simple a 16-year-old boy may draft pleadings."[162] In particular, the Judicial Conference of the Ninth Circuit requested a complete return to code pleading with a resolution in 1952 asking that Rule 8(a)(2) be amended to require "a short and plain statement of the claim showing that the pleader is entitled to relief, *which statement shall contain the facts constituting a cause of action*."[163] The Judicial Conference sent the Ninth Circuit's resolution to the Advisory Committee for consideration.[164]

The Advisory Committee rejected the recommendation, proposing a new note to Rule 8(a)(2). The Committee noted that the attacks on Rule 8(a)(2) "appeared[ed] to be based on the view that the rule does not require the averment of any information as to what has actually happened."[165] The Committee responded "[t]hat Rule 8(a) envisages the statement of circumstances, occurrences, and events in support of the claim," and 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."[166] The Advisory Committee concluded that Rule 8 "requires the

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[160] RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 1146 (9th ed. 2007).

[161] CLAIM OR CAUSE OF ACTION, *supra* note 159, at 276.

[162] O.L. McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A. J. 123, 123 (1952), *noted by* Pierson M. Hall, J., *June 13, 1952 Discussion, in* CLAIM OR CAUSE OF ACTION, *supra* note 159, at 264-65.

[163] CLAIM OR CAUSE OF ACTION, *supra* note 159, at 253 (emphasis added). In addition, as Professor Marcus has noted, "some district judges in New York undertook to upgrade pleading requirements in antitrust cases," and "Professor McCaskill lobbied academically for a return to the old ways." Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1750 n.5 (1998) (citing Archie O. Dawson, *The Place of the Pleadings in a Proper Definition of the Issues in the "Big Case," in* PROCEEDINGS OF THE SEMINAR ON PROTRACTED CASES, *reprinted in* 23 F.R.D. 430, 433–35 (1958); McCaskill, *supra* note 162).

[164] 5 WRIGHT & MILLER, *supra* note 95, § 1216, at 239 (citing REPORTS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 23 (1952)).

[165] 1955 REPORT, *supra* note 138, at 18, *reprinted in* 12A WRIGHT & MILLER, *supra* note 95, app. F, at 644 *and* 2 MOORE'S FEDERAL PRACTICE, *supra* note 104, § 8App.01[3]. A proposed note to Rule 8 taken from 1955 REPORT, *supra*, is reprinted in 2 MOORE'S FEDERAL PRACTICE, *supra* note 104, 634-35 (2008).

[166] 1955 REPORT, *supra* note 138, at 18–19, *reprinted in* 12A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE app. F, at 645 (2008) *and* 2 MOORE'S FEDERAL PRACTICE, *supra* note 104, § 8App.01[3].

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."[167]

In 1957, Judge Clark stressed that mere "'notice' is not a concept of the Rules, as the Advisory Committee's Note . . . so carefully points out."[168] He was even more emphatic, however, "that strict special pleading has never been found workable or even useful in English and American law. . . . *General* fact pleading is useful; special pleading of details, carried to the extreme, . . . has shown all the evils apparent . . . in the Hilary Rules."[169] But he went on to say that the "assumed dichotomy" between "'stat[ing] a cause of action instead of merely stating a claim,'" was contrary to the principles of the Rules expressed in the Advisory Committee's 1955 note, and "without any specific content of meaning."[170]

Judge Clark thus continued to reject a too-sharp distinction between the codes' "cause of action" and Rule 8's "claim."[171] As he put it in 1958, "[w]ith the need for clarity without technicality in mind, the Advisory Committee by precept and illustration established a system of general pleading not at all a departure from the best common-law precedents, and not the 'notice' pleading often advocated by many whose aims are high, but whose ideas are unclear."[172] Around the same time, he told the Wyoming bar that the Advisory Committee's

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[167] *Id.* at 19, *reprinted in* 12A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE app. F, at 645 (2008) *and* 2 MOORE'S FEDERAL PRACTICE, *supra* note 104, § 8App.01[3].

[168] Clark, *supra* note 139, at 49–50. Judge Clark attached the Advisory Committee's Note on Rule 8(a)(2) as an appendix to his paper. *See id.* at 53–54.

[169] *Id.* at 47. The "Hilary Rules" were "[a] collection of English pleading rules" adopted in 1834 that "extend[ed] the reach of strict-pleading requirements into new areas of law. Widespread dissatisfaction with the Hilary Rules led to the liberalization of the pleading system under the 1873–1875 Judicature Acts." BLACK'S LAW DICTIONARY 747 (8th ed. 2004). According to Holdsworth, "never was a more disastrous mistake made. 'Under the common law system the matter was bad enough with a pleading question decided in every sixth case. But under the Hilary Rules it was worse. Every fourth case decided a question on the pleadings. Pleading ran riot.'" 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 325 (3d ed. 1944) (quoting Clark B. Whittier, *Notice Pleading*, 31 HARV. L. REV. 501, 507 (1918)). The Hilary Rules were a favorite foil for Clark when discussing pleading reform. *See, e.g.*, Clark, *supra* note 74, at 976 (observing that, under the Hilary Rules, "never has pleading been more technical and abstruse or justice more often denied for errors of form"); Clark, *Simplified Pleading*, *supra* note 153, at 276, *reprinted in* 2 F.R.D. at 459 (describing the Hilary Rules as "a famous example of the evils of special pleading"); Clark, *supra* note 139, at 45–46.

[170] Clark, *supra* note 139, at 50 (quoting United Grocers' Co. v. Sau-Sea Foods, Inc., 150 F. Supp. 267, 269 (S.D.N.Y 1957)). According to Judge Clark, "The dichotomy is more one between 'general' and 'special' pleading, with renewed emphasis on the former, than between the old and the new." Clark, *Pleading Under the Federal Rules*, *supra* note 151, at 173.

[171] One commentator has suggested that Clark's "sterner tone" with respect to pleading requirements in the 1950s "may have signified a tactical shift rather than a change of heart." Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 925 (1976). Noting the assaults on simplified pleading in the 1950s, Smith suggests "Clark may have decided to fend off these challenges by deemphasizing the liberality of existing law." *Id.* at 926.

[172] Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 449 (1958). The reference to "precept" is to the Rules themselves, particularly Rule 8. The reference to "illustration" means the forms included in the Appendix to the Rules, which

1955 report "was our final definite statement. *It's not notice pleading. It's more than that. It's a general statement of the case, but it is not detailed pleading either.*"[173] Thus, in fending off attacks on Rule 8(a)(2), Judge Clark and the Advisory Committee responded by explaining that the Rules represented a middle course between the technicality that had come to characterize code pleading (especially in New York), on one side, and the laxity of pure "notice" pleading, on the other.

The 1953 district court decision in *Daves v. Hawaiian Dredging Co.*[174] took such a middle-of-the-road approach. *Daves* was a sprawling action on behalf of more than 4,600 employees against eight defense contractors engaged in construction projects for Naval Air Bases in Hawaii and various United States possessions throughout the Pacific.[175] The complaint alleged that the defendants had failed to pay the plaintiffs overtime compensation in violation of the Fair Labor Standards Act of 1938 (FLSA).[176]

Defendants, represented by then-Assistant Attorney General Warren E. Burger, moved to dismiss and asserted, among other things, that the plaintiffs' complaint did not satisfy Rule 8.[177] Defendants rhetorically asked

> [W]hether the overall spirit of the Federal Rules and the specific requirements of Rule 8 are met by a complaint which avoids material details, uses generalized statements of fact and law designed to blanket in everyone, and dumps 4646 plaintiffs into a single shot-gun complaint casting the burden of preparation and disclosure on the defendants in the hope that some shot will bring down some quarry, or that the action will become so involved as to lead to a settlement to get rid of it.[178]

The district court responded that it did not.[179] In language later quoted by *Wright & Miller*, the district court observed:

> [I]t seems to be the purpose of Rule 8 to relieve the pleader from the niceties of the dotted *i* and the crossed *t* and the uncertainties of distinguishing in advance between evidentiary and ultimate facts, *while still requiring, in a practical and sensible way, that he set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery*.[180]

In short, according to the *Daves* court, Rule 8(a)(2)'s "claim" was like the old "cause of action," but without the old technicalities. A general factual statement identifying some legal entitlement to relief would suffice.

Judge Clark maintained were essential to a proper understanding of what the pleading rules aimed to do.

[173] Clark, *Pleading Under the Federal Rules*, *supra* note 151, at 187 (emphasis added).

[174] Daves v. Hawaiian Dredging Co., 114 F. Supp. 643 (D. Haw. 1953).

[175] *Id.* at 646-47.

[176] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (1952).

[177] *Daves*, 114 F. Supp. at 645.

[178] Memorandum in Support of Defendants' Motion to Dismiss or for Summary Judgment at 17, Daves v. Hawaiian Dredging Co., 114 F. Supp. 643 (D. Haw. 1953) (Civ. Action No. 674), *available at* Case Files, United States District Court for the District of Hawaii, Records of District Courts of the United States, Record Group 21, National Archives and Records Administration—Pacific Region (San Francisco) (also on file with the author).

[179] *Daves*, 114 F. Supp. at 646.

[180] *Id.* at 645 (emphasis added), *quoted in* 5 WRIGHT & MILLER, *supra* note 95, § 1216, at 233. The excerpt has appeared in *Wright & Miller* since the first edition in 1969. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 123–24 (1st ed. 1969).

C. Conley v. Gibson *and "No Set of Facts"*

Unfortunately, the Supreme Court never acted on the Advisory Committee's 1955 Report, and dissolved the Committee the following year.[181] Some of the language in *Conley v. Gibson* appeared to endorse the Advisory Committee's approach, however, for the opinion noted not only the Rules' requirement of "fair notice of what the plaintiff's claim is" but also "the *grounds* upon which it rests."[182] *Conley*'s "no set of facts" language, on the other hand, appeared to be a repudiation of factual pleading, even general fact pleading, altogether. *Conley*'s "no set of facts" language, at least if read literally, represented an endorsement of "notice" pleading in its least demanding form. Only where the plaintiff "plead[ed] himself out of court" could a complaint be dismissed.[183]

Some commentators concluded that the "Court could not have meant literally what it said," and suggested that the "no set of facts" language was "hyperbole."[184] Hyperbole or not, the "decision was apparently intended to put the matter of deciding cases on the pleadings to rest, and proposals to tighten the pleading rules ceased."[185] More importantly, the "no set of facts" language became the pleading standard in thousands of cases for the next fifty years.

III. The Road Now Taken?

By sweeping away *Conley*'s "no set of facts" standard, *Bell Atlantic* opens the way for the more moderate interpretation of Rule 8(a)(2) suggested by Professors Wright, Miller, Moore, and Hazard and utilized in cases such as *Daves*. The road not taken in *Conley* may be the road now taken a half century later. Moreover, *Bell Atlantic* itself suggests how the new standard can be formulated for future cases.

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[181] *See* Order Discharging the Advisory Comm., 352 U.S. 803 (1956); 4 Wright & Miller, *supra* note 95, § 1006, at 37 (3d ed. 2002). In 1958, Congress authorized the Judicial Conference of the United States to "carry on a continuous study of" and make recommendations for improvements to the rules of practice and procedure used in the federal courts. Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. § 331 (2000)). To implement the Act, the Judicial Conference created the current standing Committee on Rules of Practice and Procedure with advisory committees reporting to it, including the Advisory Committee on Rules of Civil Procedure. Annual Report of the Proceedings of the Judicial Conference of the United States, 6–7 (1959), http://www.uscourts.gov/rules/Minutes/1958-09-ST-JC_approves_ST_Comm_Adv_Comm.pdf.

[182] Conley v. Gibson, 355 U.S. 41, 47 (1957) (emphasis added). For a detailed account of the *Conley v. Gibson* litigation, see Emily Sherwin, *The Story of* Conley*: Precedent by Accident*, *in* Civil Procedure Stories 281 (Kevin M. Clermont ed. 2004). As Sherwin notes, although "Justice Black's remarks in *Conley* have been treated as a definitive resolution of the long debate over pleading, . . . there is no evidence that the Court considered the fine points of that debate." *Id.* at 305. Indeed, Moses Lasky complained in 1961 that he had "consulted the briefs in *Conley v. Gibson* to see how much of the literature on the subject, how much of the pros and cons, had been brought before the court. They contained—nothing, not a syllable." Moses Lasky, *Observing Appellate Opinions from Below the Bench*, 49 Cal. L. Rev. 831, 836 (1961). For Justice Black's response, see *id.*

[183] Hazard, *supra* note 53, at 1685 (quoting Early v. Bankers Life & Cas. Co., 959 F.2d 75, 79 (7th Cir. 1992)).

[184] James, Hazard & Leubsdorf, *supra* note 85, at 190.

[185] Marcus, *supra* note 163, at 1750. R

Professor Hazard's suggestion that Rule 8(a)(2), properly interpreted, requires a factual "narrative in ordinary language . . . setting forth all elements of a claim under applicable substantive law"[186] is similar to the *Car Carriers* requirement—quoted in *Bell Atlantic*—of "direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory."[187] It also echoes Judge Clark's formulation of a moderate form of notice pleading for code jurisdictions.[188]

The precise formulation of the Rule 8 standard utilized in *Car Carriers* originated in the Former Fifth Circuit's 1981 decision in *In re Plywood Antitrust Litigation*.[189] There, the Fifth Circuit observed:

> Despite the liberality of modern rules of pleading, a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory. . . . "[I]f a pleader cannot allege definitely and in good faith the existence of an essential element of his claim, it is difficult to see why this basic deficiency should not be exposed at the point of minimum expenditure of time and money by the parties and the court."[190]

On the former point, the Fifth Circuit cited a district court decision, which in turn quoted a similar statement in the first edition of *Wright & Miller*;[191] thus, the *Plywood Antitrust* formulation is really just a paraphrase of *Wright & Miller*. On the latter point, the Fifth Circuit was quoting *Daves v. Hawaiian Dredging Co.*,[192] the case quoted at length in the same section of *Wright & Miller*; the same excerpt, along with a citation to *Daves*, also appears in *Bell Atlantic*.[193]

These authorities suggest an appropriate interpretation of the Rule 8(a)(2) pleading standard after *Bell Atlantic*: factual allegations in plain language touching (either directly or by inference) all material elements necessary to recover under substantive law—but freed from the technicalities of common

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[186] Hazard, *supra* note 53, at 1685. I omit Professor Hazard's use of the adjective "detailed" in reference to the factual narrative because it could be understood to suggest a greater level of detail than the *Car Carriers* line of cases requires.

[187] Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (1984) (quoting Sutliff, Inc. v. Donovan Cos., 727 F.2d at 654, in turn quoting *In Re* Plywood Antitrust, 655 F.2d 627, 641 (5th Cir. Unit A Sept. 1981)).

[188] *See* CLARK, CODE PLEADING (2d ed.), *supra* note 85, § 38, at 240.

[189] *Plywood Antitrust*, 655 F.2d at 627.

[190] *Id.* at 641-42 (citations omitted) (quoting Daves v. Hawaiian Dredging Co., 114 F. Supp. 643, 645 (D. Haw. 1953)).

[191] *Id.* (citing City of Gainsville v. Florida Power & Light Co., 488 F. Supp. 1258, 1263 (S.D. Fla. 1980), in turn quoting 5 WRIGHT & MILLER, *supra* note 180, at 121–23 (1st ed. 1969)). R

[192] Daves v. Hawaiian Dredging Co., 114 F. Supp. 643, 645 (D. Haw. 1953). Although the Former Fifth Circuit attributed its quotation from *Daves* to the late Chief Justice Burger, *Plywood Antitrust*, 655 F.2d at 642, the excerpt is from the district court's opinion. Daves, 114 F. Supp. at 645. The district court's opinion does not indicate that it is quoting (or paraphrasing) the defendants' argument; there is no citation of any kind for this statement. *See id.* A review of the *Daves* case file shows the defendants argued at some length that the plaintiffs had not satisfied Rule 8, but their argument contains no statements from which the excerpt appears to have been taken. *See* Memorandum in Support of Defendants' Motion to Dismiss or for Summary Judgment, *supra* note 178, at 16–19.

[193] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1966 (2007) (quoting 5 WRIGHT & MILLER, *supra* note 95, §1216, at 233–34 , in turn quoting *Daves*, 114 F. Supp. at 645).

law and code pleading. One of the benefits of the *Plywood Antitrust/Car Carriers* formulation of the standard is that it directs attention to "allegations" on "the material elements necessary to sustain recovery" without reference to either the "facts" or the "cause of action" that so plagued code pleading.

A major reason for rejecting the Ninth Circuit's plea to add code pleading language to Rule 8(a)(2) was the fear that such language would revive battles over what constituted "facts" and the proper definition of a "cause of action."[194] By avoiding the language of the codes, the *Plywood Antitrust/Car Carriers* formulation encourages courts to focus on the Rules' textual standard of "entitle[ment] to relief," as measured by the elements necessary to recover, without returning to the technicalities of code pleading.

Moreover, measuring "entitle[ment] to relief" by "the material elements necessary to sustain recovery" finds support in the history of Rule 8. In upholding a government antitrust complaint in *United States v. Employing Plasterers Association*,[195] the Supreme Court noted that, "where a bona fide complaint is filed *that charges every element necessary to recover*, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified."[196] Judge Clark later quoted this language from *Employing Plasterers* in his paper, *Special Pleading in the "Big Case"?*[197]

The Supreme Court's decision in *Swierkiewicz* does not reject, as some have suggested,[198] requiring a complaint to allege the elements of a claim under substantive law. *Swierkiewicz* rejected using an evidentiary standard as a pleading standard; it did not reject measuring the sufficiency of a complaint by whether it alleged all of the elements necessary to recover.[199] For example, one of the plaintiff's claims in *Swierkiewicz* was a Title VII claim for national origin discrimination.[200] There are two elements of a statutory claim for national origin discrimination: (1) an adverse employment action (e.g., firing, demoting, refusing to hire); and (2) the plaintiff's national origin was a "moti-

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194 *See* 1955 REPORT, *supra* note 138, at 19, *reprinted in* 12A WRIGHT & MILLER, *supra* note 95, app. F, at 644 *and* 2 MOORE'S FEDERAL PRACTICE, *supra* note 104, § 8App.01[3].

195 United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954).

196 *Id.* at 189 (emphasis added).

197 Clark, *supra* note 139, at 49.

198 *See* MOORE'S FEDERAL PRACTICE, *supra* note 104, at § 8.04[1a] ("The Supreme Court . . . has rejected the idea that courts should measure a pleading's adequacy by the elements of a claim."). The third edition of Moore's Federal Practice was first published in 1997, after Professor Moore's death in 1994. Wolfgang Saxon, Obituary, *James W. Moore, 89, Legal Scholar and Teacher*, N.Y. TIMES, Nov. 1, 1994, at B8.

199 *See* John P. Lenich, *Notice Pleading Comes to Nebraska: Part I – Pleading Claims for Relief*, NEB. LAW., Sept. 2002, at 2, 7 n.12 ("The authors [of Moore's Federal Practice] are wrong.").

200 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 509 (2001). Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e–2(a)(1) (2000).

vating factor" in the employer's decision.[201] Swierkiewicz had plainly alleged both of those elements in his complaint.[202]

The Second Circuit's "heightened pleading" standard required more than the two statutory elements of national origin discrimination, however. It required allegations of all four elements of a *McDonnell Douglas*[203] prima facie case: "(1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination."[204] The Supreme Court rejected making *McDonnell Douglas*'s "evidentiary standard" into a "pleading requirement."[205] In particular, the Court observed that

> [I]t is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. . . . It . . . seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.[206]

What the Court rejected in *Swierkiewicz* was requiring a complaint to allege all the elements of the *McDonnell Douglas* evidentiary standard; the Court did not reject requiring a plaintiff to allege all the elements of a statutory claim. *Swierkiewicz* does not suggest that the plaintiff's complaint would have been sufficient if it had failed to allege an adverse employment action or plaintiff's national origin as a motivating factor for that action (the required statutory elements). Thus, *Swierkiewicz* does not reject requiring a complaint to allege all the elements of a claim under substantive law.

In fact, *Bell Atlantic* itself is an exercise in measuring "entitle[ment] to relief"[207] by "the material elements necessary to sustain a recovery."[208] The first element of an offense under section 1 of the Sherman Act is "that the defendants entered into an agreement or conspiracy."[209] The Court held in *Bell*

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[201] *See id.* Model jury instructions confirm this:

> To prove his [her] claim, plaintiff must prove by a preponderance of the evidence:
> First, that defendant [e.g., failed to hire, promote, or demoted] the plaintiff, and
> Second, that plaintiff's [e.g., race, gender, religion] was a motivating factor in defendant's decision.

5 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS 88-133 (2007).

[202] Among other things, Swierkiewicz alleged:

> 20. Mr. Chavel demoted Mr. Swierkiewicz on account of his national origin (Hungarian) and his age (he was 49 at the time).
>
> . . . .
>
> 37. Plaintiff's age and national origin were motivating factors in SOREMA's decision to terminate his employment.

Amended Complaint, Swierkiewicz v. Sorema N.A., 86 Fair Empl. Prac. Cas. (BNA) 1595 (S.D.N.Y 2000) (No. 99 Civ. 12272), *reprinted in* Joint Appendix at 25a, 27a., Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2001) (No. 00-1853), 2001 WL 34093952.

[203] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[204] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2001)

[205] *Id.* at 510–11.

[206] *Id*. at 511-12.

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

[208] In re Plywood Antitrust, 655 F.2d 627, 641 (5th Cir. Unit A Sept. 1981).

[209] *See* 4 SAND ET AL., *supra* note 201, at 79-98.

Atlantic that plaintiffs had failed to allege sufficient facts to suggest that such an agreement or conspiracy was "plausible."[210] Accordingly, the plaintiffs had failed to establish that they were "entitled to relief" under Rule 8(a)(2) because they failed to allege sufficiently one of "the material elements necessary to sustain recovery" under section 1 of the Sherman Act.[211]

The *Plywood Antitrust/Car Carriers* interpretation of Rule 8(a)(2) remains a break from the technical horrors that often accompanied code pleading, and continues to permit the Rule to be construed liberally to avoid dismissals for "foot faults" in pleading. True, it represents a somewhat higher standard than the literal terms of *Conley*'s "no set of facts" language permitted. As Professor Hazard's article suggests, however, this interpretation is "quite possible" again now that Rule 8 is no longer "turned . . . on its head" by *Conley v. Gibson*.[212]

IV. NOT THAT NEW—AND NOT THAT HIGH—AFTER ALL: THE IMPORTANCE OF INFERENCE

This "new" standard will not really be new in many circuits. As noted, the Seventh Circuit's *Car Carriers* formulation of the Rule 8(a)(2) standard was first articulated by the Fifth Circuit in *Plywood Antitrust*, but *Wright & Miller* has said essentially the same thing since 1969.[213] The *Plywood Antitrust/Car Carriers* standard has been used not only in the Fifth and Seventh Circuits, but in the First,[214] Sixth,[215] Eleventh,[216] and District of Columbia[217] Circuits as well. After *Bell Atlantic*, the Third,[218] Eighth,[219] and Tenth[220] Circuits have used the standard too, albeit frequently in unpublished decisions.

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[210] Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1971 (2007) ("We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy.").

[211] *See id.* at 1973 n.14 ("[T]he complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.").

[212] Hazard, *supra* note 53, at 1685.

[213] *See supra* note 180 and accompanying text.

[214] Fitzgerald v. Codex Corp., 882 F.2d 586, 589 (1st Cir. 1989).

[215] Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988) (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101 (1984), in turn citing *In re* Plywood Antitrust, 655 F.2d 627 (5th Cir. Unit A Sept. 1981)). The Sixth Circuit has begun citing *Bell Atlantic* for its use of the *Car Carriers* standard. League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 527 (6th Cir. 2007).

[216] Roe v. Aware Woman Ctr. for Choice, Inc., 253 F.3d 678, 683 (11th Cir. 2001) (quoting *Plywood Antitrust*, 655 F.2d 627). In *Bonner v. City of Prichard*, the Eleventh Circuit adopted as binding precedent all decisions handed down by the Former Fifth Circuit before the close of business on September 30, 1981. Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). Thus, *Plywood Antitrust* is binding precedent in the Eleventh Circuit.

[217] District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1081 n.14 (D.C. Cir. 1984).

[218] *See* Montville Township v. Woodmont Builders, LLC, 244 F. App'x 514, 517 (3d Cir. 2007); Haspel v. State Farm Mut. Auto. Ins. Co., 241 F. App'x 837, 839 (3d Cir. 2007).

[219] *See* Carter v. Hassell, No. 07-1145, 2008 WL 649180, at *1 (8th Cir. 2008); Abdullah v. Minnesota, 261 F. App'x 926, 927 (8th Cir. 2008).

[220] Bryson v. Gonzales, 534 F.3d 1282, 1286 (10th Cir. 2008).

A. Liberal Construction of the Plywood Antitrust/Car Carriers Standard and the Importance of "Inferential Allegations"

Subsequent decisions applying the *Plywood Antitrust/Car Carriers* standard, moreover, suggest that the standard should be liberally construed. For example, in *Roe v. Aware Woman Center for Choice*,[221] the Eleventh Circuit emphasized the continued liberality of Rule 8(a)(2) under the *Plywood Antitrust/Car Carriers* standard.[222] As the Eleventh Circuit observed in 1986, even under the *Plywood Antitrust/Car Carriers* standard, "the liberal 'notice pleading' standards embodied in Federal Rule of Civil Procedure 8(a)(2) do not require that a plaintiff specifically plead every element of a cause of action."[223] The court quoted a leading treatise on civil procedure for the proposition that "the pleader need not . . . worry about the particular form of the statement or that it fails to allege *a specific fact* to cover every element of the substantive law involved."[224] It quoted *Wright & Miller* to the same effect: "[T]he complaint . . . need not state *with precision* all of the elements that are necessary to give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided to the opposing party."[225] On the other hand,

> [W]hile notice pleading may not require that the pleader allege a 'specific fact' to cover every element or allege "with precision" each element of a claim, it is still necessary that a complaint "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory."[226]

To resolve the tension between the *Plywood Antitrust/Car Carriers* requirement of "all the material elements necessary to sustain a recovery," with these other authorities' emphasis that notice pleading did not require this to be done "with precision" or with a "specific fact" for each element, the Eleventh Circuit emphasized the "inferential" aspect of the standard.[227] As the Eleventh Circuit put it, "at a minimum, notice pleading requires that a complaint contain *inferential allegations from which we can identify each of the material elements necessary to sustain a recovery* under some viable legal theory."[228] This comports with *Wright & Miller*, which states that "the pleading must contain allegations from which an inference fairly may be drawn by the district court that evidence on these material points will be available and introduced at trial,"[229]

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[221] *Roe*, 253 F.3d 678.

[222] *Id.* at 684.

[223] *Id.* at 683.

[224] *Id*. (quoting JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE §5.7 (2d ed. 1993) (emphasis added)). *See also* FRIEDENTHAL, KANE & MILLER, *supra* note 95, at 268 (citing *Roe*, 253 F.3d at 683).

[225] WRIGHT & MILLER, *supra* note 95, § 1216, at 214–20 (emphasis added), *quoted in Roe*, 253 F.3d at 683 (without alteration or emphasis).

[226] *Roe*, 253 F.3d at 683 (quoting *In re* Plywood Antitrust*,* 655 F.2d 627, 641 (5th Cir. Unit A Sept. 1981)) (emphasis omitted in *Roe*).

[227] *Id.* at 684.

[228] *Id.* (emphasis added).

[229] WRIGHT & MILLER, *supra* note 95, § 1216, at 227. This is the language paraphrased in *Plywood Antitrust*. *See supra* note 187 and accompanying text.

adding that the viable legal theory need "not be the one suggested or intended by the pleader."[230]

B. Form 9 and "Inferential Allegations"

The importance of "inferential allegations" under *Plywood Antitrust* and *Car Carriers* is underscored by the Supreme Court's continued reliance on the Form 9 "Complaint for Negligence" in the Appendix of Forms to the Federal Rules of Civil Procedure.[231] Rule 84 provides that "[t]he forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."[232] Both the Court and the dissenters pointed to Form 9 in *Bell Atlantic*, emphasizing its sufficiency under Rule 8(a)(2).[233] This sufficiency is not immediately apparent, however, if "entitle[ment] to relief" under the Rule is measured by reference to "all the material elements necessary to sustain a recovery," as *Plywood Antitrust* and *Car Carriers* hold.[234]

As others have noted, Form 9 "does not specifically allege all the elements of the tort of negligence (*e.g.,* duty, breach, causation, and injury). It does not even allege what the defendant did that was negligent. Was he speeding, intoxicated, or driving against a red light?"[235] If Form 9 does not allege all the elements of negligence, and Form 9 is a model complaint specifically made "sufficient" by the Rules, how can it be correct to measure entitlement by the material elements necessary to recover? The answer lies in the "inferential allegations" that satisfy the *Plywood Antitrust/Car Carriers* standard.

Judge Clark repeatedly used Form 9 to illustrate the operation of Rule 8(a)(2). As he told the Wyoming Bar Association in 1958, Form 9 "particularizes the accident from among all other accidents in the world and *gives you the basic picture. If you can't fill it in, you're not living in this world*."[236] As he put it some years earlier,

> there are only certain kinds and numbers of misdeeds—speed, signals, position on the highway, failure to look, and so on—which either party can commit. These each party should prepare himself to face; even if they be unstated, a wise counsel will not face trial without considering their contingency."[237]

In other words, Form 9 gives sufficient information for the court and the defendant to draw reasonable inferences about the kind of negligent conduct

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[230] WRIGHT &MILLER, *supra* note 95, § 1216 at 227, *paraphrased in* St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am., 795 F.2d 948, 954 (11th Cir. 1986), in turn *quoted in part* in *Roe*, 253 F.3d at 683.

[231] Form 9, Complaint for Negligence, FED. R. CIV. P., 28 U.S.C. app. 285 (2006) (amended 2007). In the 2007 revisions to the Federal Rules of Civil Procedure, Form 9 was updated and redesignated as Form 11.

[232] FED. R. CIV. P. 84.

[233] *See* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1971 n.10 (2007); *id.* at 1977 (Stevens, J., dissenting).

[234] *See In re* Plywood Antitrust*,* 655 F.2d 627, 641 (5th Cir. Unit A Sept. 1981); Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1106 (1984) (quoting Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984), in turn quoting *Plywood Antitrust*, 655 F.2d at 641).

[235] MICHAEL ALLEN & MICHAEL FINCH, AN ILLUSTRATED GUIDE TO CIVIL PROCEDURE 36 (2006).

[236] Clark, *Pleading Under the Federal Rules*, *supra* note 151, at 182 (emphasis added).

[237] Clark, *Simplified Pleading*, *supra* note 153, at 106, *reprinted in* 2 F.R.D. 456, 462.

plaintiff will attempt to prove. Moreover, as Clark also repeatedly noted, if the defendant wants more specifics, the discovery rules[238] provide an easy and quick way to obtain them.

Under the *Plywood Antitrust/Car Carriers* standard, the pleader need not support its claim with a "specific fact" for each element or identify each element of its claim "with precision," but there must be enough alleged for the court reasonably to infer allegations on the material elements necessary to recover under a viable legal theory. Moreover, the pleader does not have to choose a particular legal theory, and may even have in mind the *wrong* legal theory — as long as the court can discern "*some* viable legal theory" that would entitle the pleader to relief.

C. Erickson v. Pardus

The continued liberality of pleading under Rule 8(a)(2) after *Bell Atlantic* is suggested by the Supreme Court's per curiam decision in *Erickson v. Pardus*.[239] Decided only two weeks after *Bell Atlantic*, the Court vacated a Tenth Circuit decision dismissing a prisoner's pro se complaint alleging prison officials' deliberate indifference to his serious medical needs in violation of the Eighth Amendment.[240] The prisoner alleged that he suffered from hepatitis C, that he had begun treatment for the disease, but that prison officials had removed him from treatment "in violation of department protocol, 'thus endangering [his] life.' "[241] The district court found Erickson's allegations of "substantial harm" insufficient, and the Tenth Circuit affirmed.[242]

The Court quoted Rule 8(a)(2)'s "short and plain statement" requirement, and observed that "[s]pecific facts are not necessary."[243] Quoting *Bell Atlantic* and *Conley*, the Court stated that "the statement need only ' "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," ' "[244] and noted that the judge must accept all of the complaint's factual allegations as true when ruling on a motion to dismiss, again citing *Bell Atlantic*.[245] The Court noted that the prisoner's complaint alleged that the prison officials' decision to remove him "from his prescribed hepatitis C medication was 'endangering [his] life," that the "medication was withheld 'shortly after' [Erickson] had commenced a treatment program that would take one year, that he was 'still in need of treatment for this disease,' and that the prison officials were in the meantime refusing to provide treatment."[246] According to the Court, "This alone was enough to satisfy Rule 8(a)(2)."[247] The Court also observed that the

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[238] FED. R. CIV. P. 26–37.
[239] Erickson v. Pardus, 127 S. Ct. 2197 (2007) (per curiam).
[240] *Id. See* Estelle v. Gamble, 429 U.S. 97, 104–05 (1976).
[241] *Erickson*, 127 S. Ct. at 2199 (quoting Prisoner's Complaint at 2, Erickson v. Pardus, No. 05-CV-00405-LTB-MJW, 2006 WL 650131 (D. Colo. Mar. 13, 2006) (No. 05-405)).
[242] *Id. See* Erickson v. Pardus, No. 05-CV-00405-LTB-MJW, 2006 WL 650131 (D. Colo. Mar. 13, 2006), *aff'd* 198 F. App'x 694 (10th Cir. 2006), *vacated*, 127 S. Ct. 2197 (2007) (per curiam).
[243] *Erickson*, 127 S. Ct. at 2200.
[244] *Id.* (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
[245] *Id.* (citing Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007)).
[246] *Id.* (quoting Prisoner's Complaint, *supra* note 241, at 2–4).
[247] *Id.*

Tenth Circuit's "departure from the liberal pleading standards set forth by Rule 8(a)(2)" was "even more pronounced," because Erickson was proceeding pro se, and a pro se complaint "is 'to be liberally construed.'"[248] The Court thus vacated the Tenth Circuit's judgment and remanded the case for further proceedings, noting that other issues raised by the prison officials' motion to dismiss remained to be addressed.[249]

Coming only two weeks after abandoning *Conley*'s "no set of facts" language, *Erickson* appears intended to signal that the Court does not mean for *Bell Atlantic* to overthrow "the liberal pleading standards set forth by Rule 8(a)(2)."[250] Rather, the Court viewed *Conley*'s "no set of facts" language as going *beyond* the liberal standard of Rule 8(a)(2), and *Bell Atlantic*, with its continued reference to *Conley*'s sometimes overlooked requirement of "grounds," in addition to "fair notice,"[251] was meant as a corrective to *Conley*'s "hyperbole."[252] The fact that the Court held the case under consideration while *Bell Atlantic* was being written also indicates that it was intended to demonstrate *Bell Atlantic*'s holding in operation.[253]

Reading *Erickson* as a key to interpreting *Bell Atlantic* suggests that the type, complexity, size, and context of a case will influence how courts evaluate "plausibility" under Rule 8(a)(2). In *Erickson*, the plaintiff's allegation that removing him "from his prescribed hepatitis C medication was 'endangering [his] life'"[254] was sufficient. In *Bell Atlantic*, the plaintiffs' allegation that the Baby Bells "have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local . . . markets and have agreed not to compete with one another"[255] was not.

Why the easy judicial inference of harm in *Erickson*, but no judicial inference of conspiracy (in the teeth of a direct allegation) in *Bell Atlantic*? *Erickson* involved a state prisoner proceeding pro se. His grievance (removal from a hepatitis C medical treatment program) was straightforward, and the potential for harm was readily apparent from the nature of his disease.[256] *Bell Atlantic*,

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[248] *Id.* (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

[249] *Id.* On remand, the Tenth Circuit reinstated the portions of its order and judgment affirming the dismissal of Erickson's other claims for deprivation of procedural due process and deprivation of hygiene items, and remanded the case to the district court for further proceedings on Erickson's Eighth Amendment claim related to his removal from hepatitis C treatment. Erickson v. Pardus, No. 06-1114, 2007 WL 1636290 (10th Cir. June 7, 2007).

[250] *Erickson*, 127 S. Ct. at 2200.

[251] *See* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1964–65 & n.3 (2007) (referring to "fair notice" and "grounds").

[252] *See* JAMES, HAZARD & LEUBSDORF, *supra* note 85, at 190 (characterizing *Conley*'s "no set of facts" language as "hyperbole").

[253] *See* Docket, Erickson v. Pardus, 127 S. Ct. 2197 (No. 06-7317), http://www.supremecourtus.gov/docket/06-7317.htm; Ides, *supra* note 6, at 638 n.124 (quoting Posting of Amy Howe to SCOTUSblog, http://www.scotusblog.com/wp/uncategorized/more-on-yesterdays-decision-in-no-06-7317-erickson-v-pardus/#more-5535 (June 5, 2007, 5:10 pm EDT)). R

[254] *Erickson*, 127 S. Ct. at 2200 (quoting Prisoner's Complaint *supra* note 241, at 2).

[255] *Bell Atl. Corp*., 127 S. Ct. at 1963 (quoting Consolidated Amended Complaint, *supra* note 16, at 51).

[256] The hepatitis C virus "is the leading cause of death from liver disease in the United States." Doris B. Strader et al., *Diagnosis, Management, and Treatment of Hepatitis C*, 39 HEPATOLOGY, Apr. 2004, at 1147, 1147; Larry I. Lutwick, *Hepatitis C in* 3 GALE ENCYCLO-

on the other hand, was brought by a large, sophisticated plaintiffs' firm, purported to involve hundreds of millions of consumers and billions of dollars, and concerned the vexing distinction between lawful parallel conduct and unlawful conspiracy,[257] a problem that can require millions of dollars of discovery to resolve.[258]

Justice Stevens certainly seems to have a point when he describes the Court's conclusion that "so far as the Federal Rules are concerned, no agreement has been alleged at all" as "mind-boggling."[259] What the disparate attitudes in *Bell Atlantic* and *Erickson* suggest, however, is that the nature and size of the case, the underlying substantive law, and the sophistication of the party (or its counsel) attempting to satisfy the Rule 8 pleading standard all appear to matter now even more than before.[260] But if *Bell Atlantic* was meant as a statement that federal notice pleading requires *both* "notice" *and* "grounds," *Erickson* is the period at the end of that statement.

PEDIA OF MEDICINE 1776, 1777–78 (Jacqueline L. Longe ed., 3d ed. 2006) (stating that "roughly one-fifth" of persons developing hepatitis C would "recover completely . . . and have no later problems," but that others faced risk of "chronic liver infection and possibly serious complications such as liver cancer"). *See* Powell v. City of Pittsfield, 221 F. Supp. 2d 119, 147 (D. Mass. 2002) (stating that "medical evidence . . . showed that hepatitis C causes cirrhosis, liver failure, cancer, and death").

[257] *See, e.g.*, Jonathan B. Baker, *Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory*, 38 ANTITRUST BULL. 143, 144–45 (1993) ("The difficult issue of proving an agreement to fix prices from parallel pricing and other circumstantial evidence is at the core of antitrust's longstanding efforts to attack the 'oligopoly problem.'"); James Langenfeld & James Morsch, *Refining the* Matsushita *Standard and the Role Economics Can Play*, 38 LOY. U. CHI. L.J. 507, 511 (2007) ("[E]conomics teaches that it is difficult to infer a conspiracy only from market information of parallel conduct in an oligopoly setting. . . ."); Thomas A. Paraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 382 (2007) ("The courts and agencies have found it difficult to confirm when oligopolists have entered into illegal conspiracies rather than simply engaging in permissible parallel conduct.").

[258] *See, e.g.*, *Bell Atl. Corp*., 127 S. Ct. at 1966–67 (discussing high cost of antitrust discovery).

[259] *Id.* at 1984. (Stevens, J., dissenting). On the other hand, one can also read the Court as concluding that the plaintiffs' conspiracy allegation was nothing more than an unsupported, pejorative "label" attached to the evidence pleaded of conscious parallelism, which alone is insufficient to demonstrate a conspiracy. *See id.* at 1970 ("Although in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations.") (footnote omitted).

[260] Moreover, the Court's unwillingness to infer conspiracy or agreement represents a clear departure from Judge Clark's views. In *Nagler v. Admiral Corp.*, Clark held that "the trier of facts may draw an inference of agreement or concerted action from the 'conscious parallelism' of the defendants' acts of price cutting and the like, as the Supreme Court recognizes." Nagler v. Admiral Corp., 248 F.2d 319, 325 (2d Cir. 1957) (citing Theatre Enters. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954)). The split was hardly inadvertent, however, for the Court noted its difference with *Nagler* in *Bell Atlantic*. *See Bell Atl. Corp*., 127 S. Ct. at 1968 n.7 (noting that Nagler did not explain its citation to *Theatre Enterprises*, and that, after intervening Supreme Court cases, "it is time for a fresh look at adequacy of pleading when a claim rests on parallel action.").

CONCLUSION

In the wake of *Bell Atlantic*, some have expressed the "hope[ ] that trial judges, long overworked but fearful of reversal by the circuit court, will now be unshackled, free to dismiss the large number of meritless cases that clog dockets and cost defendants untold losses in time and money."[261] *Bell Atlantic* does suggest a greater willingness to dismiss cases at the pleading stage—especially the "big cases" where "big" lawyers have plenty of time and talent to lay out their cases adequately. If the *Plywood Antitrust/Car Carriers* formulation of the Rule 8(a)(2) pleading standard prevails, however, district courts will not be "unshackled," but will instead be more closely focused on the text of Rule 8(a)(2), particularly the requirement of showing "entitle[ment] to relief," instead of *Conley v. Gibson*'s now abrogated "hyperbole."[262]

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[261] WILLIAM F. PATRY, PATRY ON COPYRIGHT § 19:2at 19-6 (2008).
[262] JAMES, HAZARD & LEUBSDORF, *supra* note 85, at 190.