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Righting the Notice Pleading Ship: How *Erickson v. Pardus* Solidifies the Modern Supreme Court Trend of Notice-Giving in Light of *Bell Atlantic Corporation v. Twombly*

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RIGHTING THE NOTICE PLEADING SHIP: HOW ERICKSON V. PARDUS SOLIDIFIES THE MODERN SUPREME COURT TREND OF NOTICE-GIVING IN LIGHT OF BELL ATLANTIC CORPORATION. V. TWOMBLY

JEREMY D. KERMAN*

INTRODUCTION

Since the adoption of the Federal Rules of Civil Procedure in 1938, the Supreme Court has followed a trend that has "restrict[ed] the pleadings to the task of general notice-giving."1 "General notice-giving" is simply the plaintiff giving the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," usually in the complaint itself.2 In the summer of 2007, the Supreme Court decided two separate cases involving the notice pleading standard under Rule 8(a)(2) of the Federal Rules of Civil Procedure.3 It is these two cases, Bell Atlantic Corp. v. Twombly4 and Erickson v. Pardus,5 that this Comment focuses on. Specifically, this Comment focuses on the implication of the holding of Erickson and its effect on the holding in Twombly.

In Twombly, the Supreme Court dismissed the plaintiff's complaint for failure to meet the notice pleading standard of 8(a)(2) on an action for liability under § 1 of the Sherman Act.6 However, in dismissing the complaint, the Court specifically noted that it did not wish to "apply any

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3. "A pleading which sets forth a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2)(2009).
6. 127 S.Ct. at 1961. § 1 of the Sherman Act can be found at 15 U.S.C. § 1, and it provides that:
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Id.
heightened pleading standard, nor... seek to broaden the scope of \(\text{FEDERAL RULE OF CIVIL PROCEDURE} \, 9\), which can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation.\(^7\)

In contrast, \textit{Erickson} involved the complaint of a \textit{pro se} prisoner who sparsely alleged that prison officials violated his Eighth Amendment rights by taking him off of his hepatitis C medication.\(^8\) The Supreme Court overruled the decision of the Tenth Circuit Court of Appeals, which had dismissed the petitioner’s complaint for failure to state a claim, and held that the petitioner’s complaint was sufficient under the simple notice pleading standard established by Rule 8(a)(2).\(^9\) While some academics felt that the \textit{Twombly} decision “signal[ed] the rejection of notice pleading,” and that “the Court [was] saying that Rule 8 requires ‘notice-plus’ pleading,” the timing and straightforward nature of the \textit{Erickson} decision suggests that the Court did not intend for \textit{Twombly} to alter the trend of general notice pleading that the Court has followed since the creation of the Federal Rules.\(^10\)

Part I of this Comment traces the history of pleading in the United States from the development of what was known as Field Code Pleading to the adoption of the Federal Rules in 1938. Part II focuses on how the courts implemented the newly enacted Federal Rules until the \textit{Conley v. Gibson} decision in 1957.\(^11\) Part III continues this historical examination from 1957 through the \textit{Twombly} and \textit{Erickson} decisions in the summer of 2007.

Part IV first examines the \textit{Twombly} decision and its effects on the trend the Supreme Court has established over the last half-century concerning the notice pleading standard of Rule 8(a)(2). This Comment suggests that the \textit{Twombly} Court effectively created a heightened pleading standard for antitrust cases, even though it specifically denied doing so. Part IV then analyzes the \textit{Erickson} decision and how the timing and direct nature of \textit{Erickson} suggest that the Court’s decision in \textit{Twombly} does not extend beyond \textit{Twombly} itself. Ultimately, Part V of this Comment argues that while \textit{Twombly} departed from the modern trend of simple notice pleading in response to concerns with the ever-increasing costs of discovery in fed-

\(^7\) Id. at 1973 n.14 (internal citations and quotations omitted).

\(^8\) 127 S.Ct. at 2197.

\(^9\) Id. at 2198.


\(^11\) \textit{Conley v. Gibson}, 355 U.S. 41 (1957) is significant because it was one of the first Supreme Court cases to establish the new pleading standard as “notice pleading.” \textit{Twombly} also later abrogated specific language in \textit{Conley}, causing some to believe that \textit{Twombly} signaled the end of the notice pleading trend the Supreme Court seemed to be following after the \textit{Conley} decision.
eral litigation, Erickson demonstrates the Court’s desire to isolate Twombly as an outlier and reinforce the modern trend in which Rule 8(a)(2) does not require a heightened pleading standard.

I. FROM FIELD CODE PLEADING TO THE FEDERAL RULES OF CIVIL PROCEDURE

The Code of Civil Procedure in New York in 1848 marked the beginning of what was known as “Field Code Pleading” in the United States. This reform was led by New York attorney David Dudley Field, whose goal was to break out from the common law system adopted from the English model of pleadings by creating a system in which there was “but one form of action.” Pleadings under this system began with a complaint, which only needed to contain a concise statement of the facts alleging the cause of action in such a way that the receiver of the complaint would understand the plaintiff’s intentions. Similarly, the answer was limited to “a specific denial of each material allegation of the complaint controverted by the defendant” and “a plain concise statement of any new matter constituting a defense or set-off without unnecessary repetition.” And, under this system, pleadings were limited to a complaint, an answer, a reply, and a demurrer.

However, Field Code Pleading, also known as fact pleading, created many problems for lawyers and courts. Courts often had difficulty reading complaints and determining what could be qualified as evidence, facts, or mere conclusions. For example, the North Carolina Supreme Court in Gillispie v. Goodyear Service Stores granted a defendant’s demurrer on the basis that the plaintiff’s complaint asserted mere conclusions rather than ultimate facts. While the Gillispie Court found that the plaintiff’s complaint failed to allege “what occurred, when it occurred, where it occurred, who did what, [or] the relationships between defendants and plaintiff,” it could be argued that the plaintiff alleged enough in the complaint, if read liberally, to constitute all of the elements of the various causes of ac-

13. Id.
14. Id.
15. Id.
16. Id. Today, the function of the demurrer has been replaced by the surreply; in other words, a reply to the plaintiff’s reply.
19. Id.
Therefore, courts following the Field Code Pleading System often had problems distinguishing between complaints that appropriately pled "ultimate facts" and those that only pled "conclusions" or "mere evidence."21

Although the Gillispie case was decided in 1963, it is a prototypical example of how courts handled the pleading standard under the Field Code system before a committee headed by Yale Law School Dean Charles Clark drafted the Federal Rules of Civil Procedure in 1938.22 Historically, the pleading system had served four functions: (1) providing notice of the nature of the claim or defense, (2) stating the facts that the parties believed to exist, (3) narrowing the issues to be litigated, and (4) providing a means for speedy disposition of sham claims and insufficient defenses.23 However, because of the difficulty courts had in drawing the lines between evidence, facts, and conclusions, the drafters of the newly proposed federal rules narrowed the purposes of pleading to just providing notice.24 Clark and the drafting committee thus favored what has been called a "liberal ethos," where having a trial on the merits by a jury and full disclosure through the use of liberal discovery procedures was preferred to the use of exhaustive fact-laden pleadings.25

To ensure that pleadings would not be as fact-intensive as they were under Field Code Pleading, Rule 8(a)(2) only requires "a short and plain statement of the claim showing that the pleader is entitled to relief."26 The drafters used these words to replace the language of the Field Code Pleading system, which required "facts constituting a cause of action."27 The drafters of the federal rules intentionally avoided the terms "fact," "conclusion," and "cause of action," in drafting Rule 8(a)(2) in order to distinguish the new system from the most prominent feature of Field Code Pleading, namely the distinction between "ultimate facts" and "conclusions."28

In order to clarify exactly how "short and plain" the statement of the claim needed to be under Rule 8(a)(2), the drafters prepared a series of forms to serve as the basic outlines for complaints.29 Some of these forms,

20. Id. at 766.
22. MARCUS ET AL., supra note 12, at 131.
23. WRIGHT & MILLER, supra note 17, §1202, at 87–88.
24. Id. § 1201, 84–87.
25. Marcus, supra note 21, at 439.
27. WRIGHT & MILLER, supra note 17, § 1202, at 87.
28. Marcus, supra note 21, at 439.
29. Id.
such as Form 11,\textsuperscript{30} were so simplistic that, for example, the allegation that “defendant negligently drove a motor vehicle against plaintiff” would constitute a well-pled allegation.\textsuperscript{31} The adoption of the Federal Rules in 1938 therefore left the courts somewhat confused; the courts had become accustomed to the detail required under the old Field Code, fact pleading system, but were now faced with a newly-developing system that focused only on the notice pleading function served by the old system.\textsuperscript{32}

\section*{II. FROM THE FEDERAL RULES TO \textit{CONLEY V. GIBSON}}

The shift from Field Code pleading to the new notice pleading standard under the Federal Rules did not immediately affect how attorneys and judges dealt with pleadings.\textsuperscript{33} In fact, Charles Clark was later a judge for the Second Circuit Court of Appeals, and wrote the opinion for \textit{Dioguardi v. Durning}, which saw the Second Circuit following the newly drafted Federal Rules.\textsuperscript{34} \textit{Dioguardi} involved an “obviously home drawn” complaint by an uneducated plaintiff, which the District Court of the United States for the Southern District of New York dismissed for failure to state a claim—as would have been required under the old Field Code System.\textsuperscript{35} However, Clark overturned this decision, finding that the plaintiff had stated enough to withstand a 12(b)(6) motion to dismiss because:

\begin{quote}
[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.”\textsuperscript{36}
\end{quote}

Clark further chastised the District Court in noting that dismissal under 12(b)(6) only based on the face of the complaint was an “instance of judicial haste which in the long run makes waste.”\textsuperscript{37} The Second Circuit therefore affirmed the presence of the new standard under the Federal

\begin{itemize}
\item \textsuperscript{30} An example of a negligence pleading that would follow the requirements of Form 11 would be: (1) This Court has jurisdiction over this matter; (2) On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway; (3) As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars., and (4) Wherefore, plaintiff demands judgment against defendant in the sum of five thousand dollars and costs. \textit{Fed. R. Civ. P. Form 11}.
\item \textsuperscript{31} Marcus, \textit{supra} note 21, at 439.
\item \textsuperscript{32} \textit{WRIGHT & MILLER, supra} note 17, § 1202, at 92–93.
\item \textsuperscript{33} \textit{MARCUS ET AL., supra} note 12, at 132.
\item \textsuperscript{34} 139 F.2d 774 (2d Cir. 1944).
\item \textsuperscript{35} \textit{id.} at 774.
\item \textsuperscript{36} \textit{id.} at 775.
\item \textsuperscript{37} \textit{id.}
\end{itemize}
Rules; and, even though the plaintiff in Dioguardi was inarticulate in stating his claims, the court could “not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes.”

While some district courts continued to apply elements of the Field Code Pleading System, the Supreme Court began a trend of overturning district court decisions and formally accepting the new standard under the Federal Rules. It was not until 1947 that the Supreme Court first noted that “the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings,” and that the “new rules . . . restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial.”

By 1957, Supreme Court decisions seemed to accept the new notice pleading standard under Rule 8(a)(2). In Conley v. Gibson, the Court was presented with a class action suit by African-American railway and steamship workers alleging wrongful discharge by their employers and discrimination by their union under the Railway Labor Act. Specifically, the workers claimed that the union did not help them protect their jobs, as the union did with white employees, because they were African-Americans. In reversing the decision of the lower court, the Supreme Court famously stated that it would follow the 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 its claim which would entitle him to relief.”

Going further, the Court noted that the inclusion of illustrative forms along with the Rules as prototypical examples of complaints for different causes of action demonstrated that pleading is not “a game of skill in which one misstep by counsel may be decisive to the outcome,” and that the Rules “accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” The Court also adopted the “liberal ethos” of the original drafters in applying this simplified notice pleading with an eye

38. Id.
41. Conley, 355 U.S. at 46.
42. Id.
43. Id.
44. Id. at 45–46.
45. Id. at 48.
46. Marcus, supra note 21, at 439.
toward "liberal . . . discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of . . . claim[s] . . . and to define more narrowly the disputed facts and issues."\textsuperscript{47}

Although Conley seemed to signal a clear adoption of notice pleading, at least one academic believed that "Conley v. Gibson turned Rule 8 on its head by holding that a claim is insufficient only if the insufficiency appears from the pleading itself."\textsuperscript{48} In other words, a complaint would only be dismissed if the plaintiff failed to keep the complaint plain or short; compliance with Conley would therefore only require "giving the names of the plaintiff and the defendant, and asking for judgment."\textsuperscript{49} However, the Conley Court, in adopting the "short and plain statement of the claim"\textsuperscript{50} standard, was also clear that a complaint must state more than just the names of the parties, which, while being plain and short, would not provide "fair notice of what the plaintiff's claim is,"\textsuperscript{51} which Rule 8(a)(2) also requires. Thus, Conley marked the beginning of a new Supreme Court trend in which the Court clearly and directly followed the pleading standard of Rule 8(a)(2) in overturning decisions of the lower courts and only requiring the most basic notice for a complaint to withstand a motion to dismiss.\textsuperscript{52}

III. \textit{After Conley v. Gibson: The Modern Supreme Court Trend}

In the thirty-five years following the decision in Conley v. Gibson, the Court faced no significant challenges to the new notice pleading standard that appeared to be firmly established under Rule 8(a)(2). In fact, the Court usually dismissed any minor challenges to the new standard with a simple reference to the language in Conley or to the idea of liberal discovery and summary judgment procedures as alternative methods of defining facts and issues.\textsuperscript{53}

\textsuperscript{47} Conley, 355 U.S. at 47–48.
\textsuperscript{49} Id.
\textsuperscript{50} Fed. R. Civ. P. 8(a)(2).
\textsuperscript{51} Conley, 355 U.S. at 47.
\textsuperscript{52} See id.
\textsuperscript{53} See Renne v. Geary, 501 U.S. 312, 343 (1991) (Marshall, J., dissenting) (citing Conley, 355 U.S. at 47–48) (disagreeing with the majority's insistence that a complaint by styled as a challenge based on overbreadth because this would be "inconsistent with the liberal notice pleading philosophy that informs the Federal Rules of Civil Procedure"); Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (noting that the simplified notice pleading standard of Rule 8(a)(2) allows the summary judgment process to fulfill the role of identifying factually insufficient claims); Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 149–52 (1984) (holding that a Title VII claim for employment discrimination had no heightened pleading standard and that the standard as stated in Conley only requires that the defendant receive fair notice of the plaintiff's claims and the grounds upon which it rests); Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (finding that the notice pleading system does not limit
In spite of this Supreme Court trend, some federal courts demonstrated resistance to the minimal requirements of the new notice pleading standard. Judge Richard Posner of the Seventh Circuit Court of Appeals, for one, opposed the notice pleading standard in affirming a Rule 12(b)(6) dismissal in *Sutliff, Inc. v. Donovan Companies, Inc.* Acknowledging the relaxed pleading standard adopted by the Supreme Court in *Conley*, Judge Posner stated that the standard has never been taken literally. Professors Wright and Miller treat as authoritative the statement in an earlier case that the pleader must “set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery[.]” The heavy costs of modern federal litigation and the mounting caseload pressures on the federal courts, counsel against launching the parties into pretrial discovery if there is no reasonable prospect that the plaintiff can make out a cause of action from the events narrated in the complaint.

Judge Posner thus believed that plaintiffs must set out the elements of their claim beyond just a short plain statement of the claim, especially because the costs of litigation are so high that proceeding to discovery without any indication of a legitimate complaint is ill-advised, even if discovery is designed to uncover underlying facts and issues.

Similarly, Judge Michael Boudin of the First Circuit Court of Appeals followed Judge Posner in resisting the standard established by *Conley* and Rule 8(a)(2). In affirming the dismissal of the plaintiff manufacturer’s complaint alleging conspiracy to restrain trade in violation of the Sherman Act by a standards organization for imposing a certain standard for reagent grade water, the First Circuit stated that:

the price of entry, even to discovery, is for a plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that plaintiff is engaging in a fishing expedition.

Thus, while the First Circuit, like the Seventh Circuit in *Sutliff*, acknowledged the existence of the Rule 8(a)(2) notice pleading standard, it also noted that the standard requires more than minimal notice and must discovery to issues raised by the pleadings because liberal discovery proceedings are designed to “define and clarify issues”).

54. "Every defense, in law or fact, to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion . . . (6) failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).
55. 727 F.2d 648 (7th Cir. 1984).
56. Id. at 654.
57. Id.
58. See DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53 (1st Cir. 1999).
59. Id.
additionally provide sufficient facts to proceed to discovery so that the plaintiff does not waste time and run up unnecessary expenses by engaging in a "fishing expedition."60

Even Judge Clark, reporter for the drafting committee of the Federal Rules of Civil Procedure and the person generally credited with the idea of notice pleading, did not necessarily believe that the new standard was a complete departure from fact pleading.61 Clark acknowledged that a complaint, even under a notice pleading standard, could not be too general or conclusory and that "[a] bare allegation that the defendant had injured the plaintiff through negligence . . . would not suffice."62 Thus, even under a notice pleading standard, some judges and scholars believed that a complaint containing unsupported, conclusory facts could not withstand a motion to dismiss.

Even with dissenters raising concerns in the lower federal courts, the Supreme Court persisted in following the trend of simplified notice pleading in requiring merely a "short and plain statement of the claim."63 In 1993, the Court granted certiorari in Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit64 to decide whether civil rights cases required a "heightened pleading standard" under Rule 8(a)(2).65

Leatherman arose out of two separate incidents involving officers forcibly entering a home after noticing odors indicative of narcotic manufacturing, with one plaintiff alleging assault by the entering officers and the other alleging that the entering officers had killed her dogs.66 Both the United States District Court for the Northern District of Texas and the Fifth Circuit Court of Appeals dismissed the complaints under a heightened pleading standard67 for § 1983 claims, reasoning that the government was entitled to specific factual details so that it could adequately prepare for a likely defense of government immunity.68

The Supreme Court disagreed, finding the Fifth Circuit’s heightened

60. Id.
62. Id.
63. FED. R. CIV. P. 8(a)(2).
64. 507 U.S. 163 (1993).
65. Id. at 164.
66. Id. at 164–65.
67. In Elliott v. Perez, 751 F.2d 1472, 1473 (5th Cir. 1985), the Fifth Circuit established a heightened pleading standard for § 1983 claims: "In cases involving governmental officials involving the likely defense of immunity we require of trial judges that they demand that the plaintiff’s complaints state with factual detail and particularity the basis for claims which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity."
68. Leatherman, 507 U.S. at 167.
pleading standard to be completely inconsistent with the “liberal system of
notice pleading set up by the Federal Rules.”69 Referencing Conley, the
Court noted that the Rules simply “do not require a claimant to set out in
detail the facts upon which he bases his claim,”70 except for in two specific
instances under Rule 9(b), which require particularity.71 Thus, the Court
held that neither Rule 8(a)(2) nor Rule 9(b) indicate any kind of heightened
pleading standard for § 1983 claims, and while either of the Rules could be
rewritten to add such a specificity requirement, doing so could only be
accomplished by amending the Federal Rules, not by judicial interpreta-
tion.72 Until such an amendment occurred, the Court once again empha-
sized the federal courts’ reliance upon liberal discovery and summary
judgment procedures in order to “weed out unmeritorious claims sooner
rather than later.”73

Similar to Leatherman, Swierkiewicz v. Sorema N.A. presented the
Court with the opportunity to accept a heightened pleading standard for
employment discrimination claims.74 Petitioner Swierkiewicz alleged that
he had been wrongfully terminated because of his age and national origin;
however, both the United States District Court for the Southern District of
New York and the Second Circuit Court of Appeals dismissed the com-
plaint for failure to adequately allege a prima facie cause of discrimina-
tion as set forth under by the Supreme Court in McDonnell Douglas Corp.
v. Green.75

Returning once again to the simplified notice pleading standard, the
Swierkiewicz Court held that “an employment discrimination complaint
need not include such [prima facie] facts and instead must contain only a
short and plain statement of the claim showing that the pleader is entitled to

69. Id. at 168 (internal quotations omitted).
70. Id. (citing Conley v. Gibson, 355 U.S. 41, 47 (1957)).
71. “In alleging fraud or mistake, a party must state with particularity the circumstances constitut-
ing fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged
generally.” FED. R. CIV. P. 9(b).
72. Leatherman, 507 U.S. at 168.
73. Id. at 168–69.
75. Id. at 509.
76. 411 U.S. 792, 802 (1973). The standard set forth by the Court in McDonnell Douglas is as
follows:
The complainant in a Title VII trial must carry the initial burden under the statute of establish-
ing a prima facie case of racial discrimination. This may be done by showing (i) that he be-
longs to a racial minority; (ii) that he applied and was qualified for a job for which the
employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv)
that, after his rejection, the position remained open and the employer continued to seek appli-
cants from persons of complainant’s qualifications.
76. Id.
relief.” 77 Furthermore, the Court distinguished the *McDonnell Douglas* standard as an evidentiary standard instead of a heightened pleading requirement that a plaintiff must satisfy in order to survive a motion to dismiss. 78

The Court also indicated that requiring a plaintiff to plead facts under an evidentiary standard would be a bad policy decision because the *McDonnell Douglas* framework would not apply in every employment discrimination case. 79 Because it is possible for a plaintiff to prove direct evidence of discrimination, he would not have to always plead the elements of a prima facie case in order to succeed. 80 Therefore, the Court found it “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.” 81

Like the *Leatherman* Court, the *Swierkiewicz* Court relied on liberal discovery rules and summary judgment motions in making its decision to strictly adhere to the Rule 8(a)(2) notice pleading standard and avoid a heightened pleading standard for a specific cause of action. 82 Under this standard, the Court found that the plaintiff’s complaint easily satisfied the bare notice requirement without having to establish any type of prima facie case for employment discrimination. 83 At the same time, the Court noted that Rule 8(a) establishes a pleading standard without any concern for the merits of the claim, and that “it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.” 84

Almost two months after the decision in *Swierkiewicz*, the Court was put in a different position than it had been in its previous decisions when it granted *certiorari* to decide whether a complaint should be dismissed after having been deemed sufficient by the Circuit Court of Appeals for the District of Columbia. 85 In *Christopher v. Harbury*, the plaintiff alleged that Government officials had intentionally deceived her by concealing information regarding the detention and torture of her husband. 86 Ultimately, the Court held that the complaint was insufficient because it failed to identify an underlying cause of action and, furthermore, the complaint did not

77. *Swierkiewicz*, 534 U.S. at 508.
78. *Id.* at 510–12.
79. *Id.* at 511–12.
80. *Id.*
81. *Id.*
82. *Id.* at 512–13.
83. *Id.* at 514.
84. *Id.* at 515.
86. *Id.*
seek any presently available relief. 87

What distinguished Harbury from earlier cases was the Court’s explicit acknowledgment that “the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to the defendant.” 88 Because the plaintiff failed to identify an underlying cause of action, the defendants could only guess as to what the unstated cause of action was and what the subsequent remedy should have been. 89 Therefore, the Harbury Court added, or at least clarified, another subtlety to the notice pleading standard: that “a short and plain statement of the claim showing that the pleader is entitled to relief” 90 must include some explicit mention of the remedy itself in order for the complaint to be deemed sufficient. 91 Even in adding this nuance, Harbury encapsulated the modern Supreme Court trend, beginning with Conley, of liberally reading complaints to only require minimal notice to the defendant without also requiring any substantial factual allegations. 92

IV. TWOMBLY AND ERICKSON: CONFLICTING DECISIONS?

In the summer of 2007, the Supreme Court decided Bell Atlantic Corp. v. Twombly, the first of two cases it would decide that summer involving Rule 8(a)(2). 93 The plaintiffs in Twombly were a putative class of plaintiffs made up of subscribers to local telephone and Internet services 94 who alleged a cause of action for liability under § 1 of the Sherman Act, which requires a “contract, combination . . . or conspiracy, in restraint of trade or commerce.” 95 Specifically, the plaintiffs alleged that the defendant corporations “engaged in parallel conduct” in order to inhibit the growth of newly formed local competitors, and also made agreements together to “refrain from competing against one another.” 96 Therefore, like the Courts in Leatherman and Swierkiewicz, the Twombly Court granted certiorari to determine the proper pleading standard for a specific cause of action—here, a pleading for antitrust conspiracy through allegations of parallel conduct. 97

87. Id.
88. Id. at 416 (emphasis added).
89. Id. at 418.
90. FED. R. CIV. P. 8(a)(2).
91. 536 U.S. 403.
94. Id. at 1962.
95. See supra note 6 and accompanying text.
97. Id. at 1963.
In first addressing the question of whether the anticompetitive conduct in question arose from independent decisions or from some type of collaborative agreement among the defendants, the Court held that "[w]hile a showing of parallel business behavior is admissible circumstantial evidence... it falls short of conclusively establishing agreement or itself constituting a Sherman Act offense." \(^9\)

The Court then proceeded to analyze how exactly to square the requirements it established for a claim under the Sherman Act with Rule 8(a)(2).

Like other Courts before it, the *Twombly* Court noted that Rule 8(a)(2) only requires "a short and plain statement of the claim"\(^9\) in order to provide the "defendant fair notice of what the... claim is and the grounds upon which it rests."\(^10\) However, the *Twombly* Court then differed from the trend of its predecessors of accepting any complaint that provided notice by stating that while a complaint does not need detailed factual allegations, a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."\(^11\)

The Court further added that Rule 8(a)(2) requires a "showing" rather than a "blanket statement" demonstrating entitlement to relief and that a claimant would simply be unable to provide fair notice and the grounds on which a claim rests without at least some factual allegations in the complaint.\(^12\)

Thus, the *Twombly* Court held that the plaintiffs' allegation of parallel conduct and bare assertion of conspiracy would not, without facts supporting the existence of a conspiracy agreement, withstand a motion to dismiss.\(^13\) The Court made a special note saying that it was "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."\(^14\) Going further, and unlike previous Courts' decisions, *Twombly* suggested that

it is 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 reasonably founded hope that the discovery process will reveal relevant evidence.\(^15\)

Therefore, it appeared that the Court in *Twombly*, like Judge Pos-

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98. *Id.* at 1964 (internal quotation omitted).
99. FED R. CIV. P. 8(a)(2).
100. *Twombly*, 127 S.Ct. at 1964 (internal quotation omitted).
101. *Id.* at 1965.
102. *Id.*
103. *Id.* at 1966.
104. *Id.* at 1966–67.
105. *Id.* at 1967 (internal quotations omitted).
ner, focused on the cost of discovery rather than following the "liberal ethos" favored by the drafters of the Federal Rules.

However, the Twombly Court also expressly (and sua sponte) abrogated some of the fifty year old language from Conley, which some believed to strike the "death-knell" for notice pleading. The Twombly Court revisited the "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 its claim which would entitle him to relief" language from Conley and stated that this language "can 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."

Given this reading of the "no set of facts" language from Conley, the Court in Twombly determined that "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of [undisclosed] facts to support recovery." Therefore, the ruling in Twombly was that the "no set of facts" 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."

In looking at the complaint in Twombly, the Court noted that the pleadings did not mention a "time, place, or person involved in the alleged conspiracies," nor did it indicate which of the defendant corporations were involved in the anti-competition agreement. Therefore, the Court held that "nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy [or]... anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance."

In the same vein as the Court in Swierkiewicz and Leatherman, the Twombly Court noted that it was not applying any "heightened pleading standard," nor did it "seek to broaden the scope of Federal Rule of Civil

106. See supra notes 55–57 and accompanying text.
107. Marcus, supra note 21, at 439.
111. Twombly, 127 S.Ct. at 1968.
112. Id. at 1969.
113. Id. at 1970–71 & n.10.
114. Id. at 1971.
Procedure 9, which can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation. Unlike certain causes of action, which Rule 9 requires plaintiffs to allege with particularity, the Court did not feel as though the claim in *Twombly* needed such a heightened pleading standard because there was no risk of abusive litigation inherent in an antitrust claim. Instead of being “insufficiently particularized, . . . the complaint warranted dismissal because it failed in toto to render plaintiff’s entitlement to relief possible.” Still, some academics felt as though the decision “signal[ed] the rejection of notice pleading” or that “the Court [was] saying that Rule 8 requires ‘notice-plus’ pleading.” Still others dismissed the case as “quite insignificant” and posited that “Twombly does not turn away from notice pleading.”

Dissenting Justices Stevens and Ginsburg agreed with the former set of academics in viewing the majority’s decision as a “dramatic departure from settled procedural law,” and noting that one of the majority’s main concerns seemed to be the high cost of antitrust litigation. However, the dissent felt as though “[t]he potential for sprawling, costly, and hugely time-consuming discovery is no reason to throw the baby out with the bathwater.” The dissenting Justices believed that the plaintiffs in *Twombly* had at least provided “a short and plain statement of the claim showing that the pleader is entitled to relief” in their complaint. Therefore, Justices Stevens and Ginsburg determined that the majority decision was either contrary to the modern notice pleading trend established by over a half-century of Supreme Court precedent, or that, in spite of its insistence to the contrary, the majority was creating a heightened pleading standard for the plaintiffs’ claim.

If the Court’s position on notice pleading seemed uncertain after *Twombly*, the Court’s decision two weeks later in *Erickson v. Pardus* left nothing up to interpretation. In *Erickson*, the petitioner was a pro se prisoner whose complaint alleged that prison officials wrongfully termi-

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117. See FED R. CIV. P. 9.
119. *Id.* (internal quotations omitted).
121. *Id.*
123. *Id.* at 1987 n.13 (Stevens, J., dissenting).
124. FED. R. CIV. P. 8(a)(2).
nated his hepatitis C treatment, which threatened his life and violated his Eighth Amendment rights by showing "deliberate indifference to his serious medical needs." The prison officials took Erickson off of his treatment because they believed that he had been using drugs, which would render his treatment ineffective.

The United States District Court for the District of Colorado dismissed Erickson's complaint on the ground that it failed to allege either that the prison officials' actions caused him any substantial harm, or that the prison officials had a sufficiently culpable state of mind. The Tenth Circuit affirmed, holding that Erickson had only made conclusory allegations in his complaint and that he had failed to show any harm (much less substantial harm) as a result of the discontinued treatment.

The Supreme Court's opinion was both concise and straightforward. With little to no in-depth analysis, the Court reversed the Tenth Circuit's decision as a stark departure from the "pleading standard mandated by the Federal Rules of Civil Procedure." The Court then notably cited Twombly in stating that "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests." After noting that Erickson's complaint stated that the prison doctor's decision to remove Erickson from his treatment endangered his life, and that Erickson was taken off the treatment while he still had a need for it, the Court simply held that "[t]his alone was enough to satisfy Rule 8(a)(2)." Ultimately, and without ever deciding whether Erickson's complaint was sufficient in all respects, the Court stated that the "case cannot . . . be dismissed on the ground that petitioner's allegations of harm were too conclusory to put these matters at issue."

V. THE FUTURE OF NOTICE PLEADING

In light of these two decisions, the question is then what effect, if any, did the decision in Erickson have on the decision in Twombly? The fact that Erickson undeniably follows a simple notice pleading standard sheds light

127. 127 S.Ct. at 2197–98.
128. Id. at 2198.
129. Id. at 2199.
130. Id. (explaining that discontinuing the treatment after eighteen months because of his suspected drug use put Erickson at no greater risk "than what he already faced from Hepatitis C itself.").
132. Id. at 2198.
133. Id. at 2200 (internal quotation omitted).
134. Id.
135. Id.
onto the seemingly revolutionary decision in *Twombly* to depart from that standard and return, to some degree, to a fact pleading standard. However, in order to fully understand the purpose of *Erickson*, it is first necessary to look at the timing of the two decisions.

*Erickson* was first distributed to the Court for conference in early January 2007, but the Court delayed decision on the petition for *certiorari* for several months by calling for the respondent prison officials to respond to the complaint and also calling for a copy of the record. The docket reflects that the record was received by the Court on March 7, 2007, and yet there was no further action in the *Erickson* case until May 10, 2007, just eleven days prior to the release of the *Twombly* opinion, when it was distributed for conference. *Erickson* was then relisted three times before the opinion was finally released, two weeks after the release of the *Twombly* decision.

Considering that the Court initially received *Erickson* in early January 2007, it seems unlikely that the Court would wait until June to release such a straightforward opinion without having good reason for the delay. The Court’s decision in *Erickson* was simple and clear-cut; all the petitioner needed to do was to draft a complaint so as to provide the defendant with notice as required by Rule 8(a)(2). Furthermore, *Erickson* was a *pro se* plaintiff, so his complaint likely presented the bare minimum of what the Court was willing to accept in terms of simple notice pleading. If even *Erickson*'s sparse complaint was enough to satisfy Rule 8(a)(2), then the *Erickson* decision alone would serve as a clear restatement of the trend toward simplified notice pleading that the Supreme Court had followed since *Conley* in 1957.

Yet, *Erickson* did not stand on its own. The *Erickson* decision was delayed until just after *Twombly* was decided precisely because it was such a clear-cut opinion. The *pro se* petitioner’s simple complaint, and the straightforward ruling that the Court knew it would make, made *Erickson* the perfect vehicle to follow the decision in *Twombly*, which was neither straightforward nor in line with the trend requiring simple notice pleading. The question is then what the Court tried to accomplish in *Twombly* and why it was necessary to delay the decision in *Erickson* to counteract any misconceptions about the notice pleading standard that the Justices believed *Twombly* would cause.

136. Howe, *supra* note 120.
137. Id.
138. Id.
139. See 127 S.Ct. 2197.
Despite the Twombly majority’s assertion that it was not creating a heightened pleading standard, the Twombly decision, as suggested by dissenting Justices Stevens and Ginsburg, did exactly that. It seems counterintuitive that a majority of the Supreme Court would decide a case like Twombly that could even appear to go against the notice pleading trend that had appeared so consistent from Conley through Swierkiewicz (where the Court specifically declined the opportunity to create a heightened pleading for employment discrimination claims). At the same time, the decision is not surprising if one compares the reasoning in Twombly with the resistance shown to the simple notice pleading trend in some of the lower federal courts.

Spurred by the “liberal ethos” of Dean Clark and the drafting committee for the Federal Rules, the first Supreme Court cases to adopt the general notice pleading trend, such as Conley, preferred to have a trial where facts came out through discovery rather than in the complaint itself. Resistance to this trend first arose not in the Supreme Court, but in the lower federal courts, with individuals such as Judge Posner and Judge Boudin addressing their concerns that the rising costs of federal litigation would make it impractical to wait for facts to come out in an increasingly expensive discovery phase, when instead the facts could be alleged at the pleadings stage.

The Twombly majority expressed similar concerns, for the first time at the Supreme Court level, stating that it was “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.” And the Twombly majority did not stop there, but further noted that it must require more than what the plaintiffs had alleged because it was only then that they could “hope to avoid the potentially enormous expense of discovery.”

The Twombly majority opinion thus presents a conflict within itself: the majority did not want to create a heightened pleading standard and yet the Court also wanted to require the plaintiffs to plead with greater particularity—at least in the Twombly antitrust litigation—in order to avoid the
rising costs of discovery. The majority was undoubtedly aware of the trend within Supreme Court precedent, which had established a simple notice pleading standard since the adoption of the Federal Rules, and so too must it have been aware that its decision in *Twombly* would counteract that trend. This awareness and the desire not to counteract such a pervasive trend explain the majority’s insistence that it was not establishing a heightened pleading standard in *Twombly*.

However, if the Court’s only ruling had been that it was not establishing a heightened pleading standard, then the plaintiffs’ complaint in *Twombly* would have been adequate under a simple notice pleading standard that would have required the case to proceed to discovery. Proceeding past the pleadings stage would then have counteracted the majority’s stated goal of avoiding expensive discovery in antitrust litigation. Therefore, the *Twombly* majority had to make a broader decision and hold that the plaintiffs’ complaint was inadequate even though the majority was supposedly not creating a heightened pleading standard. The majority was thus not only aware of the trend in lower federal courts to avoid expensive discovery at the expense of requiring heightened pleading, but also adopted that trend for itself.

Still, the Court did not want to radically alter the established trend of simple notice pleading, which could have happened if the *Twombly* decision were to stand on its own. Thus, the *Twombly* Court created a heightened pleading standard for the plaintiffs in that case, embracing the trend of the lower federal courts and explaining its concerns about the rising costs of discovery. However, rather than lighten the implications of this radical departure from the well-established simple notice pleading trend within *Twombly* itself, the Court did so with the *Erickson* decision.

*Twombly* then stands for the idea that a plaintiff in antitrust litigation must plead with a certain amount of particularity to proceed past the pleadings stage, so as to ensure that there is enough of a substantial claim to continue into the potentially expensive discovery phase. *Erickson*, decided two weeks after *Twombly*, ensures that the implications of the *Twombly* decision do not extend beyond the four corners of that opinion. *Erickson*, because its adherence to the simple notice pleading trend was so clear cut, limits the heightened pleading requirement to the specific plaintiffs in *Twombly*, or perhaps to plaintiffs in antitrust litigation under § 1 of the Sherman Act. In doing so, *Erickson* guarantees that the seemingly revolutionary *Twombly* decision does not rebuke the modern trend of simple notice pleading in which Rule 8(a)(2) does not require anything more than “a short and plain statement of the claim showing that the pleader is entitled to
CONCLUSION

The history of pleading in the United States changed from a fact pleading standard prior to the drafting of the Federal Rules in 1938 to a notice pleading standard after the drafting of the Rules. This trend continues through the present day, and was particularly visible at the Supreme Court level, beginning with the Court’s decision in Conley v. Gibson and continuing through the summer of 2007. However, at the same time, a resistance to this trend developed in some of the lower federal courts, which favored greater particularity in drafting complaints to ensure that the important facts would come out prior to discovery, hopefully acting as a countermeasure to the rising costs of civil litigation, particularly during the discovery phase.

The Twombly Court seemed to adopt the lower federal court’s resistance to the trend, creating confusion among academics as to whether the decision had created a heightened pleading standard for antitrust litigation or whether notice pleading had been abandoned all together in favor of the fact pleading standard used prior to the drafting of the Federal Rules. However, the Court’s straightforward the decision in Erickson two weeks after Twombly shows that Twombly was meant to stand on its own and dismiss the complaint of the specific plaintiffs in that case without departing from the simple notice pleading trend. Whether Twombly created a heightened pleading standard for other antitrust cases or for other types of cases involving particularly costly discovery is yet to be seen, but the Court’s clear-cut affirmation of a simple notice pleading standard in Erickson assures the legal world that Rule 8(a)(2) truly requires no more than “a short and plain statement of the claim showing that the pleader is entitled to relief.”

148. FED. R. CIV. P. 8(a)(2).
149. Id.