

BELL ATLANTIC CORP. v. TWOMBLY

United States Supreme Court, 2007.

___ U.S. ___, 127 S.Ct. 1955 ___ P.3d ___.

Professor's substantive note: Venturing into this rocky terrain will be *your* first exposure to a debate that essentially began in this country in 1848—with a fresh pleading system via the “Field Code” (discussed in the *Bell Atlantic* dissent). Its objective was to distance the New York state pleading system from its medieval English predecessor. The ensuing state court pleading systems in America focused on pleading facts in support of a cause of action, rather than previous technical legal conclusions—which had exalted form over substance before the Field Code began to be adopted by various states.

This “state fact pleading” requirement (still applied in many states) was shunned by the 1938 FRCP. Under the federal rules, specifically the “federal notice pleading” standard, less factual pleading was required. The theory was that facts supporting the pleadings would, instead, surface during the pleading stage. FRCP 8(a)(2) thus required—at least until *Bell Atlantic*—just enough detail in the complaint to generally put the defendant on notice regarding the nature of the plaintiff’s claim.

There is a significant difference in application. State courts have traditionally required the plaintiff to plead at least one fact that matches *each* element of the prima facie tort/contract case. Where, for example, the plaintiff has three distinct theories of recovery with three elements each, s/he would have to plead nine facts to satisfy this standard (some facts may do double duty, for elements common to two or more of these various theories). The U.S. Supreme Court gave its good housekeeping seal of approval to the comparatively lax “federal notice pleading standard” in its 1957 *Conley* decision—which had been cited 78,133 times by courts and commentators as of the date of *Bell Atlantic*.

The federal "notice" pleading standard is exemplified by FRCP 8(a)(2). It requires a "short and plain statement of the claim showing that the pleader is entitled to relief." As a result, complaints filed in federal court have not needed the factual detail necessary in a "code" pleading jurisdiction like California. See, e.g., Federal Form 11 Complaint for Negligence.

In 1957, the U.S. Supreme Court articulated the federal standard in its interpretation of FRCP 8(a)(2) as: “[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.” *Conley v. Gibson*, 355 U.S. 41, 46-47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). The Court consistently adhered to this standard for the next 50 years. For example, a 2002 decision reminded the lower federal courts that imposing heightened pleading requirements in civil rights cases:

conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512, 122 S.Ct. 992, 998, 152 L.Ed.2d 1 (2002).

Sometimes, however, the Court has enforced heightened pleading standards when specifically required by a statute or the FRCP. These situations reside in a twilight zone more akin to state “fact” pleading than federal “notice” pleading. For example, Congress augmented the pleading bar in federal securities cases in the 19__ Private Securities Litigation Reform Act. 15 USC § 78u-4; *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, ___ U.S. ___, 127 S.Ct. 2499, ___ P.3d. ___ (2007) (requiring detailed sworn certification from private plaintiffs who file securities class actions. In limited circumstances, the FRCP has raised the bar as well. FRCP 9(b) is a prime example. It requires a party to state “with particularity” the circumstances constituting any fraud or mistake (as addressed in the next class’s *Denny* case).

The 50-year reign of the comparatively generous federal notice pleading approach is in flux. Justice Souter’s majority opinion, in the following June 2007 antitrust conspiracy case, declared that part of *Conley*’s articulation of the federal standard—its “no set of facts” language—was “best forgotten as an incomplete, negative gloss on an accepted pleading standard.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S.Ct. 1955, ___ L.Ed.2d ___ (2007). The Court’s alternative articulation was that:

[w]hile a complaint * * * does not need detailed factual allegations, a plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do * * *. Factual allegations must be enough to raise a right to relief above the speculative level * * * [and] “the pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.”

* * *

While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant “set out *in detail* the facts upon which he bases his claim,” Rule 8(a)(2) still requires a “showing,” rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only “fair notice” of the nature of the claim, but also “grounds” on which the claim rests. Rule 8(a) “contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented” and does not authorize a pleader’s “bare averment that he wants relief and is entitled to it.”

Id. at ___ and ___ n.3, 127 S.Ct. at 1964-1965 and n.3. In sum, the Court demanded that the plaintiff cross “the line between possibility and plausibility of ‘entitle[ment] to relief.’” *Id.* at ___ U.S. ___, 127 S.Ct. at 1965.

The degree to which *Bell Atlantic* will encourage lower courts to close the gap between state fact pleading and federal notice pleading remains to be seen. Just two weeks after *Bell Atlantic*, the Court released an unsigned opinion in a prisoner’s civil rights case which

specifically confirmed the “liberal pleading standards” of FRCP 8(a)(2). The Court reminded the Court of Appeals, which had found the prisoner’s claims to be too conclusory:

Specific facts are not necessary; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic* (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic* (citing *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n.1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) * * * .

This post-*Bell Atlantic* opinion added that: “a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. ___, ___, 127 S.Ct. 2197, 2200, ___L.Ed.2d___ (2007). No mention was made of *Bell Atlantic*’s newly drawn line between “possibility and plausibility.” As a consequence, it is not clear whether *Bell Atlantic* will ultimately govern pleading standards in general, or be limited to pleading conspiracies allegedly violating federal antitrust laws.

Professor’s case-editing note: Editor’s deletions are indicated by “ * * * ”. Most citing references have been omitted. []” indicates matter added to the opinion to provide context or improve readability. Lettered footnotes have been inserted. When you are in practice, you will wish that you still had a casebook editor/law school prof to do this for you. If OTOH you decide that reading cases is not necessary, then let me be the first to wish you a well-deserved early retirement :-)

Justice SOUTER delivered the [majority] opinion of the Court.

* * *

I

The upshot of the 1984 divestiture of the American Telephone & Telegraph Company's (AT & T) local telephone business was a system of regional service monopolies (variously called “Regional Bell Operating Companies,” “Baby Bells,” or “Incumbent Local Exchange Carriers” (ILECs)), and a separate, competitive market for long-distance service from which the ILECs were excluded. More than a decade later, Congress withdrew approval of the ILECs' monopolies by enacting the Telecommunications Act of 1996 (1996 Act), which “fundamentally restructure[d] local telephone markets” and “subject[ed] [ILECs] to a host of duties intended to facilitate market entry.” In recompense, the 1996 Act set conditions for authorizing ILECs to enter the long-distance market.

* * *

Respondents William Twombly and Lawrence Marcus (hereinafter plaintiffs) represent a putative class consisting of all “subscribers of local telephone and/or high speed internet services ... from February 8, 1996 to present.” In this action against [defendant/appellant] petitioners, a

group of ILECs,¹ plaintiffs * * * claimed violations of § 1 of the Sherman [antitrust] Act, 15 U.S.C. § 1, which prohibits “[e]very 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.”

* * *

The complaint couches its ultimate allegations this way:

“In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition * * * within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.”

The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted. The District Court acknowledged that “plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement,” but emphasized that “while ‘[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy[, ...] ‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely.’”^a

Thus, the District Court understood that allegations of parallel business conduct, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts that “ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior.” The District Court found plaintiffs' allegations of parallel ILEC actions to discourage competition inadequate [to meet the federal notice pleading standard] because “the behavior of each ILEC * * * is fully explained by the ILEC's own interests in defending its individual territory.” As to the ILECs' supposed agreement against competing with each other, the District Court found that the complaint does not “alleg[e] facts ... suggesting that refraining from competing in other territories * * * was contrary to [the ILECs'] apparent economic interests, and consequently [does] not rais[e] an inference that [the ILECs'] actions were the result of a

¹ The 1984 divestiture of AT & T's local telephone service created seven Regional Bell Operating Companies. Through a series of mergers and acquisitions, those seven companies were consolidated into the four ILECs named in this suit: BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. (successor-in-interest to Bell Atlantic Corporation). Together, these ILECs allegedly control 90 percent or more of the market for local telephone service in the 48 contiguous States.

^a Two gas stations on the same corner keep changing their prices—sometimes up, sometimes down. Each owner is eyeing the other, with a view toward maximizing profits. Assume that in today's market, associated with increased wholesale and distribution prices, one station increases prices, then the other follows suit. No problem. That's conscious parallelism. But if they *agree* with one another to raise prices, even if their respective prices are different (e.g., to avoid the suggestion that they are acting in concert), that will likely violate federal antitrust law.

conspiracy.”

The Court of Appeals for the Second Circuit reversed, holding that the District Court tested the complaint by the wrong standard. It [2d Cir.] held that “plus factors [additional facts which would exclude independent conduct] are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal.” * * *

We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct, and now reverse.

II

A

* * * “[T]he crucial question” is whether the challenged anticompetitive conduct “stem[s] from independent decision or from an agreement, tacit or express.” While a showing of parallel “business behavior is admissible circumstantial evidence from which the fact finder [at trial] may infer agreement,” it falls short of “conclusively establish[ing] agreement or ... itself constitut[ing] a Sherman Act offense.” Even “conscious parallelism,” a common reaction of “firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions” is “not in itself unlawful.”

* * *

B

This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act. Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests,” *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). While a complaint attacked by a * * * motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic^b recitation of the elements of a cause of action will not do, [(given that) (on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a [case specific] factual allegation”). Factual allegations must be enough to raise a right to relief above the speculative level. (“[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action”),³ on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

^b Most Scrabble players would challenge this, and some of Justice Souter’s other supercalifragilistic-expialidocious word choices below.

³ The dissent greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether ([when opining that the] pleading standard of Federal Rules “does not require, or even invite, the pleading of facts”). While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant “set out *in detail* the facts upon which he bases his claim,” [per] *Conley v. Gibson* (emphasis added), Rule 8(a)(2) still requires a “showing,” rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only “fair notice” of the nature of the claim, but also “grounds” on which the claim rests. (Rule 8(a) “contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented” and does not authorize a pleader’s “bare averment that he wants relief and is entitled to it”).

In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [an] illegal agreement.⁴ And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and “that a recovery is very remote and unlikely.” * * * It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must 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.

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the “plain statement” possess enough heft to “sho[w] that the pleader is entitled to relief.” A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of “entitle[ment] to relief.”

* * *

Plaintiffs['] * * * main argument against the plausibility standard at the pleading stage is its ostensible conflict with an early statement of ours construing Rule 8. Justice Black's opinion for the Court in *Conley v. Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” This “no set of facts” 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; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard * * *

On such a focused and literal reading of *Conley's* “no set of facts,” a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some “set of [undisclosed] facts” to support recovery. So here, the Court of Appeals specifically found the prospect of [later] unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does

⁴ Commentators have offered several examples of parallel conduct allegations that would state a § 1 claim under this standard * * * [such as] (* * * “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”) * * * .

not set forth a single fact in a context that suggests an agreement.

* * *

[T]here is no need to pile up further citations to show that *Conley's* “no set of facts” language has been questioned, criticized, and explained away long enough. * * * [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The 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. ([Thus,] once a claim for relief has been stated, a plaintiff “receives the benefit of imagination, so long as the hypotheses are consistent with the complaint”).^c *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.⁸

III

When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short. To begin with, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. * * * The nub of the complaint, then, is the ILECs' parallel behavior, * * * and its sufficiency turns on the [mere] suggestions raised by this conduct when viewed in light of common economic experience.

* * * 14

Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

* * *

The judgment of the Court of Appeals for the Second Circuit is reversed, and the cause is remanded for further proceedings consistent with this opinion.

^c This articulation of the federal pleading standard is by no means self-explanatory. Reading the whole case will place this formulation into context.

⁸. * * * The dissent finds relevance in Court of Appeals precedents from the 1940s, which allegedly gave rise to *Conley's* “no set of facts” language. Even indulging this line of analysis, these cases do not challenge the understanding that before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct [giving rise to civil liability]. * * * Rather, these cases stand for the unobjectionable proposition that, when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder.

¹⁴ In reaching this conclusion, we do not apply any “heightened” pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished “ ‘by the process of amending the Federal Rules, and not by judicial interpretation.’ ” On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. Fed. Rules Civ. Proc. 9(b)-©. Here, our concern is not that the allegations in the complaint were insufficiently “particular[ized];” rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.

It is so ordered.

Justice STEVENS, with whom Justice GINSBURG joins except as to Part IV, dissenting.

* * *

Thus, this is a case in which there is no dispute about the substantive law. If the defendants acted independently, their conduct was perfectly lawful. If, however, that conduct is the product of a horizontal agreement among potential competitors, it was unlawful. Plaintiffs have alleged such an agreement and, because the complaint was dismissed in advance of answer, the allegation has not even been denied. Why, then, does the case not proceed? Does a judicial opinion that the charge is not “plausible” provide a legally acceptable reason for dismissing the complaint? I think not.

Respondents' amended complaint describes a variety of circumstantial evidence and makes the straightforward allegation that petitioners

“entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.”

The complaint explains that, contrary to Congress' expectation when it enacted the 1996 Telecommunications Act, and consistent with their own economic self-interests, petitioner Incumbent Local Exchange Carriers (ILECs) have assiduously avoided infringing upon each other's markets and have refused to permit nonincumbent competitors to access their networks. * * * In sum, respondents allege that petitioners entered into an agreement that has long been recognized as a classic *per se* violation of the Sherman Act. See Report of the Attorney General's National Committee to Study the Antitrust Laws 26 (1955).

Under rules of procedure that have been well settled * * *, a judge ruling on a defendant's motion to dismiss a complaint, “must accept as true all of the factual allegations contained in the complaint.” But instead of requiring knowledgeable executives * * * to respond to these allegations by way of sworn depositions or other limited discovery—and indeed without so much as requiring petitioners to file an answer denying that they entered into any agreement—the majority permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot. The Court embraces the argument of those lawyers that “there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway;” that “there was just no need for joint encouragement to resist the 1996 Act;” and that the “natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.”

The Court and petitioners' legal team are no doubt correct that the parallel conduct alleged is consistent with the absence of any contract, combination, or conspiracy. But that conduct is also entirely consistent with the *presence* of the illegal agreement alleged in the complaint. * * * As such, the Federal Rules of Civil Procedure, our longstanding precedent, and sound practice mandate that the District Court at least require some sort of response from

petitioners before dismissing the case.^d

* * *

I

Rule 8(a)(2) of the Federal Rules requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” The rule did not come about by happenstance and its language is not inadvertent. The English experience with Byzantine special pleading rules—illustrated by the hypertechnical Hilary rules of 1834—made obvious the appeal of a pleading standard that was easy for the common litigant to understand and sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought. Stateside, David Dudley Field developed the highly influential New York Code of 1848, which required “[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.” Substantially similar language appeared in the Federal Equity Rules adopted in 1912. See Fed. Equity Rule 25 (requiring “a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence”).

* * *

Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. See *Swierkiewicz*, 534 U.S., at 514, 122 S.Ct. 992 (“The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim”). Charles E. Clark, the “principal draftsman” of the [1938] Federal Rules, put it thus:

“Experience has shown ... that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear * * * .”

The pleading paradigm under the new Federal Rules was well illustrated by the inclusion in the appendix of Form 9, a complaint for negligence. As relevant, the Form 9 complaint states only: “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.” The complaint then describes the plaintiff’s injuries and demands judgment. The asserted ground for relief—namely, the defendant’s negligent driving—would have been called a “‘conclusion of law’ ” under the code pleading of old. But that bare allegation suffices under a system that “restrict[s] the pleadings to the task of general notice-giving and invest[s] the deposition-discovery process with a vital role in the preparation for trial.”³

^d Would the typically terse general denial (authorized by federal practice) add anything?

³ The Federal Rules do impose a “particularity” requirement on “all averments of fraud or mistake,” Fed. Rule Civ. Proc. 9(b), neither of which has been alleged in this case. We have recognized that the canon of *expressio unius est exclusio alterius* applies to Rule 9(b).

II

It is in the context of this history that *Conley v. Gibson* must be understood. The *Conley* plaintiffs were black railroad workers who alleged that their union local had refused to protect them against discriminatory discharges, in violation of the National Railway Labor Act. The union sought to dismiss the complaint on the ground that its general allegations of discriminatory treatment by the defendants lacked sufficient specificity. Writing for a unanimous Court, Justice Black rejected the union's claim as foreclosed by the language of Rule 8. In the course of doing so, he articulated the formulation the Court rejects today: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Consistent with the design of the Federal Rules, *Conley's* "no set of facts" formulation permits outright dismissal only when proceeding to discovery or beyond would be futile. Once it is clear that a plaintiff has stated a claim that, if true, would entitle him to relief, matters of proof are appropriately relegated to other stages of the trial process. Today, however, in its explanation of a decision to dismiss a complaint that it regards as a fishing expedition, the Court scraps *Conley's* "no set of facts" language. Concluding that the phrase has been "questioned, criticized, and explained away long enough," the Court dismisses it as careless composition.

If *Conley's* "no set of facts" language is to be interred, let it not be without a eulogy. That exact language, which the majority says has "puzzl[ed] the profession for 50 years," has been cited as authority in a dozen opinions of this Court and four separate writings. In not one of those 16 opinions was the language "questioned," "criticized," or "explained away." Indeed, today's opinion is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation. Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears "beyond doubt" that "no set of facts" in support of the claim would entitle the plaintiff to relief.

* * *

Today's majority calls *Conley's* "no set of facts" language "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." This is not and cannot be what the *Conley* Court meant. First, as I have explained, and as the *Conley* Court well knew, the pleading standard the Federal Rules meant to codify does not require, or even invite, the pleading of facts.⁶ The "pleading standard" label the majority gives to what it reads into the *Conley* opinion—a statement of the permissible factual support for an adequately

⁶ The majority is correct to say that what the Federal Rules require is a "showing" of entitlement to relief. Whether and to what extent that "showing" requires allegations of fact will depend on the particulars of the claim. For example, had the amended complaint in this case alleged *only* parallel conduct, it would not have made the required "showing." Similarly, had the pleadings contained *only* an allegation of agreement, without specifying the nature or object of that agreement, they would have been susceptible to the charge that they did not provide sufficient notice that the defendants may answer intelligently. Omissions of that sort instance the type of "bareness" with which the Federal Rules are concerned. A plaintiff's inability to persuade a district court that the allegations actually included in her complaint are "plausible" is an altogether different kind of failing, and one that should not be fatal at the pleading stage.

pleaded complaint—would not, therefore, have impressed the *Conley* Court itself. Rather, that Court would have understood the majority's remodeling of its language to express an *evidentiary* standard, which the *Conley* Court had neither need nor want to explicate. Second, it is pellucidly clear that the *Conley* Court was interested in what a complaint *must* contain, not what it *may* contain. In fact, the Court said without qualification that it was “appraising the *sufficiency* of the complaint.” It was, to paraphrase today's majority, describing “the minimum standard of adequate pleading to govern a complaint's survival.”

* * *

As any civil procedure student knows,^e Judge Clark's opinion [in *Conley*] disquieted the defense bar and gave rise to a movement to revise Rule 8 to require a plaintiff to plead a “ ‘cause of action [stating facts].’ ” The movement failed, see *Dioguardi* [v. *Durning*, 139 F.2d 774 (C.A.2 1944) which] was explicitly approved in *Conley*; and “[i]n retrospect the case itself seems to be a routine application of principles that are universally accepted,” 5 *Wright & Miller* § 1220, at 284-285.

* * *

We have consistently reaffirmed that basic understanding of the Federal Rules in the half century since *Conley*. For example, in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), we * * * emphasized that “[w]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims [during the discovery stage]. *Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test*” (emphasis added).

* * *

The same year we decided *Conley*, Judge Clark wrote, presciently,

“I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings, i.e., the formalistic claims of the parties. Experience has found no quick and easy short cut for trials * * * .”

In this “Big Case,” the Court succumbs to the temptation that previous Courts have steadfastly resisted. While the majority assures us that it is not applying any “ ‘heightened’ ” pleading standard, I shall now explain why I have a difficult time understanding its opinion any other way.

* * *

IV

* * *

The transparent policy concern that drives the [majority] decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our

^e ... once s/he has been an appellate justice for some years.

economy—from the burdens of pretrial discovery. * * *

If the allegation of conspiracy happens to be true, today's decision obstructs the congressional policy favoring competition that undergirds both the Telecommunications Act of 1996 and the Sherman Act itself. More importantly, even if there is abundant evidence that the allegation is untrue, directing that the case be dismissed without even looking at any of that evidence marks a fundamental-and unjustified-change in the character of pretrial practice.

Accordingly, I respectfully dissent.

Notes and Questions

1. To better appreciate the interplay between substance and procedure, you should first consider the following antitrust law applications: What is “conscious parallelism?” Does it violate federal antitrust law? If not, what does?

2. Why did the plaintiffs’ “parallel business conduct” allegations not yield adequate notice of the claim against the defendants? Did the defendants not know *why* they were being sued? What does the majority mean by its articulation regarding whether a claim is “plausible” Is alleging a conspiracy enough to satisfy Bell Atlantic’s pleading standard? What is the related significance of the *Conley* term (discussed in the dissent) “no set of facts?”

3. In what way did the intermediate appellate court, and Supreme Court dissenters, disagree with the *Bell Atlantic* majority opinion? Given its potentially huge impact on federal pleading, this will not be the last word from the Supreme Court—for another 50 years, as in *Conley*. For example, fewer cases will survive the pleading stage, especially where the defendant possesses the information the plaintiff would obtain in the discovery phase to prove the case at trial. So which opinion “got it right?”

4. As stated by a noted commentator: “One seeming impact of *Conley v. Gibson* was that commentators lost interest in pleading. For years before and after the adoption of the Federal Rules in 1938, pleading had been the subject of intense academic discussion.” For an excellent analysis, see Richard L. Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433 (1986). *Bell Atlantic* will usher in an academic deluge.

5. Fraud claims must be plead with particularity. FRCP 9(b). Statutory claims (not just antitrust claims) cannot rest solely upon conclusory charging allegations which are copy-pasted from the statute to the complaint. Something else must be plead to acquaint the defendant with the basis upon which the defendant’s conduct fits within the relevant statute. Are either of these pre-existing heightened pleading requirements a basis for the majority’s decision?

6. What is the current federal pleading standard regarding the detail necessary to avoid a dismissal for failing to state a claim? What is left of the prior “federal notice pleading” standard after *Bell Atlantic*? Did the Supreme Court effectively merge the state court fact-pleading standard with the federal notice pleading standard? Or did it merely jettison *Conley*’s supposed soggy articulation of the federal pleading standard?

7. We will be discussing the process regarding amendments to the FRCP—and the related Advisory Committee process, whereby proposals work their way through the committee after a public comment period. The Supreme Court and Congress play a role as well. Would it have been better for the Court to essentially propose a change that would have first worked its way through this process? Alternatively, as the Court has stated many times, the law previously announced by the courts is never wrong. New judicial decisions merely find and explain earlier

case law as it was meant to be applied.

8. As we will learn later this semester, courts are very liberal about allowing amendments. But even if the trial judge were able to authorize another amendment, how would the plaintiffs be in a position to add new facts, which would make the case more “plausible?” When we later discuss sanctions for frivolous pleadings, we will consider whether the plaintiffs’ attorneys would face sanctions under FRCP 11 for adding such facts (without the benefit of any discovery). Finally, we will address class actions. This “putative” class action could not get certified, because the complaint did not survive the pleading stage. The related question will be what impact this decision has upon all of those potential plaintiffs.

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