

***Twombly* and its Children**

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I. Introduction

Two recent US Supreme Court decisions, *Bell Atlantic Corp. v. Twombly*,² decided May 21, 2007, and *Ashcroft v. Iqbal*,³ decided May 18, 2009, strengthened the Court's interpretation of the pleading requirements in Rule 8(a)(2) for stating a claim in antitrust and other federal civil cases.

Rule 8(a)(2) requires a complaint to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." The Court's new standard for the showing required by this provision is more granular and more demanding than the preceding permissive and deferential "no set of facts" formulation of *Conley v. Gibson*, which the *Twombly* Court repudiated.

Plaintiffs now bear a greater obligation at the inception of their lawsuit to allege facts reasonably confirmable by discoverable evidence that are sufficient, if proven, to establish the grounds for the plaintiffs' claimed right to relief. This new pleading obligation, sometimes referred to as a "plausibility standard," requires the pleader to give at least some particulars about *how* the defendants are bound to the plaintiffs through the latter's entitlement to seek judicial relief.

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² 550 U.S. 544 (2007).

³ 556 U.S. ____, 129 S.Ct. 1937 (2009).

For the half-century immediately preceding *Twombly*, *Conley v. Gibson* stood as an important expression of notice pleading. The standard was permissive by design. Civil complaints had merely to allege facts consistent with an entitlement to relief. Gaps in certain particulars or unpleaded material information unknown to the plaintiff were presumed to emerge out of discovery, barring which the case would be disposed of on summary judgment. Provided that some set of facts could support the relief sought, including those residing solely within the imagination of the presiding judge, a complaint setting forth conclusory allegations that mentioned all the necessary elements of the claim was not subject to dismissal.

With the retirement of the “no set of facts” formulation, however, courts can require plaintiffs to provide at least one set of facts in a chain that connects a prohibited act by a defendant to a remediable injury suffered by a plaintiff. A complaint that alleges *some* basis for entitlement to relief no longer will suffice; a plaintiff must plead *the* basis for the entitlement. The Court refers to this as the “Rule 8 entitlement requirement.”

The Rule 8 entitlement requirement constitutes the first prong of the *Twombly* standard. It tests the sufficiency of the evidence alleged in the complaint. The necessary quantum and nature of the allegations depend on the circumstances. The substantive prong of the new standard is likely to be dispositive in difficult or complex cases, where judicial gap-filling has been most frequently relied upon.

The second prong of the new standard addresses the probative value of the facts being offered. With the “no set of facts” standard withdrawn, the courts are free to scrutinize the inferential weight of the facts alleged. “Conclusory” or “factually neutral” allegations standing alone are insufficient under the *Twombly* standard for the purposes of alleging grounds for entitlement.

The rest of the article proceeds as follows. Section II begins with the “substantive” prong of the *Twombly* standard, the Rule 8 entitlement requirement. This is followed by a discussion of the evidentiary prong and the categories of evidence identified by the Court. The section closes with precisely how the complaint in *Twombly* failed to satisfy the new pleading standard. It is apparent

almost immediately that the term “plausibility standard” is a counterintuitive term of art. Whatever its flaw, the complaint in *Twombly* did not lack “plausibility,” as that word is ordinarily understood.

Section III summarizes the Court’s further discussion of the standard in *Erickson v. Pardus*⁴ and *Ashcroft v. Iqbal*.⁵ Section IV visits with some of “*Twombly*’s children.” A selection of circuit court opinions are discussed in the first part of the section, followed by a review of some district court rulings that illustrate successful post-*Twombly* Section 1 cases alleging only circumstantial and economic evidence.

The discussion abstracts from whether *Twombly* represents sound judicial policy or ought to be repealed by legislative enactment, as currently being proposed. The Supreme Court’s penchant for formulaic reasoning and cost-benefit analysis, its recalibration of pleading standards in a fashion that disproportionately burdens claimants and favors defendants, and the Court’s apparent disdain for the capacity of the federal judiciary to manage discovery and its own dockets and to control abuse of the system by litigants all may be regrettable developments, but, short of an act of Congress (or the Supreme Court overturning itself), the *Twombly* standard will remain a fixture of federal practice for the foreseeable future.

II. Deconstructing *Twombly*

The Court in *Twombly* decisively repudiated “the accepted rule [of the Court’s 1957 decision in *Conley v. Gibson*] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁶ Its mission was to “address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct,”⁷ and take a “fresh look at

⁴ 551 U.S. 89, 127 S.Ct. 2197 (2007).

⁵ 556 U.S. ____, 129 S.Ct. 1937 (2009).

⁶ *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

⁷ 550 U.S. at 553.

[the] adequacy of pleading when a claim rests on parallel conduct.”⁸ In *Ashcroft v. Iqbal*,⁹ the Court confirmed that *Twombly*, as an “interpretation and application of Rule 8,” “expounded the pleading standard for ‘all civil actions.’”¹⁰

The *Conley* standard delegated the responsibility to the presiding court to bring its experience and sound judgment to bear on whether the allegations of a complaint provided the defendant with sufficient notice of the claim against him. By contrast, the standard articulated by the *Twombly* Court is far less forgiving. *Twombly*’s repudiation of the largely discretionary, and, by construction, standard-less regime of *Conley* has both substantive and evidentiary implications.

Substantively, the new standard requires that the facts adequately show entitlement to seek relief. Procedurally, the new standard ranks certain *kinds* of facts according to the probative value of the evidence they describe.

A. The Substantive Prong: The Rule 8 Entitlement Requirement

The *Twombly* Court held that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief,’ [under Rule 8] requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.”¹¹ Under the Rule 8 entitlement requirement a complaint requires “[f]actual

⁸ *Id.* at 561, n. 7.

⁹ 556 U.S. ____, 129 S.Ct. 1937 (2009). The Court had already expanded the *Twombly* analysis to Section 2 of the Sherman Act, *see* *Pacific Bell Telephone Co. v. LinkLine Comm’ns, Inc.*, 556 U.S.--, 129 S.Ct. 1109, 1123 (2009) (“[i]t is for the District Court on remand to consider whether the amended complaint states a claim [for predatory pricing] upon which relief may be granted in light of the new pleading standard we articulated in *Twombly*”).

¹⁰ 129 S.Ct. at 1953 quoting Rule 1.

¹¹ 550 U.S. at 555 (citation omitted, alteration in original).

allegations ... enough to raise a right to relief above the speculative level,”¹² and “‘something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.’”¹³ The “threshold requirement [is] that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”¹⁴ Excluding a “recitation of a cause of action’s elements,” what other factual material is needed to show entitlement?

The nature of the allegations called for is suggested by the reasoning in *Dura Pharmaceuticals, Inc. v. Broudo*,¹⁵ which the Court cited as “alluding to” the Rule 8 entitlement requirement. *Dura* was a securities fraud case in which the plaintiffs alleged they were injured when they paid an inflated price for the issuer’s shares compared to what the price would have been in the absence of the issuer’s misrepresentations. The Supreme Court held that the purchase of shares whose price fluctuated for a variety of reasons did not state a cause of injury.

Other than the elements of the cause of action, the nature of the factual matter that may be needed is suggested by Justice Stevens, writing for the dissent in *Twombly*, explaining why dismissing the complaint in *Dura* was correct:

Because it alleged nothing more than that the prices of the securities the plaintiffs purchased were artificially inflated, the *Dura* complaint failed to ‘provide the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the [alleged] misrepresentation.’¹⁶

¹² 550 U.S. at 555.

¹³ *Id.*

¹⁴ *Id.* at 557 (citation omitted, second alteration in original).

¹⁵ 544 U.S. 336 (2005).

¹⁶ *Twombly*, 550 U.S. at 588 (Stevens, J., dissenting).

As the *Twombly* majority put it, “something beyond the mere possibility of loss causation must be alleged.”¹⁷ So, the complaint was not dismissed because it failed to allege the essential element that the plaintiffs’ loss was caused by the fraud, but because it failed to allege *how* the plaintiffs’ loss was caused by the fraud.

The Court’s description of *Dura* as the source of “the practical significance of the Rule 8 entitlement requirement” suggests that showing an entitlement to relief requires a plaintiff to plead the factual thread that ties a defendant’s bad act to the plaintiff’s remediable loss. The required facts are not the elements of the claim, but the supporting material between them. If the elements are akin to the bricks from which a claim is built, the facts called for by the *Twombly* standard are the mortar that holds them in place.

Conceiving of the required allegations as the factual thread of loss causation resolves the apparent contradiction between the generality of Form 9, a sample complaint for automobile negligence, on the one hand, and the *Twombly* Court’s standards for the antitrust conspiracy claim before it on the other. The *Twombly* dissenters argued that Form 9 provided a sufficient showing in the case of an automobile crash, and suggested that nothing more specific should be required in an antitrust case.

The difference between the two cases lies in the common understanding of automobile accidents. A defendant is hard pressed to demand that the details of precisely *how* his negligence caused harm to the plaintiff be pleaded in the complaint on the grounds that he otherwise would lack notice of the plaintiff’s entitlement to seek relief. The link between negligent driving and injuries to person or property is common knowledge, so there would be little point in an automobile negligence complaint to require detailed allegations about the plaintiff’s injuries and precisely how they occurred. The words “collided with” or “struck” are suggestive enough by themselves to give the defendant ample notice of the grounds of the plaintiff’s entitlement to sue.

¹⁷ *Id.* at 557-58.

By contrast, a claim based on an antitrust conspiracy depends on a complex set of facts removed from common experience. A plaintiff's entitlement to seek relief depends on the particular facts of the case, and the grounds may be far from evident where only generalities or conclusions are alleged. Thus, the substantive prong of the *Twombly* standard is flexible, because it demands additional facts only where some enhanced showing is necessary, *i.e.*, where the chain of loss causation does not find adequate expression in the pleading, so that the defendant can claim a legitimate lack of notice of the grounds for the plaintiff's entitlement to seek relief.

B. The Evidentiary Prong of the *Twombly* Standard

The *Twombly* standard also requires that the grounds for relief be alleged through facts that possess minimal inferential qualities. The *Conley* "no set of facts" language was tolerant of allegations of evidence with little or no inferential value. The *Twombly* Court's differentiation in its new standard between conclusions and indeterminate evidence on the one hand and ordinary direct and circumstantial evidence on the other is inconsistent with the long-standing rule in *Conley*. To make way for the new standard, therefore, the Court declared that the "no set of facts" language "ha[d] earned its retirement."¹⁸ The Court observed that the language "ha[d] been questioned, criticized, and explained away long enough," and "[wa]s best forgotten as an incomplete, negative gloss on an accepted pleading standard"¹⁹

The obligation to show the specific grounds of the plaintiff's entitlement to relief (calling in some cases for additional factual material to be pleaded) must be met through allegations of fact that are suggestive and discoverable. Suggestive allegations cross the "boundary ... between the factually neutral and the

¹⁸ *Id.*

¹⁹ 550 U.S. at 563.

factually suggestive ...” to enter “the realm of plausible liability.”²⁰ Entitlement must be alleged with “enough facts to state a claim to relief that is plausible on its face.”²¹ And the discoverability component, which concerns the prospect of a plaintiff “with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence,”²² hinges entitlement to relief on a “reasonable expectation that discovery will reveal relevant evidence.”²³

The Court likened the claim in *Twombly* to a claim alleging parallel pricing, which by itself neither proves an unlawful Section 1 agreement²⁴ nor is sufficient to overcome a defendant’s motion for summary judgment.²⁵ It is settled precedent that to survive a

²⁰ 550 U.S. at 557 n. 5. The word “plausible” appears fifteen times in the opinion as a noun, adverb, and adjective, excluding quoted instances.

²¹ *Id.* at 570.

²² 550 U.S. at 559, citing *Dura*, 544 U.S. at 347 (quoting *Blue Chip Stamps v Manor Drug Stores*, 421 U.S. 723, 741 (1975)) (alteration in *Dura*).

²³ *Id.* at 556.

²⁴ *Theatre Enterprises, Inc. v. Paramount Film Dist. Corp.*, 346 U.S. 537, 540 (1954) (“To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement ...[but the Court] ... has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense”), citing *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), *United States v. Masonite Corp.* 316 U.S. 265 (1942), *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944), *American Tobacco Co. v. United States*, 328 U.S. 781, and *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

²⁵ *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (“conduct as consistent with permissible

defense motion for summary judgment in a parallel pricing case (and, perforce, to make out a *prima facie* case at trial), the plaintiff must present additional evidence beyond mere parallel conduct. The additional evidence creates a factual issue on the issue of agreement where it tends to contradict tacit, lawful oligopoly conduct. In the parlance of summary proceedings, ambiguous evidence of parallel conduct must be accompanied by “plus factors,” evidence “‘that tends to exclude the possibility’ that the alleged conspirators acted independently.”²⁶

The Court did not look to the plus factor paradigm to address what it framed as the antecedent issue of whether the pleaded allegations of parallel conduct in *Twombly* were sufficient to state a Section 1 claim. Instead, in a now familiar pattern, the Court first modified the interpretation of Rule 8 and then applied the modified standard to the complaint before it. The plus factor paradigm, in any case, would have been inadequate for the Court’s purposes of articulating the new pleading standards. The plus factor approach treats all evidentiary factors more or less equally.²⁷ The Court’s *Twombly* analysis, by contrast, distinguishes between four categories of evidence of agreement: i) direct evidence of the agreement itself, ii) unambiguous circumstantial evidence of an agreement, iii) ambiguous evidence of an agreement, and, iv) “labels and conclusions” and formulaic recitations of the elements of a claim.

competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy”).

²⁶ *Id.* quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

²⁷ See William E. Kovacic, “The identification and proof of horizontal agreements under the antitrust laws,” 38 *Antitrust Bull.* 5, 35 (Spring, 1993) (“...[C]ourts rarely attempt to rank plus factors according to their probative value or to specify the minimum critical mass of plus factors that must be established to sustain an inference that the observed market behavior resulted from concerted conduct rather than from ‘consciously parallel’ choices.”).

With respect to allegations of conspiracy under Section 1, the *Twombly* standard requires plausible direct evidence of agreement, circumstantial evidence “plausibly suggesting” agreement,²⁸ or parallel conduct “placed in a context that raises a suggestion of a preceding agreement.”²⁹ “A blanket assertion of entitlement to relief” and “labels and conclusions” are not entitled to credit as well-pleaded facts. This flexible standard is summarized in the following table:

Nature of the Allegation	Type of Inference Required	Applicable Standard
1. Direct evidence of agreement	No inference	Plausible
2. Communications and other unambiguous circumstantial evidence of agreement	Ordinary inference from circumstantial evidence	Plausibly suggestive
3. Parallel conduct and other ambiguous circumstantial evidence of agreement	Inference from economic data or market behavior	Plausibly suggestive when placed in context
4. Labels and conclusions	No inference warranted	Not creditable

²⁸ 550 U.S. at 557.

²⁹ *Id.*

The most frequent forms of category 1, or direct evidence of agreement in private Section 1 claims are guilty pleas in criminal prosecutions and the admissions recited in deferred prosecution agreements.

Category 2, unambiguous circumstantial evidence, is indirect evidence, such as evidence of secret communications or clandestine meetings of the conspirators or of documents that appear to further a common scheme or purpose, which is probative of agreement and also tends to exclude the hypothesis of non-cooperation, justifying an inference of agreement.

By contrast, category 3 evidence of parallel conduct or other economic data may be ambiguous on the issue of agreement, that is, as consistent with agreement as it is with oligopolistic interdependence.³⁰

In singling out this category 3 evidence for special treatment, the *Twombly* decision serves as the vehicle for the incorporation into antitrust of the principle that economic evidence of this kind often requires interpretation and factual context to show that it rejects the hypothesis of Nash non-cooperative equilibrium before an inference of agreement is justified. Standing apart from a sufficiently suggestive context, such evidence is what the *Twombly* court labeled “factually neutral” on the issue of agreement. The flexible plausibility standard, therefore, accommodates the practical distinction between allegations of non-economic, circumstantial evidence of agreement and economic evidence of a market outcome probative of agreement only if inconsistent with non-cooperation. Finally, allegations that are conclusions and labels, in category 4, do not adequately show grounds for entitlement to relief.

The Court in footnote 4 of *Twombly* cited three factual scenarios that might provide plausibly suggestive context for a

³⁰ See *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 655 (2002) (“The evidence upon which a plaintiff will rely will usually be ... of two types—economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete.”)

claim based on parallel conduct. The first is “parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.”³¹ The second is “conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement.”³² Finally, “complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason”³³ would also provide a suitable context. These allegations supporting a plausible inference of conspiracy are likely to supplant plus factors as the focus of Section 1 claims based on circumstantial evidence for the simple reason that what must be alleged also must be proven.

To summarize, the evidentiary prong of *Twombly* Court’s more granular pleading standard governs the character of the evidence being described as grounds for entitlement for relief. For complaints alleging direct and unambiguous circumstantial evidence of facts that possess a reasonable hope of being discovered, the existing pleading standard remains largely unaffected. But, in complaints describing ambiguous circumstantial evidence and stating conclusory assertions of liability, that is, evidence in categories 3 and 4, grounds for entitlement to relief are not necessarily sufficiently stated absent a further analysis consistent with an approach that requires category 3 evidence to be pleaded in a suggestive factual context before it may be given inferential weight and that gives no weight to conclusions or labels.

³¹ 550 U.S. at 557, n. 4 quoting 6 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1425, at 167-185 (2d ed.2003).

³² *Id.* quoting Blechman, “Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws,” 24 N.Y.L. S. L.Rev. 881, 899 (1979).

³³ *Id.* quoting Brief for Respondent (*Twombly*) at 37.

C. The Dismissal in *Twombly*

In *Twombly*, the allegations in the plaintiffs' amended complaint did not adequately establish plaintiff's entitlement to relief. The Court held that an allegation of parallel conduct in a Section 1 case, without more, does not suffice to state a claim. "[S]uch a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made."³⁴

The plaintiff in *Twombly* was a putative class consisting of the customers of the regional Bell telephone monopolies. The plaintiffs alleged that the phone companies had agreed among themselves to refrain from expanding into one another's service regions after passage of the Telecommunications Act of 1996. As a result of the alleged agreement, the companies could maintain an anticompetitive market allocation and exclude potentially competitive, third-party entrants. Proof of these facts would in all likelihood establish a *per se* violation of Section 1. Moreover, such a conspiracy among the nation's incumbent telephone monopolists seems hardly implausible.

The collusive agreement was expressly, if generally, alleged, as was the defendants' non-rivalrous marketplace conduct. The plaintiff also averred that the defendants' marketplace conduct would have been against their individual economic self-interests were they not, in fact, engaged in a collusive arrangement.

But, the amended complaint in *Twombly* was ideal for illustrating the principle that oligopolistic interdependence does not support an inference of agreement. Both before the 1996 deregulatory telecommunications legislation and afterward, the regional telephone companies each occupied in their own regions optimal, jointly profit-maximizing monopoly positions from which none of the companies would have had an economic incentive to deviate, and for the maintenance of which no prohibited agreement would have been necessary. To allege that the defendants had acted against their own self-interest after passage of the Act in circumstances in which it appeared that the defendants had simply chosen to continue in a position upon which it was difficult or

³⁴ *Id.* at 556.

impossible to improve did not supply sufficient grounds to infer that the defendants had entered into an unlawful agreement.

The *Twombly* Court viewed the plaintiffs' allegations that the defendants engaged in a "contract, combination or conspiracy" and "agreed not to compete with one another" were merely legal conclusions resting on the prior allegations.³⁵ "The nub of the complaint," the Court observed, "is the [defendants'] parallel behavior."³⁶ But, applying the standard for category 3 to those allegations, the Court concluded that the complaint had not "nudged [the] claims across the line from conceivable to plausible." This was so even though the plaintiffs had alleged a widely recognized plus factor, that the defendants' conduct was contrary to their economic self-interests. Had the alleged plus factor been instead category 2 circumstantial evidence of agreement, plausible grounds for relief would certainly have been stated. But, plaintiffs apparently knew of no category 2 evidence. The Court's implicit conclusion was that the complaint did not allege facts that were inconsistent with a Nash non-cooperative equilibrium in the US telephone market, including the alleged plus factor. Indeed, the defendants' *ex ante* occupancy of allocated monopolies fails to suggest that refraining from competition was necessarily against their individual economic self interests. Under the circumstances, the Court deemed plaintiffs' assertion in this regard as conclusory and not entitled to the presumption of truth, placing it in category 4.

III. *Erickson and Iqbal*

A. *Erickson v. Pardus*

The Court used *Erickson v. Pardus*,³⁷ decided two weeks after *Twombly*, to reaffirm the undisturbed portion of *Conley* and its continued fidelity to the concept of notice pleading where ordinary language conveys the entitlement to seek relief. The case involved a suit by a prisoner seeking to have prison officials reinstate

³⁵ 550 U.S. at 565.

³⁶ *Id.* at 566.

³⁷ 551 U.S. 89, 127 S.Ct. 2197 (2007).

necessary medical treatment that the prisoner claimed had been discontinued in violation of his Eighth Amendment rights. A magistrate judge recommended that the complaint be dismissed, deeming the allegations too “conclusory” to state a claim for relief, and the district judge adopted the recommendation. The Tenth Circuit Court of Appeals affirmed.

The Supreme Court reversed. “It was error,” the Court said, “for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered ‘a cognizable independent harm’ as a result of his removal from the hepatitis C treatment program.”³⁸ In the final analysis, the district court may be proven to have been correct to dismiss the complaint, the Court observed, but “that is not the issue here.” Treating the facts alleged as true, the prisoner’s entitlement to relief was clear from the face of his complaint: he would be injured by the unconstitutional denial of necessary medical care. The claimant’s theory of loss causation is obvious. Consequently, the pleaded facts showed the grounds claimed for his entitlement to relief, which is all that Rule 8(a) requires.

Quoting from its *Twombly* decision, which in turn quoted from *Conley*, the Court’s *per curiam* order reiterated that a pleading need only “... give the defendant fair notice of what ... the claim is and the grounds upon which it rests.” As with the example of the automobile accident, the holding in *Erikson* rests on the clear notice of loss causation expressed by allegations that necessary medical attention was withheld, which in ordinary and common experience is likely to cause injury. The Court’s citation to the part of the *Conley* standard that survived the repudiation of the neighboring “no set of facts” formulation is also a strong declaration of fidelity to traditional notions of notice pleading where the entitlement to seek relief is clear from the face of the complaint.

³⁸ *Id.* at 2200.

B. *Ashcroft v. Iqbal*

In *Ashcroft v. Iqbal*, in which the plaintiff's entitlement was somewhat less clear, the Court offered the following guidance for implementing the *Twombly* standard:

Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. ... [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.³⁹

Iqbal involved a civil claim against US government officials for prisoner abuse and discrimination which alleged that the Attorney General and FBI Director personally “knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff]’ to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.”⁴⁰ The Court held that “[u]nder *Twombly*’s construction of Rule 8,” these allegations “are conclusory and not entitled to be assumed true.”⁴¹ As to the remaining allegations describing the conduct of the officials inflicting the discrimination, while arguably consistent with an intent of the two named defendants to discriminate, the Court concluded that the plaintiff needed “to allege more by way of

³⁹ 129 S.Ct. 1950.

⁴⁰ 129 S.Ct. at 1951.

⁴¹ *Id.*

factual content to ‘nudg[e]’ his claim of purposeful discrimination ‘across the line from conceivable to plausible.’⁴²

Under *Iqbal*, courts ruling on Rule 12(b)(6) motions to dismiss claims based on circumstantial grounds for relief should identify conclusory allegations and then test whether the remaining allegations describe sufficiently suggestive facts to state grounds for relief. Facts that are equally as consistent with an entitlement to relief as not, such as parallel conduct, state grounds for relief only if pleaded in a sufficiently suggestive factual context.

IV. *Twombly*’s Children

Twombly and *Iqbal* have already been cited in thousands of reported cases, including opinions of the various Circuit Courts of Appeal reviewing the new standard as applied by trial courts.⁴³ A discussion of some of these circuit court opinions appears next, followed by a discussion of some significant district court rulings.

⁴² *Id.* at 1952 quoting *Twombly*, 550 U.S. at 570 (alteration in original).

⁴³ *See, e.g., In re New Motor Vehicles Canadian Export Antitrust Litigation*, 533 F.3d 1 (1st Cir. 2008); *In re Elevator Antitrust Litigation*, 502 F.3d 47 (2nd Cir. 2007); *Phillips v. County of Allegheny*, 515 F.3d 224 (3rd Cir. 2008); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield*, 552 F.3d 430 (6th Cir. 2008); *Nicsand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2007); *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*, 499 F.3d 663 (7th Cir. 2007); *In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation*, 491 F.3d 638 (7th Cir. 2007); *Sheridan v. Marathon Petroleum Co. LLC*, 530 F.3d 590 (7th Cir. 2008); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008); *Rick-Mik Enterprises, Inc. v Equilon Enterprises, LLC*, 532 F.3d 963 (9th Cir. 2008); *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174 (10th Cir. 2007); *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210 (10th Cir. 2007); and *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007).

A. Some Circuit Court Opinions

In an early test of the new standard, the Second Circuit in *In re Elevator Antitrust Litigation*⁴⁴ affirmed dismissal of an antitrust conspiracy and monopolization case brought in the Southern District of New York against the world's leading elevator manufacturers. The plaintiff's suit followed investigations by the European Commission and the Italian Antitrust Authority, and reports of admitted wrongdoing by some of the defendants' European employees. Moreover, subsequent to the complaint, the Commission levied substantial fines against the defendants for various antitrust violations.

In affirming dismissal of the claim, the Second Circuit held,

Plaintiffs provide an insufficient factual basis for their assertions of a worldwide conspiracy affecting a global market for elevators and maintenance services. Allegations of anticompetitive wrongdoing in Europe—absent any evidence of linkage between such foreign conduct and conduct here—is merely to suggest (in defendants' words) that “if it happened there, it could have happened here.”⁴⁵

The court also noted the absence of allegations of “global marketing or fungible products,” and “no indication that participants monitored prices in other markets,” or “allegations of the actual pricing of elevators or maintenance services in the United States or changes therein attributable to defendants' alleged misconduct.”⁴⁶ Quoting *Twombly*, the panel concluded that “[w]ithout an adequate allegation of facts linking transactions in Europe to transactions and effects here, plaintiffs' conclusory

⁴⁴ 502 F.3d 47 (2nd Cir. 2007).

⁴⁵ 502 F.3d at 52.

⁴⁶ *Id.*

allegations do not ‘nudge[their] claims across the line from conceivable to plausible.’”⁴⁷

With respect to the “similarities in contractual language, pricing, and equipment design,” and other parallel conduct that the plaintiff alleged, the court held that under *Twombly*

these allegations do not constitute “plausible grounds to infer an agreement” because, while that conduct is “consistent with conspiracy, [it is] just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”⁴⁸

In *Phillips v. County of Allegheny*,⁴⁹ the Third Circuit asked the parties at oral argument to brief the court on the impact of the *Twombly* decision generally and on their appeal of the dismissal of a wrongful death suit against a 911 call center and its employees. In its opinion, the court recognized that “‘Plausibility’ is related to the requirement of a Rule 8 ‘showing.’”⁵⁰

The Supreme Court’s *Twombly* formulation of the pleading standard can be summed up thus: “stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest” the required element. This “does not impose a probability requirement at the pleading stage,” but instead “simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of” the necessary element.⁵¹

The court concluded that Rule 8 mandates “some showing sufficient to justify moving the case beyond the pleading to the

⁴⁷ *Id.* (internal citations omitted) (Second alteration in original).

⁴⁸ *Id.* quoting *Twombly*, 127 S.Ct. at 1964.

⁴⁹ 515 F.3d 224 (3rd Cir. 2008).

⁵⁰ *Id.* at 234.

⁵¹ *Id.* (internal citations omitted).

next stage of litigation,” and held that the complaint in the case before it “clearly satisfies this pleading standard, making a sufficient showing of enough factual matter (taken as true) to suggest the required elements of [the plaintiff’s] claims.” “Context matters in notice pleading,” the court observed, managing to absorb the essential *Twombly* standard yet deciding in favor of the plaintiff.

Both of these cases, although reaching different conclusions, are well-behaved children of *Twombly*. Both cases hew closely to the Court’s language, both properly emphasize the Rule 8 entitlement requirement and both seem to understand the aim of the new standard of showing entitlement though the factual connections between defendant and plaintiff.

These cases stand in contrast to at least two opinions from the Sixth Circuit, which appears to wield the *Twombly* standard somewhat recklessly. In *Total Benefits Planning Agency, Inc., v. Anthem Blue Cross and Blue Shield*,⁵² the court listed ten prior occasions in which it applied what it called the “heightened pleading standard of *Twombly*.” The Supreme Court, of course, foreswore any heightened pleading standard, observing that such a modification would require formally amending the Civil Rules, which is beyond the Court’s authority. In affirming dismissal of the rule of reason claim in *Total Benefits*, the court stated that “[g]eneric pleading, alleging misconduct against defendants without specifics as to the role each played in the alleged conspiracy, was specifically rejected by *Twombly*.”

This flawed conception of the *Twombly* standard apparently led the Sixth Circuit to condemn the *Total Benefits* plaintiffs, because they

only offer bare allegations without any reference to the “who, what, where, when, how or why.” Similarly, the vague allegations in the instant case “do not supply facts adequate to show illegality” as required by *Twombly*.

⁵² 552 F.3d 430 (6th Cir. 2008).

This view of *Twombly* is mistaken because it implies that the *only* route to pleading a conspiracy is to know what plaintiffs rarely know, that is, “who, what, where, when and how” (most plaintiffs know the “why”). Although the court recognized that an antitrust plaintiff in a conspiracy case must “provide factual allegations plausibly suggesting, not merely consistent with, such a claim,” the court’s disposition of the case establishes a rule that other routes to adequate pleading, such as economic evidence, pleaded in a suggestive context probative of agreement, would still fail to satisfy a demand for the “who, what, where, when and how,” even though such contextual pleading clearly is contemplated as sufficient by the *Twombly* Court.

In another Sixth Circuit antitrust case, *Nicsand, Inc. v. 3M Co.*,⁵³ the court seemed to overwork the *Twombly* standard to affirm dismissal of an antitrust case based not on any lack of factual allegations, but because the court appeared to be hostile to the antitrust theory being advanced. Nicsand and 3M shared the market for do-it-yourself automotive sandpaper for several years. Starting in 1997, however, Nicsand began to lose most of its market to 3M, which had begun to offer up-front rebates and multi-year discounts to the principal auto parts retail outlets. The court stated that “a ‘naked assertion’ of antitrust injury, the Supreme Court has made clear, is not enough; an antitrust claimant must put forth factual ‘allegations plausibly suggesting (not merely consistent with)’ antitrust injury.”⁵⁴

The difficulty with the court’s holding that the plaintiff’s allegations offered merely “naked assertions” of antitrust injury is that the factual thread of loss causation was described in detail in the complaint, and painstakingly recounted in the dissent, which remarked that “[i]t simply cannot be that a business must know everything about its competitors before bringing suit in an antitrust case. After all, a business that knows everything about its competitors is likely to dominate them, rather than fall prey to them, as NicSand did here.”⁵⁵

⁵³ 507 F.3d 442 (6th Cir. 2007).

⁵⁴ 504 F.3d at 451.

⁵⁵ *Id.* at 463.

A similar transgression was committed in *Kendall v. Visa U.S.A.*,⁵⁶ in which the Ninth Circuit inexplicably remarked that *Twombly* “specifically abrogated the usual ‘notice pleading’ rule,....” for purposes of pleading antitrust cases.⁵⁷ The *Kendall* panel further stated that the *Twombly* Court

also suggested that to allege an agreement between antitrust co-conspirators, the complaint must allege facts such as a “specific time, place, or person involved in the alleged conspiracies” to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin.”⁵⁸

This statement of the *Twombly* standard suffers from the same flaw as the Sixth Circuit’s preference for “who, what, where, when and how.” More specific pleading of direct evidence and detailed circumstantial evidence is but one route to allegations that are suggestive enough to plead a conspiracy under the new standard. As the district court rulings discussed below demonstrate, circumstantial economic evidence of parallel conduct, provided it is pleaded in a sufficiently suggestive context, can satisfy the standard without any allegation of a “specific time place or person” or “who, what, where, when and how.”

The result in *Kendall* may nevertheless have been correct in spite of its clumsy application of the *Twombly* standard. The plaintiffs alleged a price fixing conspiracy among certain large banks and credit card consortiums, but, even after depositions, the were unable to plead any of the particulars about the agreement. The court probably was justified at that stage in expecting some factual allegation beyond parallel pricing as the alleged proof of agreement. But the proper grounds for dismissal under *Twombly* was not the absence of direct evidence of agreement—which every court would like but no conspiracy plaintiff possesses—but the absence of allegations suggestive enough of agreement.

⁵⁶ 518 F.3d 1042 (9th Cir. 2008).

⁵⁷ 518 F.3d at 1047 n. 5.

⁵⁸ 518 F.3d at 1047.

Some dicta in two circuit court opinions also deserve mention. In *Ridge at Red Hawk, LLC v. Schneider*,⁵⁹ the Tenth Circuit reflected on the *Twombly* standard in anticipation of issues it thought the district court might face on remand. The court said

the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.⁶⁰

Finally, in *Airborne Beepers & Video, Inc. v. AT&T Mobility LLC*,⁶¹ Judge Wood for a panel of the Seventh Circuit wrote,

Taking *Erickson* and *Twombly* together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.

B. District Court Rulings on Parallel Pricing

In most cases, contextual pleading will be the only viable method for pleading a Section 1 conspiracy under the *Twombly* standard. Numerous post-*Twombly* district court rulings on motions to dismiss bear out the viability of conspiracy claims based on circumstantial economic evidence when they are pleaded in a sufficiently suggestive context. In the period immediately following the *Twombly* decision, at least thirteen Section 1 claims based on parallel conduct were permitted to proceed to discovery in federal court.⁶²

⁵⁹ 493 F.3d 1174 (10th Cir. 2007).

⁶⁰ *Id.* at 1177.

⁶¹ 499 F.3d 663 (7th Cir. 2007).

⁶² See *In re: Chocolate Confectionary Antitrust Litigation*, 2009 WL 560601 (M.D.Pa.); *Home Quarters Real Estate Group v.*

These cases vary by the degree to which contextual allegations are important, but they all fail to allege any direct evidence of agreement, or even much about the “who, what, where or when” of the alleged agreement, beyond perhaps the approximate year or month and opportune locations for the parties to interact.

For example, in *City of Moundridge v. Exxon Mobil Corp.*,⁶³ eighteen municipalities sued ExxonMobil, BP America and ConocoPhillips for agreeing to raise prices in the U.S. natural gas market where no natural gas shortage existed. A motion to dismiss was denied. The defendants moved to reconsider in light of *Twombly*, arguing that “the complaint does not provide factual allegations to suggest an actual agreement among the defendants.”⁶⁴

In explaining why the motion should be denied, Judge Roberts observed that the plaintiffs did not “rely on only bare allegations of parallel behavior, or assume that there is a conspiracy because there is an ‘absence of any meaningful competition,’” as in *Twombly*. The court found that

[t]he complaint alleges facts providing circumstantial evidence of a price fixing agreement.

Michigan Data Exchange, 2009 WL 276796 (E.D. Mich.); U.S. Information Systems, Inc. v. International Brotherhood of Electrical Workers Local Union Number 3, AFL-CIO, ADCO, 2008 WL 409143 (S.D.N.Y.); Babyage.Com, Inc. v. Toys-R-Us, 558 F.Supp.2d 575 (E.D. Pa. 2008); In re: Pressure Sensitive Labelstock Antitrust Litigation, 566 F.Supp.2d 363 (M.D. Pa. 2008); Heartland Payment Systems, Inc. v. Micros Systems, Inc., 2008 WL 4510260 (D.N.J.); In re: Southeastern Milk Antitrust Litigation, 555 F.Supp.2d 934 (E.D.Tenn. 2008); Fox v. Piche, 2008 WL 4334696 (N.D.Cal.); In re: Western States Wholesale Natural Gas Antitrust Litigation, 2008 WL 486607 (D.Nev.); In re: OSB Antitrust Litigation, 2007 WL 2253419 (E.D.Pa.); Hyland v. Homeservices of America, Inc., 2007 WL 2407233 (W.D.Ky.).

⁶³ 250 F.R.D. 1 (D.D.C., 2008).

⁶⁴ *Id.* at 4.

It alleges that the natural gas total resource base had not decreased, that the prices had risen and never fallen below an agreed-upon price, that the defendant had reported high profits, and that Hurricanes Katrina and Rita should not have affected the market as the defendants claimed and they were only a pretextual reason to justify withholding market supply to create an artificial shortage. It also identifies the years and location where the agreement was reached and the defendants who participated.⁶⁵

Citing *Iqbal*, the court noted that *Twombly* had implemented a “flexible ‘plausibility standard’” and noted that “[e]conomic interests and motivations can be relevant to evaluate plausibility, and price increases can be the result of an independent business decision. But, a complaint need not be dismissed where it does not ‘exclude the possibility of independent business action.’”⁶⁶ Pointing out that “*Twombly* requires allegations to be ‘placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action,’”⁶⁷ the court concluded that

[t]he plaintiffs provided some circumstantial facts, including historical supply and consumption levels, market prices, profit levels, and the use of the industry reports, to support an inference that the defendants engaged in not merely parallel conduct, but rather agreed to contribute false information regarding gas supply levels to industry reports, withhold supply, and engage in price-fixing.⁶⁸

“[W]hile the claim may rest ultimately on a thin factual reed,” the court said, “the plaintiffs have alleged supporting circumstantial facts and placed their claims ‘in a context that raises a suggestion

⁶⁵ *Id.* at 4 (citations omitted).

⁶⁶ *Id.* at 5 (citation omitted).

⁶⁷ *Id.* (citing *Swierkiewicz* and *Erickson*).

⁶⁸ *Id.*

of a preceding agreement,’ ‘nudg[ing] their claims across the line from conceivable to plausible[.]’⁶⁹

A similar result was reached by Judge Friedman in *In re: Rail Freight Fuel Surcharge Antitrust Litigation*,⁷⁰ involving eighteen class actions against the four major U.S. railroads comprising ninety percent of the rail freight market. About eighty percent of all rail shipments are made under private transportation contracts. The plaintiffs alleged that the defendants “determined that the most efficient means to increase their profits was through the imposition of an across-the-board artificially high and uniform fuel surcharge, rather than attempt to renegotiate all of these separate contracts.”⁷¹

The “barrier to this plan, according to plaintiffs, was that the great majority of rail freight transportation contracts already included rate escalation provisions that weighted a variety of cost factors, including fuel...”⁷² The plaintiffs alleged a conspiracy among the defendants to remove fuel from the “All Inclusive Index” published by the Association of American Railroads “so that they could apply a separate ‘fuel surcharge’ as a percentage of the total cost of freight transportation.”⁷³ The complaint also alleged that “top executives from each of the defendants met regularly at restaurants and various recreational and conference facilities in the spring of 2003,” that in July 2003 the two western railroads “began charging identical fuel surcharges,” a “parallel and complex pricing decision ... based on an agreement among the defendants,” and that in December 2003 the two eastern railroads announced that they would apply identical fuel surcharges⁷⁴ Moreover, “the defendants each applied their fuel surcharges in the

⁶⁹ *Id.* quoting *Twombly* (alteration in original).

⁷⁰ 587 F.Supp.2d 27 (D.D.C., 2008).

⁷¹ *Rail Freight Fuel Surcharge*, 587 F.Supp.2d at 30.

⁷² *Id.*

⁷³ *Id.* quoting Complaint at ¶ 5.

⁷⁴ *Id.* (citations omitted).

same way—as a percentage multiplier of the total base rate for rail freight transportation.”⁷⁵

The railroads argued that the complaint did “not plead facts plausibly suggesting that they reached any agreement on fuel surcharges, and that it shows instead only price matching and follow-the-leader pricing—neither of which violates antitrust laws.”⁷⁶ The court rejected the challenge, declaring that the plaintiffs had “alleged substantially more” than the claim in *Twombly*, by supporting “their theory of conspiracy with sufficient factual details to bring their allegations beyond the realm of bare legal conclusions,”⁷⁷ and providing “robust factual details in their complaint ... from which the Court can infer that it is plausible that an actual agreement existed.”⁷⁸

In particular, the court noted the plaintiffs’ allegation that because cost and fuel efficiency differed widely among the defendant railroads, “it is unlikely that the eastern and western defendants would independently impose identical fuel surcharges.”⁷⁹ The plaintiffs had also alleged that the revised “All Inclusive Index Less Fuel” represented a “break from the past” and “an entirely new practice.” “Taken together,” the court concluded, “these allegations make plaintiffs’ allegations that defendants entered into an agreement plausible.”⁸⁰

In *In re: OSB Antitrust Litigation*,⁸¹ the court noted that, “[a]s *Twombly* requires, Plaintiffs situate [their] allegations of parallel conduct in a context that suggests preceding agreement.” The complaint alleged that the defendants, manufacturers of oriented strand board, had agreed to mill shutdowns, delayed or canceled the construction of new mills, over bought at the open

⁷⁵ *Id.*

⁷⁶ *Id.* at 31.

⁷⁷ *Id.* at 32.

⁷⁸ *Id.* at 34.

⁷⁹ *Id.*

⁸⁰ *Rail Freight Fuel Surcharge*, 587 F.Supp.2d at 35.

⁸¹ 2007 WL 2253419 (E.D.Pa., Aug. 3, 2007).

market to create shortages, and maintained low operating rates, resulting in record high prices for OSB. The court held that

Plaintiffs have made specific factual allegations of Defendants' wrongdoing—including actions in furtherance of the conspiracy, Defendants' purported motive, the approximate time and manner of their agreement, and the mechanism by which Defendants fixed prices. *Twombly* requires no more.⁸²

Finally, in *Home Quarters Real Estate Group v. Michigan Data Exchange*,⁸³ a non-traditional real estate broker sued two overlapping trade associations that provided him local multiple listing data when they terminated his access. Approving the magistrate's report and recommendation to deny the associations' motion to dismiss on *Twombly* grounds for failing to adequately plead an agreement between them, the court noted

In addition to the allegation of parallel conduct, the plaintiff has asserted that the defendants are comprised of the plaintiff's competitors, have overlapping memberships, operate in the same geographic region, and took action within 24 hours of one another. All of these allegations, taken as true, "suggest that an agreement was made."⁸⁴

The report and recommendation of the magistrate noted that "an undesired effect of *Twombly* is that the argument 'that plaintiffs have not pleaded sufficient facts appears to have become the mantra of defendants in antitrust cases.'"⁸⁵ He concluded that "*Twombly* ... was not intended as a shield to be used by antitrust defendants to defeat even a meritorious claim."⁸⁶

⁸² *Id.* at *1.

⁸³ 2009 WL 276796 (E.D. Mich. Feb. 5, 2009).

⁸⁴ *Id.* at *1.

⁸⁵ *Id.* at *5 (citation omitted).

⁸⁶ *Id.* (citation omitted).

V. Conclusion

Retirement of *Conley*'s "no set of facts" formulation allowed the Supreme Court to articulate a new interpretation of Rule 8 with both substantive and evidentiary requirements. Substantively, it is no longer sufficient that a claim may be supported by some set of facts. A showing of entitlement to relief now requires a description of the specific grounds in factual terms that connect the defendant's wrongful act with the plaintiff's injury. With respect to the evidentiary requirement, the statement of grounds must be adequately suggestive and reasonably subject to confirmation by discoverable evidence. Allegations of conventional direct or circumstantial evidence will ordinarily be sufficiently suggestive and discoverable to satisfy the required showing, but not conclusory allegations or factually neutral economic evidence, unless placed in a sufficiently suggestive factual context.

As a selection of district court rulings indicates, significant scope remains under *Twombly* to allege a Section 1 conspiracy based on circumstantial economic evidence. The *Twombly* Court recognized that allegations of parallel conduct in any event require an industrial context before their value as probative of agreement can be assessed. The re-calibrated standard provides a framework for evaluating whether economic evidence is adequately supported by context to render it suggestive enough to establish entitlement on the basis of an unlawful agreement and to justify moving the case beyond the pleading stage.