

THE UNIVERSITY OF FLORIDA
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PROF. PEDRO A. MALAVET

PLEADING CASES HANDOUT

Professor Marcus has kindly provided an edited version of the latest caselaw in pleading as well as updated notes that supplement your casebook. For the sake of simplicity, I have transcribed the *Sorema* case, which is in your casebook at pages 177-181, and incorporated it into the new material here, so that you will be able to refer to a single set of materials for this discussion.

Copyright (c) 2007, Thomson/West: Supplement for MARCUS, REDISH & SHERMAN: CIVIL PROCEDURE: A MODERN APPROACH (4th Ed. West 2005), replaces pages 173-189.

SWIERKIEWICZ v. SOREMA, N.A.

Supreme Court of the United States, 2002. 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1.

Justice THOMAS delivered the opinion of the Court.

This case presents the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). We hold that an employment discrimination complaint need not include such facts and instead must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

I

Petitioner Akos Swierkiewicz is a native of Hungary, who at the time of his complaint was 53 years old.¹ In April 1989, petitioner began working for respondent Sorema N. A., a reinsurance company headquartered in New York and principally owned and controlled by a French [178] parent corporation. Petitioner was initially employed in the position of senior vice president and chief underwriting officer (CUO). Nearly six years later, François M. Chavel, respondent's Chief Executive Officer, demoted petitioner to a marketing and services position and transferred the bulk of his underwriting responsibilities to Nicholas Papadopoulo, a 32-year-old who, like Mr. Chavel, is a French national. About a year later, Mr. Chavel stated that he wanted to "energize" the underwriting department and appointed Mr. Papadopoulo as CUO. Petitioner claims that Mr. Papadopoulo had only one year of underwriting experience at the time he was promoted, and therefore was less experienced and less qualified to be CUO than he, since at that point he had 26 years of experience in the insurance industry.

Following his demotion, petitioner contends that he "was isolated by Mr. Chavel ... excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA." Petitioner unsuccessfully attempted to meet with Mr. Chavel to discuss his discontent. Finally, in April 1997, petitioner sent a memo to Mr. Chavel outlining his grievances and requesting a severance package. Two weeks later, respondent's general counsel presented petitioner with two options: He could either resign without a severance package or be dismissed. Mr. Chavel fired petitioner after he refused to resign.

Petitioner filed a lawsuit alleging that he had been terminated on account of his national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and on account of his

¹ 1. Because we review here a decision we must accept as true all of the factual granting respondent's motion to dismiss, allegations contained in the complaint.

age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq. The United States District Court for the Southern District of New York dismissed petitioner's complaint because it found that he "ha[d] not adequately alleged a prima facie case, in that he ha[d] not adequately alleged circumstances that support an inference of discrimination." The United States Court of Appeals for the Second Circuit affirmed the dismissal, relying on its settled precedent, which requires a plaintiff in an employment discrimination complaint to allege facts constituting a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas*, *supra*, at 802, 93 S.Ct. 1817. The Court of Appeals held that petitioner had failed to meet his burden because his allegations were "insufficient as a matter of law to raise an inference of discrimination." 5 Fed.Appx. 63, 65 (C.A.2 2001). We granted certiorari to resolve a split among the Courts of Appeals concerning the proper pleading standard for employment discrimination cases, and now reverse.

II

Applying Circuit precedent, the Court of Appeals required petitioner to plead a prima facie case of discrimination in order to survive respondent's motion to dismiss. In the Court of Appeals' view, petitioner was thus required to allege in his complaint: (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employ-[179]ment action; and (4) circumstances that support an inference of discrimination.

The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement. In *McDonnell Douglas*, this Court made clear that "[t]he critical issue before us concern[ed] the order and allocation of *proof* in a private, non-class action challenging employment discrimination." In subsequent cases, this Court has reiterated that the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination.

This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. For instance, we have rejected the argument that a Title VII complaint requires greater "particularity," because this would "too narrowly constrict the role of the pleadings." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283, n. 11, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). Consequently, the ordinary rules for assessing the sufficiency of a complaint apply.

In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"). Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

Moreover, the precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Furthermore, imposing the Court of Appeals' heightened pleading standard in employment discrimination 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 plaintiffs 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). 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. See *id.*, at 47-48, 78 S.Ct. 99; *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-169, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1202, p. 76 (2d ed. 1990).

Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts. In *Leatherman* we stated: "[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius*." Just as Rule 9(b) makes no mention of municipal liability under 1979, 42 U.S.C. § 1983, neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).²

² 4. These requirements are exemplified by the Federal Rules of Civil Procedure Forms, which "are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Fed. Rule Civ. Proc. 84. For example, Form 9 sets forth a complaint for negligence in which

Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "[n]o technical forms of pleading or motions are required," and Rule 8CD provides that "[a]ll pleadings shall be so construed as to do substantial justice." Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. 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.

Applying the relevant standard, petitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. Petitioner alleged that he had been [181] terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest. In addition, they state claims upon which relief could be granted under Title VII and the ADEA.

Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Whatever the practical merits of this argument, the Federal Rules do

plaintiff simply states in relevant part: "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."

not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman, supra*, at 168, 113 S.Ct. 1160. Furthermore, Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."

For the foregoing reasons, we hold that an employment discrimination plaintiff need not plead a prima facie case of discrimination and that petitioner's complaint is sufficient to survive respondent's motion to dismiss. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

BELL ATLANTIC CORP. v. TWOMBLY

Supreme Court of the United States, 2007

550 U.S. ___, 127 S.Ct. 1955

Justice SOUTER delivered the opinion of the Court.

Liability under § 1 of the Sherman Act, 15 U.S.C. § 1, requires a "contract, combination ..., or conspiracy, in restraint of trade or commerce." The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.

[In 1984, the American Telephone & Telegraph Co. was divested of local telephone business, and the "Baby Bells," or Incumbent Local Exchange Carriers (ILECS) were installed as regional monopolies providing local telephone service in their respective service areas. In 1996, Congress enacted the Telecommunications Act of 1996, which imposed a variety of duties on ILECs to facilitate the provision of local telephone service by Competitive Local Exchange Carriers (CLECS). The new Act permitted CLECs to use an ILEC's network to provide local service. The goal of the 1996 Act was to foster competition in provision of local telephone service. The ILECs resisted sharing their networks with competitors.

In this case, plaintiffs sued on behalf of a proposed class consisting of all subscribers of local telephone service from 1996 to the present, seeking treble damages and declaratory and injunctive relief. The defendants included the successors of all the Baby Bells -- BellSouth Corp., Qwest Commun., Int'l, SBC Commun., Inc. and Verizon Commun., Inc. Plaintiffs asserted that defendants had conspired to restrain trade in two ways. First, each "engaged in parallel conduct" in its respective service area to inhibit the growth of competing CLECs there by adopting practices designed to sabotage such competition. Second, plaintiffs alleged that the ILECs had agreed not to compete with each other in providing local telephone service in another ILEC's service area. The ILECs' alleged agreement not to compete with each other, plaintiffs asserted, was shown by the failures of various ILECs to pursue their "substantial competitive advantages" in certain adjacent areas even though those advantages made entering these markets for local telephone service "attractive business opportunities." In addition, plaintiffs invoked a reported statement from Richard Notebaert, the chief executive officer of Qwest, who was quoted as saying that competing in the territory of another ILEC "might be a good way to turn a quick dollar, but that doesn't make it right."]

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 from CLECs 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.’ ” 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 because “the behavior of each ILEC in resisting the incursion of CLECs 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 as CLECs 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 conspiracy.”

The Court of Appeals for the Second Circuit reversed, holding that the District Court tested the complaint by the wrong standard. It held that “plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal.” Although the Court of Appeals took the view that plaintiffs must plead facts that “include conspiracy among the realm of ‘plausible’ possibilities in order to survive a motion to dismiss,” it then said that “to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.”

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

II

A

Because § 1 of the Sherman Act “does not prohibit [all] unreasonable restraints of trade ... but only restraints effected by a contract, combination, or conspiracy,” “[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 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 Rule 12(b)(6) 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 recitation of the elements of a cause of action will not do, see *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation”). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-236 (3d ed.2004) (hereinafter *Wright & Miller*) (“[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), see, e.g., *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) (“ Rule 12(b)(6) does not countenance ... dismissals based on a judge’s disbelief of a complaint’s factual allegations”); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears “that a recovery is very remote and unlikely”).

³ The dissent greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether. 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,” *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (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.

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 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.” In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct fails to bespeak unlawful agreement. 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.

* * *

We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with “ ‘a largely groundless claim’ ” be allowed to “ ‘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.’ ”

⁴ Commentators have offered several examples of parallel conduct allegations that would state a § 1 claim under this standard. See, e.g., 6 *Areeda & Hovenkamp* ¶ 1425, at 167-185 (discussing “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”).

Id., at 347, 125 S.Ct. 1627 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975)). So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, “ ‘this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court.’ ”

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n. 17, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” That potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management,” given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. And it is self-evident that the problem of discovery abuse cannot be solved by “careful scrutiny of evidence at the summary judgment stage,” much less “lucid instructions to juries;” the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no “ ‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ ” to support a § 1 claim.

Plaintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior * * *, and their 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 unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. It seems fair to say that this approach to pleading would dispense with any showing of a “‘reasonably founded hope’” that a plaintiff would be able to make a case; Mr. Micawber's optimism would be enough.

Seeing this, a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. See, e.g., *Car Carriers [Inc. v. Ford Motor Co.]*, 745 F.2d, at 1106 [(CA7 1984)] (“*Conley* has never been interpreted literally”) and, “[i]n practice, a complaint ... must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory” (internal quotation marks omitted; emphasis and omission in original); *Ascon Properties, Inc. v.*

Mobil Oil Co., 866 F.2d 1149, 1155 (C.A.9 1989) (tension between *Conley's* “no set of facts” language and its acknowledgment that a plaintiff must provide the “grounds” on which his claim rests); O'Brien v. DiGrazia, 544 F.2d 543, 546, n. 3 (C.A.1 1976) (“[W]hen a plaintiff ... supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional ... action into a substantial one”); Hazard, From Whom No Secrets Are Hid, 76 Tex. L.Rev. 1665, 1685 (1998) (describing *Conley* as having “turned Rule 8 on its head”); Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L.Rev. 433, 463-465 (1986) (noting tension between *Conley* and subsequent understandings of Rule 8).

We could go on, but there 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. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after 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. *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.

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. Although in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations. Thus, the complaint first takes account of the alleged “absence of any meaningful competition between [the ILECs] in one another's markets,” “the parallel course of conduct that each [ILEC] engaged in to prevent competition from CLECs,” “and the other facts and market circumstances alleged [earlier]”; “in light of” these, the complaint concludes “that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry into their ... markets and have agreed not to compete with one another.” The nub of the complaint, then, is the ILECs' parallel behavior, consisting of steps to keep the CLECs out and manifest disinterest in becoming CLECs themselves, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience.

[The Court concluded that the allegations about efforts by each ILEC to exclude competition in its area involved "doing what was only natural anyway," and provided no basis for inferring agreement among them to behave in this manner. Regarding the ILECs failure to try to break into one another's market areas, the Court said that it was "not suggestive of conspiracy" since "monopoly was the norm in telecommunications" and "[t]he ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword." Indeed, they would know that if they tried to compete in the area of another ILEC, they "faced nearly insurmountable barriers to profitability owing to the ILECs' flagrant resistance to the network sharing requirements of the 1996 Act."

The comment by Qwest's CEO Notebaert that competing against other ILECs "might be a good way to turn a quick dollar" did not supply the needed support for conspiracy allegations. "This was only part of what he reportedly said, however, and the District Court was entitled to take notice of the full contents of the published articles referenced in the complaint, from which the truncated quotations were drawn. See Fed. R. Evid. 201. Notebaert was also quoted as saying that entering new markets as a CLEC would not be

'a sustainable economic model' because the CLEC pricing model is 'just . . . nuts.'"]

Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, but the disappointment does not make conspiracy plausible. We agree with the District Court's assessment that antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim.⁵

Plaintiffs say that our analysis runs counter to *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). * * * As the District Court correctly understood, however, “*Swierkiewicz* did not change the law of pleading, but simply re-emphasized ... that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements.” Even though *Swierkiewicz*'s pleadings “detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination,” the Court of Appeals dismissed his complaint for failing to allege certain additional facts that *Swierkiewicz* would need at the trial stage to support his claim in the absence of direct evidence of discrimination. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that *Swierkiewicz* allege “specific facts” beyond those necessary to state his claim and the grounds showing entitlement to relief.

⁵ 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.’ ” *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). 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)-(c). 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.

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.

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

* * * [T]his 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. The complaint quotes Richard Notebaert, the former CEO of one such ILEC, as saying that competing in a neighboring ILEC's territory “might be a good way to

turn a quick dollar but that doesn't make it right.” Moreover, respondents allege that petitioners “communicate amongst themselves” through numerous industry associations. 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.

* * * [I]nstead of requiring knowledgeable executives such as Notebaert 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. And the charge that petitioners “agreed not to compete with one another” is not just one of “a few stray statements;” it is an allegation describing unlawful conduct. 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.

Two practical concerns presumably explain the Court's dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions. Those concerns merit careful case

management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking. More importantly, they do not justify an interpretation of Federal Rule of Civil Procedure 12(b)(6) that seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency.

I

[Justice Stevens described the historical evolution from strict common law pleading requirements to the 1938 adoption of the Federal Rules of Civil Procedure.]

Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. * * * The 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."

II

It is in the context of this history that *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), must be understood. * * *

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. [Justice Stevens pointed out that this language had been cited without criticism in a dozen opinions of the Court, and that 26 States and the District of Columbia had adopted it as their standard for dismissal of a complaint.] * * * I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process-a rulemaking process-for revisions of that order. See 28 U.S.C. §§ 2072-2074.

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. 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 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.”

* * *

Most recently, in *Swierkiewicz*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1, we were faced with a case more similar to the present one than the majority will allow. In discrimination cases, our precedents require a plaintiff at the summary judgment stage to produce either direct evidence of discrimination or, if the claim is based primarily on circumstantial evidence, to meet the shifting evidentiary burdens imposed under the framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Swierkiewicz* alleged that he had been terminated on account of national origin in violation of Title VII of the Civil Rights Act of 1964. The Second Circuit dismissed the suit on the pleadings because he had not pleaded a *prima facie* case of discrimination under the *McDonnell Douglas* standard.

We reversed in another unanimous opinion, holding that “under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a *prima facie* case because the *McDonnell Douglas* framework does not apply in every employment discrimination case.” We also observed that Rule 8(a)(2) does not contemplate a court's passing on the merits of a litigant's claim at the pleading stage. Rather, the “simplified notice pleading standard” of the Federal Rules “relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”

As in the discrimination context, we have developed an evidentiary framework for evaluating claims under § 1 of the Sherman Act when those claims rest on entirely circumstantial evidence of conspiracy. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) [*infra*

casebook p. 458 n.9]. Under *Matsushita*, a plaintiff's allegations of an illegal conspiracy may not, at the summary judgment stage, rest solely on the inferences that may be drawn from the parallel conduct of the defendants. In order to survive a Rule 56 motion, a § 1 plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." * * *

Everything today's majority says would therefore make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court has described. But it should go without saying in the wake of *Swierkiewicz* that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage. * * *

III

* * *

Even if I were inclined to accept the Court's anachronistic dichotomy [between "factual allegations" and "legal conclusions"] and ignore the complaint's actual allegations, I would dispute the Court's suggestion that any inference of agreement from petitioners' parallel conduct is "implausible." Many years ago a truly great economist perceptively observed that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, in 39 *Great Books of the Western World* 55 (R. Hutchins & M. Adler eds. 1952). I am not so cynical as to accept that sentiment at face value, but I need not do so here. Respondents' complaint points not only to petitioners' numerous opportunities to meet with each other, but also to Notebaert's curious statement that encroaching on a fellow incumbent's territory "might be a good way to turn a quick dollar but that doesn't make it right." What did he mean by that? One possible (indeed plausible) inference is that he meant that while it would be in his company's economic self-interest

to compete with its brethren, he had agreed with his competitors not to do so. * * *

Perhaps Notebaert meant instead that competition would be sensible in the short term but not in the long run. That's what his lawyers tell us anyway. But I would think that no one would know better what Notebaert meant than Notebaert himself. Instead of permitting respondents to ask Notebaert, however, the Court looks to other quotes from that and other articles and decides that what he meant was that entering new markets as a CLEC would not be a “‘sustainable economic model.’ ” * * * [T]he District Court was required at this stage of the proceedings to construe Notebaert's ambiguous statement in the plaintiffs' favor.⁶

To be clear, if I had been the trial judge in this case, I would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint. On the other hand, I surely would not have dismissed the complaint without requiring the defendants to answer the charge that they “have agreed not to compete with one another and otherwise allocated customers and markets to one another.” Even a sworn denial of that charge would not justify a summary dismissal without giving the plaintiffs the opportunity to take depositions from Notebaert and at least one responsible executive representing each of the other defendants.

* * *

IV

* * * Whether the Court's actions will benefit only defendants in

⁶ It is ironic that the Court seeks to justify its decision to draw factual inferences in the defendants' favor at the pleading stage by citing a rule of evidence. Under Federal Rule of Evidence 201(b), a judicially noticed fact “must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Whether Notebaert's statements constitute evidence of a conspiracy is hardly beyond reasonable dispute.

antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer. But that the Court has announced a significant new rule that does not even purport to respond to any congressional command is glaringly obvious.

The transparent policy concern that drives the decision is the interest in protecting antitrust defendants -- who in this case are some of the wealthiest corporations in our economy -- from the burdens of pretrial discovery. * * * For in the final analysis it is only a lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges' independent appraisal of the plausibility of profoundly serious factual allegations, that could account for this stark break from precedent.

Notes and Questions

1. Are *Swierkiewicz* and *Bell Atlantic* consistent with each other? Some time ago a commentator complained that the Court approached pleading issues with "appalling casualness." Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 *Cornell L. Rev.* 390, 399 (1980). Consider also some other recent pleading decisions by the Court:

In *Leatherman v. Tarrant County Narcotics and Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), plaintiffs sued under 42 U.S.C.A. § 1983, claiming that local law enforcement officers had violated their constitutional rights. Because they were suing a county and two municipal corporations that employed the officers who took the actions leading to the suit, prevailing law required that they prove that the incidents resulted from official policy, custom, or practice. But plaintiffs did not allege that there had been multiple incidents of the sort of which they complained, undermining their claim that there was such a policy or practice. The Fifth Circuit upheld dismissal under its "heightened pleading standard" for such claims.

The Supreme Court held that dismissal was wrong because the

rules provided no ground for heightened pleading requirements. The Court acknowledged defendants' arguments that "the degree of factual specificity required of a complaint by the Federal Rules of Civil Procedure varies according to the complexity of the underlying substantive law." But it found that the lower court's requirement that plaintiffs "state with factual detail and particularity the basis for the claim" could not be squared with the "liberal system of 'notice pleading' set up by the Federal Rules." It noted that Rule 9(b) requires for greater particularity in pleading of certain claims, but that rule did not apply to this case. It concluded: "Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."

In *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S.Ct. 1627 (2005), the Court seemed to embrace a more demanding attitude toward pleading requirements, albeit for purposes of notice. Plaintiffs in this securities fraud action claimed that when they bought defendant's stock in 1997-98 its value was inflated due to misrepresentations about the company's financial condition and prospects. As plaintiffs' "detailed amended (181 paragraph) complaint" alleged, the company later announced that its earnings would be lower than expected, and on the following day its shares lost almost half their value, falling from \$39 per share to \$21 per share. Defendants moved to dismiss on the ground that plaintiffs had not adequately alleged "loss causation" -- that the decline in their share price was due to defendants' misrepresentations as opposed, for example, to the earnings forecast. The Court upheld dismissal.

Proving that the price was inflated on the date of purchase does not necessarily show that a securities buyer suffered a loss as a result of a misrepresentation. Instead, the Court explained, a "tangle of factors" such as changes in the overall securities market or in the

industry affect price at any given time. Securities law claims are not designed "to provide investors with broad insurance against market losses." At least, the Court suggested, plaintiffs must prove that they suffered a loss because the price fell after the truth became known.

Against that background of what plaintiffs must prove, the Court assumed that no special pleading requirement applied but held that even under Rule 8(a)(2) plaintiffs' complaint failed to provide "fair notice of what the plaintiff's claim is and the grounds on which it rests." *Id.* at 1634, quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957). "The complaint's failure to claim that Dura's share price fell significantly after the truth became known suggests that plaintiffs considered the allegation of purchase price inflation alone sufficient * * * [a]nd the complaint nowhere else provides 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 misrepresentation." "We concede that ordinary pleading rules are not meant to impose a great burden upon a plaintiff. But it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind."

In *Erickson v. Pardus*, 127 S.Ct. 2197 (2007), decided less than two weeks after *Bell Atlantic*, the Court summarily reversed dismissal of a prisoner's pro se complaint claiming that prison officials had exhibited "deliberate indifference" to his hepatitis. Plaintiff alleged that he had been diagnosed with hepatitis C, and that he required a treatment program involving weekly self-injections. He asserted that he was taken off this program after a syringe he and others used was found to have been employed for injection of illegal drugs. Plaintiff denied having used such drugs, but was not believed, and under prison policies he could not resume the hepatitis treatment program for more than a year. He alleged that his liver was suffering "irreversible damage" due to the interruption of his treatment. The district court dismissed on the ground that plaintiff had not alleged that defendants' actions -- as opposed to the disease itself -- had caused him

"substantial harm," and the Court of Appeals affirmed. The Supreme Court criticized the Court of Appeals' "departure from the liberal pleading standards set forth in Rule 8(a)(2)," explaining:

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." 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 Corp. v. Twombly*, 550 U.S. ___, ___ (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations in the complaint. *Bell Atlantic Corp.*, *supra*, at ___.

2. In *Bell Atlantic*, the Court seems to disavow the "no set of facts" language in *Conley v. Gibson*, quoting a commentator's view that this approach had "turned Rule 8 on its head." Professor Sherwin's recent study of *Conley* concludes that this language in the decision became "precedent by accident" because the case really focused on labor law issues and "[t]he influential discussion of Rule 8 in *Conley* was lifted from a much-used text and added to the opinion by a Justice who was impatient with both the defendants' intransigence and with their lawyer's strategy in arguing a losing case." Sherwin, *The Story of Conley: Precedent by Accident*, in *Civil Procedure Stories*, at 281, 302 (2002). As Justice Stevens pointed out, however, that the Court itself had repeatedly invoked this language itself since *Conley* was decided. Should the *Conley* standard continue to control?

In *Bell Atlantic*, the Court says that Rule 8's requirement that the pleader "show" it is entitled to relief requires that the claims cross "the line from conceivable to plausible." In a footnote not reprinted above, it added that the line lay "between the factually neutral and the factually suggestive." See 127 S.Ct. at 1966 n.5. Was this test properly applied in *Bell Atlantic*? Compare *Richards v. Duke University*, 480 F.Supp.2d 222 (D.C.D.C. 2007). Plaintiff there, a

graduate of Georgetown University Law Center who had transferred there from Duke University Law School, sued various officials of both law schools, as well as the U.S. Attorney General and FBI, and Bill Gates, Melinda Gates and others associated with Microsoft Corporation. Plaintiff alleged that the various defendants illegally engaged in surveillance of her, that law professors entered her apartment to see whether she was completing her assignments, that an article she wrote for a Georgetown journal was altered to imply that she was a homosexual, and that a Georgetown professor added coverage of homosexual civil rights to his syllabus for the first time while she was a student in his class. Microsoft got involved, plaintiff alleged, because Bill Gates became physically attracted to her and the Microsoft defendants feared he would leave his wife as a result. Microsoft stole plaintiff's ideas about generating revenue through wireless email, and also circulated suggestions that she was pregnant with Bill Gates' child. Although recognizing that it had to construe plaintiff's allegations in the light most favorable to plaintiff, the court said that it "does not have to accept asserted inferences or conclusory allegations that are unsupported by facts set forth in plaintiff's complaint." *Id.* at 235. Employing this standard, the court dismissed all claims against all defendants. Presumably one could readily say that this plaintiff's claims were not plausible.

Compare the following hypothetical: Plaintiff sues the City in U.S. District Court alleging that she had during the previous year received three parking tickets. Plaintiff claims she was the victim of religious discrimination because she was given tickets due to being a Zoroastrian. Giving tickets discriminatorily on religious grounds would clearly violate plaintiff's rights. Would plaintiff's claims satisfy the "plausibility" standard? Would plaintiff's claims be stronger if she were a Muslim?

How would the "plausibility" standard apply in *Swierkiewicz*? In *Bennett v. Schmidt*, 153 F.3d 516 (7th Cir. 1998), the court said that all an employment discrimination plaintiff need allege is "I was turned down for a job because of my race." *Id.* at 518. Would such an allegation suffice under *Bell Atlantic*?

How does the *Bell Atlantic* plausibility standard compare to Rule 11(b)(3)? The Court says that plaintiffs in *Bell Atlantic* failed to supply "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Had defendants moved for Rule 11 sanctions in the case, should those have been granted?

3. In *Bell Atlantic*, the Court says that a plaintiff's claims don't have to be "probable" to satisfy Rule 8(a)(2). Recall that under the PSLRA (casebook, p. 171), securities fraud plaintiffs must make particularized allegations giving rise to a "strong inference" that defendant acted with the required state of mind. In *Tellabs, Inc v. Makor Issues and Rights, Ltd*, 127 S.Ct. 2499 (2007), the Seventh Circuit found that the statutory standard was satisfied because the complaint's factual allegations provided a plausible ground for inferring scienter. The Supreme Court held that this was insufficient because the statute requires that the allegations support a "strong" inference. "To qualify as 'strong' within the intendment of [PSLRA], we hold, an inference of scienter must be more than merely plausible or reasonable -- it must be cogent and at least as compelling or reasonable as any opposing inference of nonfraudulent intent." To implement this standard, the Court explained, the district court must credit all "factual" allegations as true, and "must consider the complaint in its entirety." Then the inquiry called for by the statute is "inherently comparative" because "[t]he strength of an inference cannot be decided in a vacuum." "In sum, the reviewing court must ask: When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter at least as strong as any opposing inference?" How different is the standard in *Bell Atlantic*?

4. Form 11 of the Federal Rules (numbered Form 9 when *Swierkiewicz* was decided but renumbered in 2007) suggests that a plaintiff might allege that defendant "negligently drove a motor vehicle against plaintiff" as a specified place and time. Should the assertion that defendant drove "negligently" be sufficient? Note that Fed. R. Civ. P. 84 says that the official forms "suffice under these rules." Are

antitrust suits like *Bell Atlantic* held to a different standard?

Swierkiewicz says that courts may not add to Rule 9(b)'s list of situations with special pleading requirements. If specificity may only be required in cases covered by Rule 9(b), will courts be tempted to take an expansive view of that rule? Consider *Chiron Corp. v. Abbott Laboratories*, 156 F.R.D. 219 (N.D.Cal.1994), a patent infringement action in which defendant raised the affirmative defense of inequitable conduct by plaintiff in obtaining the patent. Plaintiff moved to strike the defense as insufficient under Rule 9(b). Although this defense is broader than common-law fraud, the court found that Rule 9(b) should apply because of "public policy considerations" such as the cost of litigating such claims, the ease with which they can be used as a delaying tactic and the temptation to use them to launch a fishing expedition. *Id.* at 221. Do these justifications affect the scope of Rule 9(b)? See *Hrick, Wrong About Everything: The Application by the District Courts of Rule 9(b) to Inequitable Conduct*, 86 Marq.L.Rev. 894 (2003) (arguing against application of Rule 9(b)). In *Pelman v. McDonalds Corp.*, 396 F.3d 508 (2d Cir. 2005), the court reversed dismissal of a suit claiming that McDonald's had violated the New York Consumer Protection Act by creating a false impressions that its food products were part of a healthy diet even if consumed daily, resulting in obesity and other health problems for plaintiffs and the class they sought to represent. Because the pertinent New York law "extends beyond common-law fraud to cover a broad range of deceptive practices," the court ruled, the claim was not subject to Rule 9(b) but only the requirements of Rule 8(a).

5. Justice Stevens asserts that the orientation of the Federal Rules' pleading standards is "not to keep litigants out of court but to keep them in." *Should that be the goal?* Fairman, *The Myth of Notice Pleading*, 45 Az. L. Rev. 987 (2003), found that "notice pleading as a universal standard is a myth," and that "the reality of federal court practice -- using all manner of fact-based particularity requirements -- is shocking." Why might courts be inclined to make demands of plaintiffs at the pleading stage? Regarding civil rights claims, it has been suggested that "these situations present

particularly difficult problems involving potential abuse of litigation because they involve outwardly innocent or admitted behavior that can, depending on the defendant's state of mind, result in very substantial liability." Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 *Colum. L. Rev.* 433, 450 (1986). Even Justice Stevens, dissenting in *Bell Atlantic*, seems to favor constraining plaintiffs' discovery; the majority says that such constraint does not work. How would it work in *Swierkiewicz*?

6. If plaintiff seeks to avoid paying the filing fee to sue, under 28 U.S.C.A. § 1915(e) the court may dismiss the suit as "frivolous." The Supreme Court has recognized that a suit in forma pauperis may be dismissed even where a complaint on which the filing fee was paid would not be subject to dismissal, *Denton v. Hernandez*, 504 U.S. 25, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992). It explained that, unlike Rule 12(b)(6), this statute gives judges "the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 1833, 104 L.Ed.2d 338 (1989).

7. In *Bell Atlantic*, the Court said that the district judge properly looked beyond the complaint's "truncated quotations" from Notebaert, the CEO of one of the defendants, in ruling on defendants' Rule 12(b)(6) motion. Is this view proper? Recall the discussion on casebook p. 131 n.7, and consider Justice Stevens' footnote 11.

8. Justice Stevens accuses the majority in *Bell Atlantic* of acting on a "transparent policy concern" of "protecting antitrust defendants." The majority, meanwhile, refers to the likely burden of discovery in an antitrust case, and difficulty of limiting it. We will examine discovery in detail in Chapter V (see particularly casebook p. 336 n.3). For the present, reflect on whether discovery burdens in *Swierkiewicz* would be comparable. Is *Bell Atlantic* stating a pleading rule for all kinds of cases or only antitrust cases? Would the discovery burden be severe in a case like the one described in Form 9 of the Federal Rules? Are most cases more like antitrust cases or the Form 9 situation in terms of discovery burden? Does that matter for

application of the pleading rules?

9. *The Rules Amendment Process*: Swierkiewicz emphasized that changes to the pleading rules should be sought through the rule-amendment process; it seems appropriate to provide some background on that process. Pursuant to the Rules Enabling Act of 1934, the entire set of Federal Rules was drafted by a blue ribbon committee in about a year and a half in the 1930s. In recent years, however, the amendment process has become quite public and takes much more time. Initially, rule proposals are generated by Advisory Committees, whose meetings must be public. See 28 U.S.C.A. § 2073(c). Any proposals to change the rules must be published for public comment and hearings. Based on the public input, the Advisory Committee considers modifications, and then approved proposals are forwarded to the Judicial Conference and, if further approved, to the Supreme Court. If the Court adopts them, they are submitted to Congress, which has seven months to act before proposals take effect. Altogether, it normally takes about three years for a rule change to become effective. For an overview, see Marcus, *Reform Through Rulemaking?*, 80 Wash.U.L.Rev. 901 (2002). The process has become more political than it was in the 1930s. "Participatory democracy now is emerging in the rulemaking process." Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C.L.Rev. 795, 800 (1991).

Who should design court procedures? Congress can do so by statute, as it did in the Private Securities Litigation Act. See *Requirements of the Private Securities Litigation Act*, casebook pp. 170-72; Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 Notre Dame L. Rev. 1677 (2004). But the idea behind the Rules Enabling Act is that the rules committee should have primary authority for devising procedural changes. The rules process is dominated by judges, however, and some predict that they would try to further their self interests in drafting rules. See Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 33 U. Legal Stud. 627 (1994); compare Alexander, *Judges' Self-interest and*

Procedural Rules, 33 J. Legal Stud. 647 (1994) (questioning assertion that judges will significantly favor their self interests in rulemaking). Both rulemaking and action by Congress remain possible with regard to any controversial topic. Justice Stevens suggests in his dissent in *Bell Atlantic* that the decision effects a rule change by judicial decree. Is that a proper criticism of the decision? Could the same criticism be made of the Court's decision in *Conley v. Gibson*?