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THE PLAINTIFF NEUTRALITY PRINCIPLE: PLEADING COMPLEX LITIGATION IN THE ERA OF *TWOMBLY* AND *IQBAL*

ROBIN J. EFFRON*

ABSTRACT

Two recent Supreme Court cases have stirred the world of pleading civil litigation. Bell Atlantic Corp. v. Twombly introduced the concept of “plausibility pleading” in which the plaintiff is required to plead facts sufficient to suggest that the claim for relief is “plausible,” and Ashcroft v. Iqbal affirmed that the plausibility standard applies to all aspects of a complaint subject to Rule 8(a) of the Federal Rules of Civil Procedure. This Article examines the consequences of the plausibility standard for pleadings in complex litigation cases.

The Article argues that it is unacceptable to automatically equate the existence of a class action with a high cost of litigation—a prominent concern in Twombly and Iqbal—because this reasoning

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fails to differentiate among types of class actions, to differentiate class actions from other potentially costly types of litigation, and to account for the efficiencies and judicial economy that some class actions are, themselves, supposed to create.

The Article then considers the role of the plausibility standard itself in complex litigation by introducing the plaintiff neutrality principle, which states that when a plaintiff makes neutral allegations concerning her own condition or conduct—that is, subject to inferences of both lawful and unlawful conduct on the part of the defendant—they are not speculative and therefore entitled to a presumption of truth for the purposes of deciding a Rule 12(b)(6) motion to dismiss.

Complex litigation pleadings, like pleadings in ordinary lawsuits, contain allegations of conduct and condition that plaintiffs make about themselves as well as those made about defendants or third parties. This peculiarity of complex litigation pleading creates an additional arena of allegations from which one might attack the factual sufficiency of a complaint: allegations that a named or lead plaintiff makes about other plaintiffs. For this scenario, a group plaintiff neutrality principle addresses how inferences drawn from “neutral” behavior should apply to allegations of class members’ conduct.

The Article concludes by analyzing situations in which the baseline for plaintiff conduct differs because of publicly available data about the condition of a group of plaintiffs, particularly those that are consolidated through multidistrict litigation, rather than as class actions. It concludes that application of the Twombly/Iqbal principle to this context may not be as harmful as application to allegations about defendant conduct because of the plaintiff’s ability to access the relevant information and, if necessary, replead the case.

TABLE OF CONTENTS

INTRODUCTION 2000

I. VIEWING PLEADING DOCTRINE THROUGH THE
LENS OF COMPLEX LITIGATION 2004

 A. *Pre-Twombly Pleading Practice* 2004

 B. *Twombly’s Role in Class Action Complaints* 2015

 C. *The Improper Use of Twombly and Iqbal in
Class Certification Proceedings* 2018

II. POST-TWOMBLY PLEADINGS OF ALLEGATIONS OF
DEFENDANT CONDUCT IN COMPLEX LITIGATION 2022

 A. *Targeting Class Action Complaints Under
Twombly’s Cost of Litigation Rationale* 2022

 B. *Scrutinizing Allegations of Defendant Conduct in
Class Action Complaints* 2028

 1. *Size of the Plaintiff Class* 2029

 2. *Relationship Between Any Increase in the
Cost of Discovery and Plaintiffs’ Ability To
State a Claim* 2031

 3. *Who Bears the Cost of Discovery?* 2034

 4. *Whether the Class Action Promotes or
Reduces Relevant Efficiencies* 2037

 C. *The Existence of the Second Gate* 2040

III. APPLYING THE TWOMBLY/IQBAL STANDARD TO
ALLEGATIONS OF PLAINTIFF, GROUP PLAINTIFF, AND
CLASS CONDUCT 2044

 A. *The Plaintiff Neutrality Principle* 2045

 B. *The Group Plaintiff Neutrality Principle* 2051

 1. *Nonspeculative Allegations of Group
Plaintiff Conduct* 2052

 2. *Speculative Allegations of Group
Plaintiff Conduct* 2053

 C. *Twombly, Iqbal, and Multidistrict Litigation
Master Complaints* 2056

 1. *Attacking the Sufficiency of a Master Complaint* 2056

 2. *Plausibility by the Numbers* 2060

CONCLUSION 2069

INTRODUCTION

Class actions and other large, aggregated actions are easy targets for those disparaging the current state of litigation in America. These critics bemoan the phenomenon of judges allowing supposedly “nonmeritorious” lawsuits to proceed far enough to force defendants to choose between mounting an expensive defense or settling the claims early in the process. Class actions, viewed as expensive both to litigate and to settle, are singled out as the worst offenders.

Litigation critics have pursued many avenues to minimize the specter of the nonmeritorious lawsuit. One such tactic is to give judges increased gatekeeping powers, that is, processes by which judges can screen nonmeritorious lawsuits and dismiss them before they reach the latter stages of litigation. Numerous stages in a lawsuit present the potential for dismissing nonmeritorious cases, from the opening bell of pleading through a post-trial review of a jury verdict. For nearly fifty years, courts and commentators viewed the pleading stage as a relatively weak point for the exercise of gatekeeping.

This changed with two recent Supreme Court cases concerning the standard for pleading and its role in litigation.¹ The first, *Bell Atlantic Corp. v. Twombly*, marked the end of the fifty-year reign of the pleading mantra familiar to generations of civil procedure students, that a district court should not dismiss a complaint for failure to state a claim for which relief can be granted “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”² In *Twombly*, the Supreme Court replaced this standard with “plausibility pleading,” in which the plaintiff is required to plead facts sufficient to suggest that the claim for relief is “plausible,”³ and in *Iqbal*, affirmed that the plausibility standard applies to all aspects of a

1. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

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

3. *Twombly*, 550 U.S. at 568.

complaint subject to Rule 8(a) of the Federal Rules of Civil Procedure.⁴

Twombly arose in a complex litigation context, and the Court intoned several warnings about the “problem[s] of discovery abuse” and “costs” of class actions.⁵ Despite this fact, the analyses of *Twombly* and *Iqbal* thus far have treated all forms of litigation as the same for the purposes of pleading. This Article examines the consequences of the plausibility standard for pleadings in complex litigation cases by providing a detailed study of how the *Twombly/Iqbal* standard applies to the allegations that are typical in complaints filed in complex litigation cases.

The inquiry reveals two ways in which isolating the complex litigation context contributes to a clearer understanding of the application of *Twombly* and *Iqbal*. First, *Twombly* changes the landscape for understanding pleadings and causes of action in complex litigation cases through both direct and indirect applications of the plausibility pleading standard. Second, a study of class action pleadings contributes a further clarification of the meaning of “plausible” in the *Twombly* and *Iqbal* opinions themselves, which has been a subject of considerable confusion among judges, litigators, and academic commentators.

Complex litigation pleadings, like pleadings in ordinary lawsuits, contain allegations of conduct and condition that plaintiffs make about *themselves* as well as those made about defendants or third parties. A more robust understanding of the plaintiff plausibility standard emerges by separating allegations about plaintiffs from allegations about defendants. Allegations of plaintiff conduct in a complex litigation complaint, however, sometimes contain speculation about the conduct or condition of other plaintiffs as well as the conduct of defendants. This peculiarity of complex litigation pleading creates an additional arena of allegations from which one might attack the factual sufficiency of a complaint.

In the complex litigation arena, a limited and nuanced application of the plausibility standard to allegations of both plaintiff and defendant conduct might actually serve as an effective and fair use of *Twombly* and *Iqbal*. The danger, however, is that a broad or unin-

4. *Iqbal*, 129 S. Ct. at 1953.

5. *Twombly*, 550 U.S. at 559.

formed application of *Twombly* in the complex litigation context may produce bad outcomes, such as shifting an evidence-based Rule 23 class certification decision to the pleadings-based motion to dismiss context, resulting in an improper dismissal of an entire lawsuit rather than a denial of class certification.

This Article proceeds in three parts. Part I argues that complex litigation, particularly class actions, presents a special problem because the named plaintiffs must also plead facts about unnamed or absent class members that might be viewed as speculative, and that the plausibility pleading standard might alter doctrines surrounding class certification. After a brief examination of the possibility of applying the plausibility standard to motions for class certification, this Article argues that the *Twombly/Iqbal* standard cannot be applied directly to the question of class certification because Rule 23 class certification is explicitly *not* a matter to be pled or decided on a Rule 12(b)(6) motion to dismiss.

Part II examines the problems associated with applying the *Twombly/Iqbal* standard to allegations of defendant conduct in complex litigation complaints. Part II.A sets out the doctrinal basis for tying the level of “plausibility” needed in a complaint to the cost of litigation in a given case. Focusing on class actions, this section then demonstrates that both the Supreme Court and lower courts consistently have presumed class actions to be costly, and thus such cases are in need of special scrutiny at the motion to dismiss phase of litigation.

Part II.B argues that it is unacceptable to automatically equate the existence of a class action with high costs of litigation because this comparison fails to differentiate among types of class actions, and to differentiate class actions from other potentially costly types of litigation. It also fails to account for the efficiencies and judicial economy that some class actions are, themselves, supposed to create. These failures amount to a tension in *Twombly* that I label the “efficiency conundrum.” That is, despite increasingly vigorous efforts to encourage consolidation of litigation to avoid perceived inefficiencies in the redundant litigation of individual cases, *Twombly* singles out class actions and complex cases as especially dangerous, costly, and in need of tight judicial control early in the lawsuit.

I conclude that judges need to account for whether the cost of discovery would actually be higher in the absence of an aggregation device, and also must discount the costs of litigation that are not associated with the existence of the cause of action, because these costs fall outside of the scope of *Twombly*. Part II.C then argues that the pronounced costs of litigation in class actions that are unaccounted for at the motion to dismiss stage are still subject to a case-screening device because class certification serves as a second, and more appropriate, gate for considering these costs.

In Part III, I turn to the application of the *Twombly/Iqbal* standard to allegations of plaintiff conduct. Part III.A introduces the plaintiff neutrality principle, which states that when a plaintiff makes neutral allegations concerning her own condition or conduct, that is, allegations subject to inferences of both lawful and unlawful conduct on the part of the defendant, these allegations are not speculative and are therefore entitled to a presumption of truth for the purposes of deciding a Rule 12(b)(6) motion to dismiss.

Part III.B turns to group plaintiff situations, suggesting that if indeed the *Twombly/Iqbal* standard is applicable to allegations regarding plaintiffs, defendants might be more successful on motions to dismiss certain class action complaints on the ground that the complaint is too speculative with regard to plaintiff class member conduct. For defendants, the *Twombly/Iqbal* standard is a useful and cost effective tool for disposing of class action cases because, unlike class certification in which plaintiffs can conduct discovery into class definition matters, a Rule 12(b)(6) motion to dismiss concerns only the pleadings. This practice presents a potential conflict with existing class action case law that discourages judges from deciding issues of class definition at the motion to dismiss phase, rather than in class certification proceedings.

Part III.B.1 examines the types of class actions in which there is no speculation about the conduct or condition of other class members, so no speculation should be imputed to the named class representatives. Part III.B.2 discusses the types of complex litigation in which plaintiff speculation is present and arrives at the group plaintiff neutrality principle which addresses how inferences drawn from “neutral” behavior should apply to allegations of class members’ conduct.

Part III.C addresses situations in which the baseline for plaintiff conduct differs because of publicly available data about the condition of a group of plaintiffs, particularly those consolidated as a multidistrict litigation rather than as class actions. In that Part, I conclude that application of the *Twombly/Iqbal* principle to this context may be less harmful than application of the principle to allegations about defendant conduct because of the plaintiff's ability to access the relevant information and, if necessary, replead the case.

I. VIEWING PLEADING DOCTRINE THROUGH THE LENS OF COMPLEX LITIGATION

The development of pleading doctrine from the pre-Federal Rules era through the recent *Twombly* revolution is now a well-documented story.⁶ This Part summarizes that story with an emphasis on the role that complex litigation has played in the evolution of pleading doctrine.

A. Pre-*Twombly* Pleading Practice

The drafters of the Federal Rules of Civil Procedure crafted Rule 8 to create a liberal notice pleading standard.⁷ It replaced the code pleading system⁸ with the simple requirement that a pleader must provide "a short and plain statement of the claim showing that the pleader is entitled to relief."⁹ The purpose of pleading under Rule 8,¹⁰ in other words, simply was to notify the defendant of the

6. See, e.g., Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 890-98 (2009); Charles B. Campbell, *A "Plausible" Showing After Bell Atlantic Corp. v. Twombly*, 9 NEV. L.J. 1, 9-21 (2009); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 434-39 (2008).

7. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990-91 (2003).

8. See *id.* (describing the evolution from common law pleading to code pleading and the Federal Rules of Civil Procedure); see, e.g., Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 19-22 (1989).

9. FED. R. CIV. P. 8(a)(2).

10. Certain claims must meet "heightened" pleading standards set forth in FED. R. CIV. P. 9, or in a statute such as the Private Securities Litigation Reform Act of 1995 (PSLRA). See *infra* notes 27-29 and accompanying text.

existence of a lawsuit and of the grounds for the relief sought. The Rule was not meant to serve a gatekeeping function for meritorious lawsuits.¹¹

For nearly fifty years, courts interpreted Rule 8 according to the famous *Conley v. Gibson*¹² formulation 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.”¹³

The aim of a notice pleading system is to isolate the filing of a complaint and confine it to a very narrow purpose: the initiation of a lawsuit.¹⁴ Matters of proof and the relative merits of a lawsuit are governed by other rules and procedural devices¹⁵ because Rule 8 was to be “part of a procedural system structured to foster the determination of cases *on the merits*.”¹⁶ It was the role of “summary judgment and control of discovery to weed out unmeritorious claims.”¹⁷

During this time, the Court engaged in a tug of war with the lower courts over the requirements of Rule 8.¹⁸ The lower courts drifted toward heightened pleading requirements for a variety of

11. See Edward D. Cavanagh, Twombly, *The Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN'S L. REV. 877, 877 (2008) (“The drafters rejected ... pleading rules ... which generally required a plaintiff to allege facts sufficient to establish a cause of action.”); Spencer, *supra* note 6, at 434 (arguing that Rule 8 had been written so that “pleadings were no longer to be a substantial hurdle to be overcome before plaintiffs could gain access to the courts”). *But see* Bone, *supra* note 6, at 892-93 (arguing that in the debates leading to the adoption of the federal rules, not everyone agreed that the standard for Rule 8(a)(2) should be notice pleading).

12. 355 U.S. 41 (1957).

13. *Id.* at 45-46.

14. See Bone, *supra* note 6, at 880 (observing that notice pleading “rejects case screening as a pleading function”).

15. Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) (stating that devices such as discovery and summary judgment mean that courts “do not need to force the pleadings to their less appropriate function”); see also *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993).

16. Fairman, *supra* note 7, at 994 (emphasis added).

17. *Leatherman*, 507 U.S. at 168-69; see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002) (discussing the role of summary judgment in adjudicating a case on the merits).

18. See Edward D. Cavanagh, Twombly: *The Demise of Notice Pleading, the Triumph of Milton Handler, and the Uncertain Future of Private Antitrust Enforcement*, 28 REV. LITIG. 1, 17-18 (2008) (“*Twombly* represents the culmination of decades of guerilla warfare on notice pleading.”).

causes of action.¹⁹ Some judges would dismiss complaints lacking a certain level of factual detail,²⁰ reasoning, for example, that the *Conley* standard “has never been taken literally.”²¹ In two separate decisions, the Supreme Court pulled back to reinforce the *Conley* standard that a plaintiff is not “require[d] ... to set out in detail the facts upon which he bases his claim.”²² Throughout this period, academic commentators echoed the Supreme Court’s holdings that Rule 8 was designed “simply [to] give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”²³

Complex litigation was often front and center in efforts to use a case-screening mechanism, persisting through special federal rules, Rule 9,²⁴ and the Private Securities Litigation Reform Act of 1995 (PSLRA).²⁵ The pleading provisions of the PSLRA are directly addressed to class actions, while Rule 9(b) applies to any complaint alleging fraud or mistake.²⁶

Rule 9(b)’s particularity requirement reflects a belief that lawsuits alleging fraud are more likely to be frivolous or harmful to the defendant.²⁷ Rule 9(b) often appears in the complex litigation setting because of the popularity of consumer fraud class action suits.²⁸

19. Fairman, *supra* note 7, at 997 (describing “the reality of federal court [pleading] practice” during this period as “using all manner of fact-based particularity requirements”); Amanda Sue Nichols, Note, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of Bell Atlantic v. Twombly?*, 76 *FORDHAM L. REV.* 2177, 2198-2205 (2008) (describing varying pleading standards applied to Alien Tort Statute cases pre-*Twombly*).

20. See Fairman, *supra* note 7, at 990-91.

21. *Sutliff, Inc. v. Donovan Cos., Inc.*, 727 F.2d 648, 654 (7th Cir. 1984); see also *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (“In practice, ‘a complaint ... must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory.’”).

22. *Leatherman*, 507 U.S. at 168-69 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

23. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley*, 355 U.S. at 47).

24. FED. R. CIV. P. 9 (mandating heightened pleading in particular cases).

25. Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C. and 18 U.S.C.).

26. FED. R. CIV. P. 9(b).

27. See Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 *U.C. DAVIS L. REV.* 281, 291-96 (2004) (describing protection of defendants’ reputations and deterrence of frivolous claims and strike suits as two common rationalizations for the existence of Rule 9(b)).

28. Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs To Allege Reliance as an Essential Element*, 43 *HARV. J. ON LEGIS.* 1

These lawsuits often use state law consumer fraud statutes as the cause of action. They are frequently litigated as class action product liability suits because the actions typically do not require an individual showing of reliance²⁹ and are therefore more amenable to class certification under Rule 23(b)(3).³⁰ Because most of these actions can only be maintained as class actions if the claim for relief is restricted to the consumer fraud claim, these lawsuits have, in effect, been subject to a form of “heightened pleading” for quite some time. Defendants seizing on the application of the 9(b) heightened pleading standard stress the necessity of pleading fraud with particularity to stem the so-called “abusive” practices of class action litigation. Although some judges and commentators have explained that Rule 9(b) merely serves the purpose of notice pleading,³¹ complex cases nonetheless loom large over the rule’s heightened pleading requirement.

The PSLRA similarly focuses on complex litigation as a target for pleading reform. This statute, which Congress passed in the mid-1990s to address perceived abuses of class action shareholder derivative suits,³² “requires plaintiffs to state with particularity ... the facts evidencing scienter, *i.e.*, the defendant’s intention ‘to deceive, manipulate, or defraud.’”³³ A strong inference “must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.”³⁴ The PSLRA also addresses the particularity with which plaintiffs must state allegations of fraud, “insist[ing] that securities fraud complaints ‘specify’ each misleading statement; that they set forth the facts ‘on which [a] belief’ that a statement is misleading

(2006).

29. *See id.* at 23-30 (describing the standards for reliance and causation in state law consumer fraud statutes).

30. *Id.* at 2-3.

31. *See* Fairman, *supra* note 7, at 991 n.23 (listing cases in which the function of Rule 9(b) is understood as providing a higher degree of “fair notice”).

32. *See* James D. Cox, Randall S. Thomas & Lynn Bai, *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 WIS. L. REV. 421, 431 (reporting that Congress passed the PSLRA because it believed it “was necessary to curb the frequency of baseless securities class actions that were being filed to extort recoveries as a consequence of lax procedural protections of defendants”).

33. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 (1976)).

34. *Id.* at 314.

was ‘formed’; and that they ‘state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.’³⁵ This requires plaintiffs to “do more than say that the statements ... were false and misleading; they must demonstrate with specificity why and how that is so.”³⁶

As a result, judges handling securities fraud class actions routinely deal with three pleading standards: Rule 9(b) for fraud, the PSLRA for scienter, and Rule 8(a)(2) for the remaining aspects of the complaint.³⁷ Class actions, then, played a central role in the maintenance and development of heightened pleading standards that ultimately led to the *Twombly* decision.³⁸

*Bell Atlantic Corp. v. Twombly*³⁹ was an antitrust class action brought against incumbent local exchange carriers (ILECs), the regional telecommunications companies that were created after the break-up of AT&T.⁴⁰ The Telecommunications Act of 1996⁴¹ required the ILECs to share their networks with competitive local exchange carriers (CLECs) in order to introduce competition into the telecommunications market.⁴² The plaintiffs were representatives of a putative class of all subscribers of local telephone and high-speed

35. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (quoting 15 U.S.C. §§ 78u-4(b)(1), (2)).

36. *Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir. 2004).

37. *Backe v. Novatel Wireless, Inc.*, 607 F. Supp. 2d 1145, 1156 (S.D. Cal. 2009) (applying Rule 8(a)(2), Rule 9(b), and PSLRA pleading standards to securities fraud class action); *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 528-30 (S.D.N.Y. 2008) (same); *In re Dot Hill Sys. Corp. Sec. Litig.*, 594 F. Supp. 2d 1150, 1157 (S.D. Cal. 2008) (same).

38. The *Twombly* decision itself, however, did not require a heightened pleading standard synonymous with Rule 9(b) itself. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming 2010) (manuscript at 14), available at <http://ssrn.com/abstract=1448796> (“[T]he Court did not reimpose a heightened-pleading requirement.... [F]or the first time, pleadings must undergo a test not for factual detail, but for factual convincingness.”); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming 2010) (manuscript at 55), available at <http://www.ssrn.com/abstract=1442786> (“If Rule 8 were construed to require additional details about events alleged in a complaint, then what purpose would Rule 9(b) serve?”).

39. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 550 (2007).

40. For a more detailed description of the facts that led to the *Twombly* case, see Cavanagh, *supra* note 11, at 879-81.

41. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

42. *Twombly*, 550 U.S. at 549.

Internet service during a roughly ten-year period.⁴³ The plaintiffs alleged that the ILECs had violated section 1 of the Sherman Antitrust Act⁴⁴ by overcharging the CLECs for access to the networks, providing inferior service, and agreeing to avoid competing in each other's markets.⁴⁵

As evidence of the conspiracy, the plaintiff's complaint alleged "the absence of any meaningful competition between the [ILECs] in one another's markets, and ... the parallel course of conduct that each engaged in to prevent competition from CLECs."⁴⁶ They further alleged the existence of an agreement in restraint of trade simply by stating that defendants and their coconspirators "entered into a contract, combination or conspiracy to prevent competitive entry in their respective ... markets."⁴⁷

The Supreme Court held that, based on the allegations in the complaint, the plaintiffs had not stated a claim under section 1 of the Sherman Act.⁴⁸ The Court began with the premise that allegations of conscious parallel conduct alone are insufficient for a section 1 claim.⁴⁹ The cause of action requires allegations of an agreement.⁵⁰ The Court held that a complaint merely alleging the existence of an agreement did not meet the requirement of Rule 8(a)(2) because the Rule "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."⁵¹ Instead, "stating a claim requires a complaint *with enough factual matter* (taken as true) to suggest that an agreement was made."⁵²

The Court had previously rejected a plausibility pleading standard, stating that "Rule 8(a) establishes a pleading standard

43. *Id.*

44. 15 U.S.C. § 1 (2006).

45. *Twombly*, 550 U.S. at 551.

46. *Id.* at 551 (internal quotations omitted) (quoting Plaintiff's complaint).

47. *Id.*

48. *Id.* at 556-57.

49. *Id.* at 557 ("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."); *id.* at 553 ("Even 'conscious parallelism' ... is 'not in itself unlawful.'" (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993))).

50. *Id.* at 553.

51. *Id.* at 555.

52. *Id.* at 556 (emphasis added).

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.'"⁵³ *Twombly* changed this standard by explicitly retiring *Conley*'s "no set of facts" language.⁵⁴

The *Twombly* decision moved pleading requirements from the realm of the possible to the realm of the plausible. This is significant given the efforts the Supreme Court and commentators previously made to dispel the "myth" of notice pleading.⁵⁵ The *Twombly* Court held that the plaintiff was responsible for "identifying facts that are suggestive enough to render a § 1 conspiracy plausible,"⁵⁶ and grounded plausibility pleading within the text of Rule 8(a)(2), interpreting the rule to mean that the allegations in the complaint must "possess enough heft to 'sho[w] that the pleader is entitled to relief.'"⁵⁷

The plaintiffs' allegations were conclusory; "[a]n allegation of parallel conduct" which "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.'"⁵⁸

While the exact level of detail that *Twombly* requires remains unclear, at the very least, the case stands for the proposition that a complaint meeting the minimum "no set of facts" standard from *Conley* no longer qualifies as "plausible." In its *Twombly* opinion, the Court rejected the Second Circuit's position that it would be permissible to "include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss," and that "to rule that allegations of parallel anticompetitive conduct fail to

53. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

54. *Twombly*, 550 U.S. at 562-63 ("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.").

55. See *supra* notes 21-26 and accompanying text.

56. *Twombly*, 550 U.S. at 556.

57. *Id.* at 557 ("The need at the pleading stage for allegations *plausibly* suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2)." (emphasis added)).

58. *Id.* (emphasis added).

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.”⁵⁹

Some proponents of the plausibility pleading standard introduced by the Supreme Court in *Twombly* argue that the Court’s holding is especially appropriate in light of the fact that the *Twombly* case itself was a large antitrust class action.⁶⁰ They emphasize the Court’s reasoning that a plaintiff should have a plausible basis for a claim before proceeding to potentially expensive discovery.⁶¹ One clear rule to emerge from *Iqbal*, however, is that the *Twombly* plausibility standard applies to all Rule 8 pleadings and is not to be limited to the antitrust context.⁶²

These commentators suggest that the drafters of the original Rule 8(a)(2) did not anticipate the advent of modern complex litigation. Thus, the argument goes, while the *Conley* interpretation of the Rule might have made sense in the early decades of the Federal Rules, the newer *Twombly* standard is appropriate in the era of large and complex cases.⁶³ Although *Twombly* has been painted as “reviving” the use of “heightened pleading” standards in federal courts, even critics acknowledge that heightened pleading requirements never really disappeared in federal practice.⁶⁴

Twombly, however, did not directly adopt a standard from the complex litigation context, nor did it clarify the precise meaning of

59. *Id.* at 553 (quoting *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005)).

60. *See, e.g.*, Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions To Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61 (2007).

61. *Id.* at 76-77, 81.

62. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (“Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8.”).

63. Epstein, *supra* note 60, at 98 (“The current provisions of the Federal Rules of Civil Procedure were designed in an earlier era for litigation that on average has been far simpler than litigation today. The Rules operated on an assumption that the greater risks in civil litigation came from the premature dismissal of meritorious cases brought by ordinary people of little means or sophistication. The large modern business dispute or class action does not fit into that template at all.”).

64. *See* Patricia W. Hatamayar, *The Tao of Pleading: Do Twombly and Iqbal Really Matter*, 59 AM. U. L. REV. 553, 598 (2010) (challenging characterizations of the pre-*Twombly* era with empirical findings that reveal “[c]learly, the endlessly repeated old saw that ‘12(b)(6) motions are viewed with disfavor and rarely granted’ should be laid to rest” (citation omitted)). *See generally* Fairman, *supra* note 7, *passim*.

“plausible.” Thus, it is no surprise that this recent jurisprudence has generated more questions than it has answered.⁶⁵ Since the decision, judges and commentators have focused on answering the most immediate of the open questions: what is the meaning of “plausible,” and what level of factual detail must plaintiffs state in a complaint?⁶⁶ Most likely, the answer to the second question lies somewhere between a bald assertion of wrongdoing and a wholesale return to fact pleading.⁶⁷ Just a few weeks after the *Twombly* decision, the Supreme Court issued a per curiam decision in *Erickson v. Pardus* in which it purported to reaffirm notice pleading.⁶⁸ The plaintiff, a prisoner suffering from Hepatitis C, claimed that the prison and prison doctor were endangering his life by withholding his medication.⁶⁹ The Court rejected the Tenth

65. See, e.g., *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007) (“Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court’s decision.”); Bone, *supra* note 6, at 881 (“The Court’s criticism of *Conley* has caused a great deal of confusion.”); Cavanagh, *supra* note 18, at 14 (“The line separating fact from conclusion is not easy to draw and never has been.”).

66. See, e.g., *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (“[T]he new formulation is less than pellucid.”); Bone, *supra* note 6, at 881 (“‘Plausible’ corresponds to a probability greater than ‘possible.’ Exactly how much greater is uncertain.”); Cavanagh, *supra* note 11, at 879 (“The Court expressly ‘retired’ *Conley v. Gibson* and, in so doing, put an end to notice pleading as it has been understood in the seventy years since the enactment of the Federal Rules of Civil Procedure.”); Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 606 (2007) (“[W]ithin three months of the decision, 808 lower federal courts opinions had cited the case, often taking divergent views of what it meant.”); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 6 (2009) (“A central question in the wake of *Twombly* is whether so-called notice pleading survived the decision.”); Suja A. Thomas, *The New Summary Judgment Motion: The Motion To Dismiss Under *Iqbal* and *Twombly** 15-18 (Oct. 27, 2009) (unpublished manuscript), available at <http://ssrn.com/abstract-1494683> (arguing that *Swierkiewicz* is no longer good law). Professor Hatamayar has conducted preliminary empirical analysis of dismissal before and after the *Twombly* and *Iqbal* decisions and has concluded that “*Iqbal* combined with *Twombly* may have already resulted in significantly more 12(b)(6) motions being granted than under *Conley*.” Hatamayar, *supra* note 64, at 2.

67. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 n.5 (2007) (“The border in *DM Research* was the line between the conclusory and the factual. Here it lies between the factually neutral and the factually suggestive. Each must be crossed to enter the realm of plausible liability.”); see also Bone, *supra* note 6, at 883 (describing the Court’s departure from notice pleading as “modest”); Steinman, *supra* note 38, at 23-30 (arguing that “The most significant pre-*Twombly* authorities on federal pleading standard are still good law” and that “plausibility is not in fact the primary inquiry” (or “even a necessary one” after *Twombly* and *Iqbal*)).

68. 551 U.S. 89 (2007) (per curiam).

69. *Id.* at 89-93.

Circuit's finding that the allegations were too conclusory to support a § 1983 claim, and even went so far as to say that "[s]pecific facts are not necessary" under Rule 8(a)(2).⁷⁰ Perhaps the Court meant to signal that it had not endorsed a *detailed* fact-pleading regime.⁷¹ The language of *Twombly*, however, unmistakably identifies plausibility as the new touchstone for pleading analysis and the Court confirmed this interpretation in the recent case *Ashcroft v. Iqbal*.⁷²

In *Iqbal*, the plaintiff, a Muslim Pakistani man, sued a number of federal officials in a *Bivens* action for constitutional violations that occurred while he was detained in a federal facility following the September 11th attacks.⁷³ He alleged that his arrest was the result of unconstitutional discrimination on the basis of his race, religion, and national origin, and that he was subjected to unconstitutionally harsh treatment while detained.⁷⁴ *Iqbal* named numerous federal officials in his complaint including former Attorney General John Ashcroft and former FBI director Robert Mueller, claiming that they were responsible for adopting the unconstitutional policy that resulted in the alleged constitutional violations;⁷⁵ Ashcroft was named as "principal architect" of the policy" and Mueller was named as "instrumental in [its] adoption, promulgation, and implementation."⁷⁶ The Supreme Court held that the plaintiff must plead "sufficient factual matter, accepted as true to 'state a claim to relief that is plausible on its face.'"⁷⁷

The Court clarified the *Twombly* standard by characterizing it as a two-pronged analysis: a court must first identify the statements

70. *Id.* at 93.

71. See Bone, *supra* note 6, at 883-84 ("The Court's approval of liberal pleading does not contradict its holding; it qualifies and explains that holding by indicating that 'plausibility' should not be interpreted as a demanding standard.").

72. 129 S. Ct. 1937 (2009).

73. *Id.* at 1942.

74. *Id.* at 1944.

75. *Id.* at 1942.

76. *Id.* at 1944.

77. *Id.* at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court further held that to sustain a *Bivens* cause of action, the plaintiff had to show that "petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin." *Id.* at 1948-49. Mere knowledge of the policies is insufficient as a matter of law. *Id.* at 1949.

in a complaint that are bare legal conclusions and therefore not entitled to an assumption of truth, then search the complaint for sufficient factual allegations that, if taken as true, show that the claim for relief is plausible.⁷⁸

Due to the Court's emphasis on the language of plausibility, commentators have attempted to sort out what precisely is required under a "plausibility pleading" standard. The *Twombly* holding has been described as a "dramatic departure from settled procedural law,"⁷⁹ "dubious,"⁸⁰ "poorly crafted,"⁸¹ and "troublesome."⁸² The *Iqbal* Court itself acknowledged that "[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."⁸³

The exact meaning of "plausible" remains vague after *Iqbal*, as does the meaning of the "facts" that plaintiffs must allege in order to meet this standard.⁸⁴ The Court, however, did emphasize that plausible facts are those that suggest wrongdoing, not simply facts that are "neutral," that is, given to multiple interpretations or explanations, some of which may suggest illegality, but some of which describe ordinary and lawful behavior.⁸⁵ Context proves to be especially important in understanding the meaning of "neutrality."⁸⁶

78. *Id.* at 1950.

79. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 573 (2007) (Stevens, J., dissenting).

80. Spencer, *supra* note 6, at 441-42.

81. Ides, *supra* note 66, at 606.

82. Cavanagh, *supra* note 11, at 889.

83. *Iqbal*, 129 S. Ct. at 1950.

84. Professor Steinman, for example, takes care to distinguish the allegation of facts from a requirement that a plaintiff "must identify evidentiary support for its allegations," because such a requirement at the pleadings stage "would contravene Rule 11 by mandating immediate dismissal of a complaint without any opportunity ... to use discovery to obtain the needed evidentiary support." Steinman, *supra* note 38, at 40-41. Professor Thomas suggests that *Iqbal* does require the plaintiff to plead additional facts, and that this requirement has turned the motion to dismiss into a new motion for summary judgment. Thomas, *supra* note 66, at 18-21.

85. Both *Twombly* and *Iqbal* have been criticized on the grounds that the facts alleged in each of the respective complaints were not as neutral as the Court chose to believe. *See, e.g.*, Cavanagh, *supra* note 11, at 881-82; Spencer, *supra* note 6, at 447 (arguing that *Twombly* "deprives plaintiffs the benefits of inferences in their favor when the pleaded facts are consistent with alternate explanations that do not involve wrongdoing").

86. *See infra* notes 230-31 and accompanying text.

B. Twombly's Role in Class Action Complaints

In certain complex litigation contexts, some are concerned that pleadings should be examined with more suspicion than ordinary complaints, and that complex litigation is almost always an expensive prospect. Taken as one general concern about complex litigation, rather than two distinct concerns that might apply to some, but not all, forms of complex litigation,⁸⁷ this position reflects an over-simplified view of complex litigation. It also mirrors the opinion in *Twombly*, which itself conflated the two distinct issues by failing to adequately define the relationship between the plausibility of facts in a complaint and the times that a court should be particularly attentive to the costs of litigation. This confusion causes problems when the *Twombly/Iqbal* standard is applied to class action complaints.

Twombly and *Iqbal* envision claims that fall along a spectrum from complete lack of knowledge of defendant activity to neutral explanations of defendant activity, through plausibility, probability, and then certainty. The crucial point in this continuum is the point at which “neutral” allegations, from which both lawful and unlawful conclusions may be inferred, require extra facts to show that the conduct has moved away from a “baseline” of normal activity.⁸⁸ The Supreme Court alluded to this idea in both *Twombly* and *Iqbal*, holding that the plaintiffs had “not ‘nudged [their] claims ... across the line from conceivable to plausible.’”⁸⁹ The *Twombly/Iqbal* standard is located somewhere along the spectrum between plausibility and probability, most likely closer to the “plausible” marker.

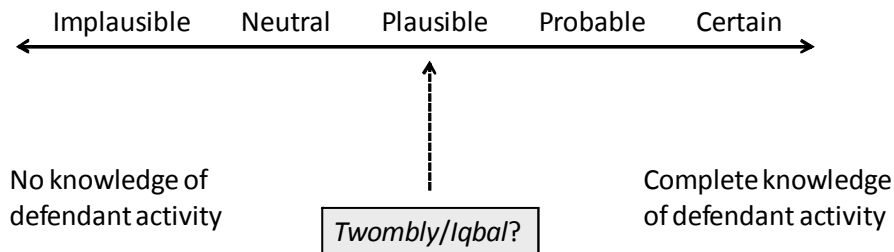
87. See *infra* note 139.

88. Professor Bone theorized the baseline idea as:

the normal state of affairs for situations of the same general type as those described in the complaint. The probability of wrongdoing for baseline conduct is not necessarily zero, but it should be very small, for otherwise the conduct in question would not be part of a socially acceptable baseline. Understood in these terms, what the *Twombly* Court requires are allegations that differ in some significant way from what usually occurs in the baseline and differ in a way that supports a higher probability of wrongdoing than is ordinarily associated with baseline conduct.

Bone, *supra* note 6, at 885-86. For Professor Spencer's interpretation of the baseline, see Spencer, *supra* note 6, at 448-50.

89. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950-51 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).



Class actions are different.⁹⁰ The district court evaluates the strength of the complaint as a class, rather than individually. The plaintiff class stands or falls as a group based on the strength of claims about the group itself. How, then, should a court make sense of “speculativeness” in a lawsuit in which the named litigants are responsible for pleading facts not only about themselves, but about other persons for whom they do not or cannot have specific knowledge?

To answer this question, it is helpful to position class actions along a spectrum of plaintiff behavior similar to that of defendant behavior. The open question, however, is whether the *Twombly/Iqbal* standard has a place on this spectrum as well.

If *Twombly* extends to *all* allegations in a complaint, then a court may dismiss a complaint because the plaintiff has not alleged sufficient facts to plausibly suggest the defendant has engaged in unlawful activity.⁹¹ In an ordinary lawsuit, the relationship between the plaintiff and the complaint is simple; each plaintiff pleads her own cause of action—she is not a representative of anyone else.⁹² Even when multiple plaintiffs are joined as necessary⁹³ or permissive⁹⁴ parties in one complaint, there is always a direct one-to-one relationship between plaintiff and pleading. In other words, each plaintiff must meet her own procedural burdens—she cannot ride

90. *Twombly*, of course, was itself a class action complaint. I address this aspect of the decision *infra* in Part II.B.

91. See *infra* notes 215-17 and accompanying text.

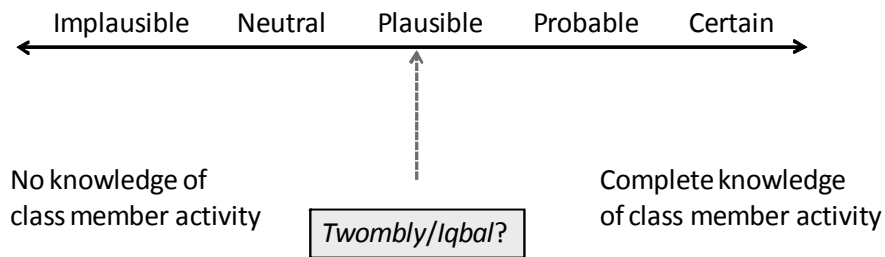
92. In limited circumstances, a party can sue as the representative of another person. See FED. R. CIV. P. 17(a)(1), (c).

93. *Id.* 19(a)(1).

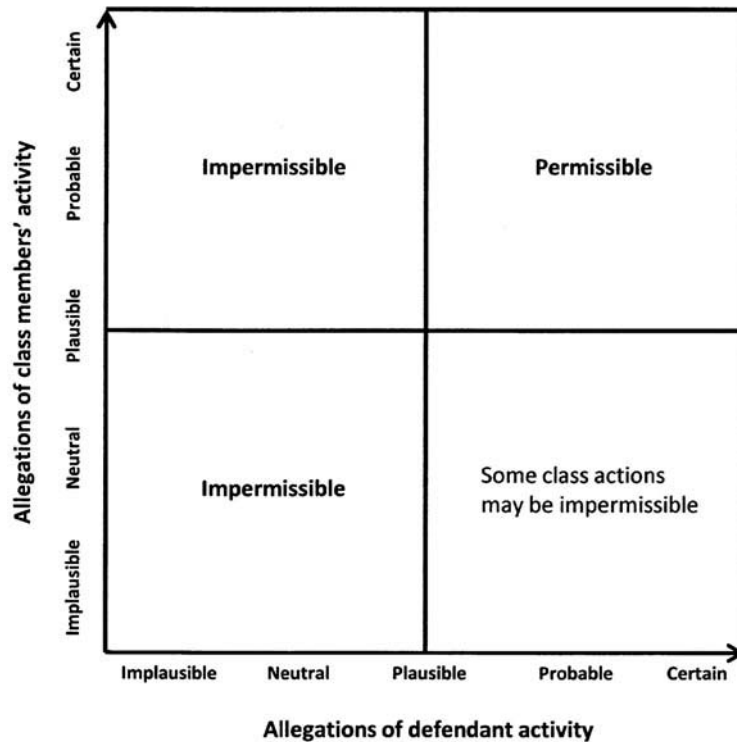
94. *Id.* 20(a)(1).

on the backs of other plaintiffs if their complaints are sufficient when hers is not. There is a spectrum of speculativeness in complaints, but the speculation runs to defendant or third-party behavior only.

Extending *Twombly* to allegations of class members' conduct means that courts could envision a spectrum of class member behavior similar to a spectrum of defendant behavior.



This spectrum is explored in detail in Part III. For now, it is sufficient to note that since class actions are subject to the same plausibility requirements regarding defendant or third-party behavior as in a normal lawsuit, the two spectra together form a matrix.



Given this complexity, this Article analyzes each axis of the spectrum independently to determine the zone of permissible pleadings in complex litigation cases.

C. The Improper Use of Twombly and Iqbal in Class Certification Proceedings

Before examining the relevance of the plausibility standard to pleadings in complex litigation cases, it is important to disentangle the application of the plausibility standard to motions to dismiss (*Twombly's* proper context) from an improper application of the standard to the class certification context.

Using the *Twombly/Iqbal* standard in class certification would require applying the plausibility standard to the facts surrounding

class membership. In other words, under this interpretation, *Twombly* would require a plaintiff suing as a named representative on behalf of a putative class to plead facts that plausibly suggest the existence of the class.⁹⁵

The intuition to apply the plausibility standard to motions beyond the motion to dismiss for failure to state a claim, such as a motion to dismiss for lack of personal jurisdiction, has already found its way into judicial decisions and academic commentary.⁹⁶ The possibility of general applicability of the plausibility standard to non-12(b)(6) motions is beyond the scope of this Article. It is clear, however, that the plausibility pleading standard does not apply directly to class certification under Rule 23.

Pleadings are directly connected to Rule 12(b)(6) motions because that rule governs dismissals based on whether the plaintiff has a stated a claim for which relief can be granted.⁹⁷ The *Twombly* and *Iqbal* holdings, in turn, address whether the pleadings, as the basis for a 12(b)(6) dismissal, are plausible. Rule 23 class certification, on the other hand, does not directly relate to the pleadings filed in a lawsuit because the formation of a plaintiff class is not itself a cause of action or a claim for which relief can be granted. As the Supreme Court has said, “In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action ... but rather whether the requirements of Rule 23 are met.”⁹⁸

Complaints alleging the existence of a class occupy a peculiar place in pleadings jurisprudence. A request for class certification is not part of a cause of action;⁹⁹ thus, an individual plaintiff could

95. This issue is distinct from the question of whether the named representative or class members actually have stated a cause of action. See *infra* note 245 and accompanying text.

96. Commentators have suggested similar applications of *Twombly* beyond the Rule 12(b)(6) context, such as in the procedures governing decisions about personal jurisdiction. See Jayne Ressler, Plausibly Pleading Personal Jurisdiction, 82 TEMP. L. REV. (unpublished manuscript, on file with author).

97. FED. R. CIV. P. 12(b)(6).

98. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (quoting *Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971)).

99. This fact provoked skeptical reactions from several of my commentators. Because most complaints in class action lawsuits *do* contain allegations of the existence of a class, many readers may be surprised to learn that class allegations are not a technical requirement of a class action complaint. Some civil procedure treatises assert (without support) that:

The class representative's complaint contains all the elements of any complaint

theoretically bring any class action complaint.¹⁰⁰ Some recent class action scholarship emphasizes the role that the class as an entity plays in adjudicating certain types of claims, such as employment discrimination claims or securities class actions, highlighting the centrality of aggregate proof or aggregate recovery in such lawsuits.¹⁰¹ The fact remains that a plaintiff does not need a class to state a cause of action.

Framing the lawsuit as a class action in the complaint is a common practice, but not a legal necessity. Although courts occasionally employ language indicating that class actions must be stated in the complaint,¹⁰² inclusion of Rule 23 elements in a complaint is not strictly necessary; however, Rule 23 does instruct the district court to rule on the issue of class certification at “an early practicable time” in the lawsuit.¹⁰³

A district court can decide the issue of class certification in a number of procedural contexts. The plaintiff may move for certification under Rule 23 at the outset of the lawsuit.¹⁰⁴ Alternatively, the

under Rule 8(a). In addition, she alleges that the case is brought as a class action, and usually states that she is suing “on behalf of a class of persons (or entities) similarly situated.” In the complaint, the representative will define the class.

RICHARD D. FREER, CIVIL PROCEDURE 732-33 (2d ed. 2009); *see also* GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 309 (4th ed. 2009) (“[The plaintiff] pleads an individual claim, but also pleads the existence of a class.”). As the research and case law of this section demonstrate, however, there is no technical requirement that when a class action is filed in federal court the complaint itself contain allegations about the existence of the class. It is, perhaps, the additional pressure that *Twombly* and *Iqbal* place on motions to dismiss that forces a clarification of the differences between the requirements for a class action and the requirements for a complaint, regardless of the form of the action brought.

100. Some scholars have argued, however, that there is a substantive legal difference between mass torts and ordinary tort actions. *See* David L. Shapiro, *Class Actions: The Class As Party and Client*, 73 NOTRE DAME L. REV. 913, 929-31 (1998).

101. *See generally* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2009) (defining a role for aggregate proof in class certification and merits determination).

102. *See, e.g.*, *Wilson v. Zarhadnick*, 534 F.2d 55, 57 (5th Cir. 1976) (“To maintain a class action, the existence of the class must be pleaded.”); *Danner v. Philips Petroleum Co.*, 447 F.2d 159, 164 n.10 (5th Cir. 1971) (“[C]lass action relief must be predicated upon a proper class action complaint satisfying all the requirements of Rule 23.”).

103. FED. R. CIV. P. 23(e)(1)(A).

104. In fact, a plaintiff may move for class certification well into the lawsuit, even years after the initial complaint has been filed. A motion made after trial, however, is probably too late. *See, e.g.*, *Lusted v. San Antonio Indep. Sch. Dist.*, 741 F.2d 817, 821-22 (5th Cir. 1984) (affirming denial of class certification when motion was made after individual plaintiff won

defendants can move for an order denying class certification,¹⁰⁵ or the court can raise the issue *sua sponte*,¹⁰⁶ but courts should not rule on it without proper briefing or argument from the parties.¹⁰⁷

Although named plaintiffs often include class action elements in pleadings, it is inaccurate to say that either the Federal Rules or case law *mandate* the inclusion of class action elements as a part of the “short and plain statement of a claim for relief” in a Rule 8(a)(2) pleading.¹⁰⁸ Accordingly, district judges cautiously avoid deciding issues pertaining to class certification in the context of a motion to dismiss.¹⁰⁹ Since language indicating the existence of a class or a request for class certification need not be included in the complaint at all, it would be quite strange for courts to insist on the inclusion of facts that plausibly suggest there is a class action, when even conclusory statements to that effect are not required.

a favorable judgment at trial). Some courts have even upheld the existence of a class when it was never formalized under Rule 23. *See, e.g.*, *Doe v. Bush*, 261 F.3d 1037, 1049 (11th Cir. 2001); *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1333-34 (1st Cir. 1991); *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 520-21 (6th Cir. 1976); *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 446-47 (5th Cir. 1973). The Supreme Court, however, has rejected in dicta the idea of “implied class certification,” and remaining circuit courts are suspicious of procedures outside of Rule 23. *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430 (1976); *Brown v. Phila. Hous. Auth.*, 350 F.3d 338, 344 (3d Cir. 2003); *Nance v. Union Carbide Corp. Consumer Prods. Div.*, 540 F.2d 718, 724 (4th Cir. 1976).

105. *See, e.g.*, *Parker v. Time Warner Entm’t Co.*, 198 F.R.D. 374, 376 (E.D.N.Y. 2001) (“Before a plaintiff moves for class certification, a defendant may ‘test the propriety of the action’ by a motion for denial of class certification.” (quoting *Brown v. Milwaukee Spring Co.*, 82 F.R.D. 103, 104 (E.D. Wis. 1979))), *vacated on other grounds*, 331 F.3d 13 (2d Cir. 2003).

106. *See Doe v. Coughlin*, 697 F. Supp. 1234, 1235 (N.D.N.Y. 1988) (“Although a motion for certification has not been made, the court will exercise the power given it by Fed. R. Civ. P. 23(c)(1) to certify class actions ‘as soon as practicable after the commencement of an action brought as a class action.’”).

107. *See, e.g.*, *Newsom v. Norris*, 888 F.2d 371, 382 (6th Cir. 1989) (“[T]he trial court’s *sua sponte* action ... in certifying the proceeding as a class action constituted error, particularly under circumstances where those issues were not joined by the complaint nor developed by the proof.”).

108. As the Third Circuit observed in demanding proof of class certification elements, “the requirements set out in Rule 23 are not mere pleading rules.” *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008) (citing *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675-77 (7th Cir. 2001)).

109. *See, e.g.*, *In re Jamster Mktg. Litig.*, No. 05CV0819, 2009 WL 1456632, at *7 (S.D. Cal. May 22, 2009) (declining to decide issue of whether to include potential class members from states that enforce nonclass action arbitration agreements in an opinion about a motion to dismiss).

The procedural differences between a Rule 12(b)(6) motion to dismiss and a Rule 23 certification proceeding also indicate that there would be some practical problems in applying the *Twombly/Iqbal* standard in the class certification context. Namely, to what documents would the standard apply? This is more than just a technicality—the fluidity of class certification procedures allows judges maximum discretion to direct a briefing or discovery schedule and manage the proceedings. Such flexibility is incompatible with the *Twombly* directive to make an early and definitive conclusion about the plausibility of a claim.

The conclusion that the plausibility standard applies to motions to dismiss a class action complaint but not to a motion to grant or deny class certification may seem simple, but as we shall see, a few courts have already succumbed to the temptation to use the plausibility standard to cut short the class certification process.¹¹⁰ While some confusion is understandable given the close relationship between the Rule 23 requirements for certification and the underlying merits of the lawsuit,¹¹¹ limiting the application of *Twombly* and *Iqbal* to their proper Rule 8(a) and 12(b)(6) contexts is critical to achieving a balance between the benefits of a gatekeeping rule and the dangers of process that blocks meritorious lawsuits from proceeding. Therefore, the remainder of this Article is dedicated to the issues that arise when *Twombly* and *Iqbal* are employed in motions to dismiss class actions and other complex cases.

II. POST-*TWOMBLY* PLEADINGS OF ALLEGATIONS OF DEFENDANT CONDUCT IN COMPLEX LITIGATION

A. Targeting Class Action Complaints Under Twombly's Cost of Litigation Rationale

The *Twombly* and *Iqbal* decisions have left judges and commentators to sort out the precise meaning of “plausibility pleading.” Most problems regarding the determination of the meaning of “plausibility” as applied to defendant conduct are common to all lawsuits, both ordinary and complex. The aspect of *Twombly* that presents a

110. See *infra* Part II.C.

111. See *infra* notes 199-201 and accompanying text.

problem unique to complex litigation is the “cost of litigation” prong of the decision because there is some indication that judges might single out class action complaints for “heightened pleading” evaluation simply on the basis that class actions raise the red flag of high discovery costs.

While the amount of factual detail necessary to “nudge” a complaint over the line from neutral to plausible is a central feature of the *Twombly/Iqbal* standard,¹¹² concentrating on the level of detail in and of itself does not capture the full scope of *Twombly*’s effect on the *Twombly/Iqbal* standard. The Court repeatedly referred to the costs of litigation, especially the purportedly high cost of discovery in antitrust class actions, as a factor in turning an increasingly critical eye to the factual sufficiency of the pleadings.¹¹³ This aspect of the *Twombly* opinion suggests that courts should look not only to the plausibility of the allegations in the complaint, but also the *relationship* between the plausibility of the allegations and the cost of discovery.¹¹⁴ The higher the cost of litigation, in other words, the more plausibility the court ought to demand from a complaint.¹¹⁵

The Court devoted significant attention in the *Twombly* opinion to the role that the cost of litigation should have in adjudicating the sufficiency of a pleading;¹¹⁶ this aspect of the decision, as setting a standard in its own right, has received relatively scant attention from the academy.¹¹⁷ It is probably the case, however, that the decision has opened the door to a cost/benefit analysis in pleading just as it has authorized some form of plausibility pleading, and that

112. See *supra* note 89 and accompanying text.

113. See *infra* notes 126-27 and accompanying text.

114. See Cavanagh, *supra* note 18, at 16 (“[I]t would not be unreasonable for lower courts to rule that the *Twombly* plausibility standard is limited to complex cases or cases where the projected costs of discovery are high and the allegations of wrongdoing thin.”). Cavanagh, writing shortly after the *Twombly* decision, suggested that lower courts have not in fact limited their application of the plausibility standard in this way, but my analysis of some lower cases below shows otherwise. See *infra* notes 117-23 and accompanying text.

115. Whether Rule 8(a)(2) can or should require tying the amount of information sought through discovery to the cost of acquiring that information prior to summary judgment and trial is beyond the scope of this Article. It is not obvious, however, that courts may fairly interpret Rule 8(a)(2) to mean that pleading serves a “gatekeeping” function. See Bone, *supra* note 6, at 898.

116. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007).

117. See Cavanagh, *supra* note 11, at 882 (observing that the cost of litigation aspect of *Twombly* has been “lost” in the post-*Twombly* debates).

this cost/benefit analysis has particular salience in the complex litigation arena.¹¹⁸

By noting that discovery costs were high in comparison to the plausibility of the allegations in the complaint, lower courts have already begun to use the cost of litigation aspect of *Twombly* to justify the application of a heightened pleading standard.¹¹⁹ For example, one district court dismissed an antitrust claim based on the assertion that, without pleading specific facts, the “plaintiffs antitrust claim should not be permitted to continue into ‘its inevitably costly and protracted discovery phase.’”¹²⁰ Other cases similarly rely upon the assumption that, without “insisting on specificity in antitrust pleadings,” defendants would be exposed “to potentially massive factual discovery costs.”¹²¹

One judge, in trying to portray the use of such cost/benefit analysis as consistent with pre-*Twombly* Supreme Court jurisprudence,¹²² found that the Court in *Swierkowitz* and *Leatherman*

118. See Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 113 (2009) (“In defense of *Conley’s* ‘retirement,’ Justice Souter flirted with but did not fully endorse an economic theory of pleading.”).

119. Some lower courts had used this type of cost/benefit analysis even before the *Twombly* decision. See Fairman, *supra* note 7, at 1014. For example, after Judge Posner dismissed an antitrust action citing “[t]he heavy costs of modern federal litigation, especially antitrust litigation” as grounds for requiring greater factual specificity in the complaint, *Sutliff, Inc. v. Donovan Cos., Inc.*, 727 F.2d 648, 654 (7th Cir. 1984), several courts quoted this language with approval. See *Warner Lambert Co. v. Purepac Pharm. Co.*, No. CIV.A. 98-02749 (JCL), 2000 WL 34213890, at *4 (D.N.J. Dec. 20, 2000); *Garshman v. Universal Res. Holding, Inc.*, 641 F. Supp. 1359, 1367 (D.N.J. 1986); see also *Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc.*, 836 F.2d 173, 182 (3d Cir. 1988) (dismissing pleading as factually insufficient because “litigation today is too expensive a process to waste time on fanciful claims”); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (“When the requisite elements are lacking, the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.”); *Syncsort Inc. v. Sequential Software, Inc.*, 50 F. Supp. 2d 318, 328 (D.N.J. 1999); *Arbitron Co. v. Tropicana Prod. Sales, Inc.*, No. 91 Civ. 3697, 1993 WL 138965, at *10 (S.D.N.Y. Apr. 28, 1993).

120. *Westerfield v. Quizno’s Franchise Co.*, 527 F. Supp. 2d 840, 857 (E.D. Wis. 2007) (citing *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003)).

121. See, e.g., *CBCInnovis v. Equifax Info. Servs. LLC*, No. 2:06-CV-654, 2008 WL 320147, at *3 (S.D. Ohio Feb. 4, 2008). This case was actually dismissed based on the fact that the plaintiffs had not alleged an antitrust injury and therefore lacked antitrust standing. *Id.* at *8.

122. *Cracker Barrel Old Country Store v. Cincinnati Ins. Co.*, 590 F. Supp. 2d 970 (M.D. Tenn. 2008).

“apparently determined that the importance of the causes of action outweighed the costs of discovery and potential for frivolous suits.”¹²³ It was not a large leap, then, for the district judge to hold that *Twombly* required “a reviewing court [to] take into consideration the costs of permitting a fishing expedition in discovery,”¹²⁴ even though the “fishing expedition” metaphor found its critics even before the *Twombly* decision.¹²⁵

Twombly calls upon judges to account for the cost of litigation when assessing the plausibility of a pleading. To say that district judges should consider the “costs of litigation,” however, is to give little direction to the trial judge attempting to balance these two factors, and the Court has said little to assist judges in this task.¹²⁶ A closer examination of which costs a judge may include in the calculation is necessary.¹²⁷

The cost of discovery is the clearest example of a litigation cost that a court may consider under *Twombly*. The Court cautioned that “proceeding to antitrust discovery can be expensive” and quoted with approval Judge Posner’s admonition that “some threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase.”¹²⁸ The citations that the Court used to show the high cost of litigation almost exclusively focus on discovery costs¹²⁹

123. *Id.* at 974.

124. *Id.*; see also *Smith v. Lyons, Doughty & Veldhuius, P.C.*, No. 07-5139, 2008 WL 2885887, at *5 (D.N.J. July 23, 2008) (holding that “[d]iscovery should not serve as a fishing expedition during which Plaintiff searches for evidence in support of facts he has not yet pleaded”).

125. See generally Elizabeth Thornburg, *Just Say “No Fishing”: The Lure of Metaphor*, 40 U. MICH. J.L. REFORM 1 (2006) (criticizing the use of “fishing expedition” for pleadings and discovery requests as using a metaphor to replace actual analysis and perpetuating bias against certain types of lawsuits and discovery requests).

126. See Cavanagh, *supra* note 18, at 22 (“The Court gives short shrift to any argument that baseless claims in federal court can be eliminated by careful case management, control of discovery, summary judgment, or carefully crafted jury instructions.”).

127. Professor Spencer identified three distinct parts of the Court’s “cost of litigation” analysis: high costs of discovery, discovery abuse, and heavy judicial caseloads. Spencer, *supra* note 6, at 452-53.

128. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (quoting *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation)).

129. *Id.* at 559 (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 30 (2004) (“describing extensive scope of discovery in antitrust cases”); Memorandum from Paul V. Niemeyer, Chair,

and discovery abuse.¹³⁰ The Court expressly cited discovery abuse and the alleged inability of judges to control discovery as reasons to insist on heightened pleading when the costs of discovery are high.¹³¹

In emphasizing the cost of discovery, the *Twombly* Court recognized the most familiar litigation costs. Critics of complex litigation, however, have yet another target: the cost to defendants of settling frivolous or meritless suits. A judge eager to dismiss a complaint that falls on the thinner side of factual detail might want to make the cost of proceeding with litigation as high as possible. One way to do this is to include the cost of settlement, that is, the actual dollar amount paid to a plaintiff group or class, as a cost of litigation. It is not clear that the *Twombly* opinion goes this far. At one point, the Court warns of “cost-conscious defendants” who might “settle even anemic cases,”¹³² but even this worry, however, is tied directly to “the threat of discovery expense.”¹³³ Presumably, the Court would not approve of dismissing a similar case with average discovery costs simply because trials are expensive or the defendant is risk averse.¹³⁴ Furthermore, if this were true, then the strength of the plaintiffs’ claim would be tied to the size of the requested damages, a conclusion even more troubling than tying the strength of the plaintiffs’ claim to the cost of discovery.

The criticisms of the cost of litigation rationale are directed, in large part, toward the fact that these concerns would be better addressed through a congressional amendment of Rule 8 or the

Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice & Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) (“reporting that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed”).

130. *Twombly*, 550 U.S. at 558 (citing Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1898-99 (2003)).

131. *Id.* at 559 (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989)). Professor Cavanagh has criticized this aspect of the opinion for relying too heavily on the Easterbrook article, stating that the assertions are “contrary to fact” and do not account for recent innovations in the tools that judges have at their disposal to control discovery. Cavanagh, *supra* note 11, at 879, 882-89. One passage from which the Court quotes extensively reads more like a rant against the adversarial system itself (in which the judge has little control over the claims) than against discovery abuse. *Twombly*, 550 U.S. at 560 n.6.

132. *Twombly*, 550 U.S. at 559.

133. *Id.*

134. See ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 13-68 (2003).

discovery rules,¹³⁵ or that these problems, especially the specter of discovery abuse, are not meaningfully related to notice of the lawsuit or its meritoriousness.¹³⁶

Although *Iqbal* was not a class action, the Court took care to reaffirm the cost of litigation rationale in the opinion.¹³⁷ *Iqbal* adds two elements to the cost of litigation analysis. First, it signals the Court's willingness to apply the rationale outside the context of large, complex litigation. Perhaps this is disheartening from the perspective of those hoping that the cost of litigation rationale, a flawed and unfounded aspect of Rule 8 interpretation, would fade into the background. The Court's willingness to apply the rationale in other contexts shows, however, that judges ought to be making such investigations on a case-by-case basis, rather than assuming that all cases of a certain type are or are not the source of high discovery costs. This argument becomes important in trying to distinguish those class actions that are, in fact, *not* the source of unusually high discovery costs vis-à-vis other cases.¹³⁸

Second, *Iqbal* introduces the idea that a cost of litigation can be something beyond mere monetary outlays. The concern in *Iqbal* was not only that discovery would be expensive, although the Court intimated that this was indeed a concern, but that discovery involving government officials entitled to a defense of qualified immunity would unacceptably disrupt their duties.¹³⁹ Those critics who view *Iqbal* as a doctrine that hinders citizen investigation into possible government malfeasance¹⁴⁰ are rightfully distressed by such reasoning. This part of the opinion, however, like the Court's willingness to examine the cost of litigation outside of the complex

135. See Clermont & Yeazell, *supra* note 38 ("The bone this Article picks with the Court is not that it took the wrong path for pleading, but that it blazed a new and unclear path alone and without adequate warning or thought."); Stephen Burbank, Debate, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141, 150 (2009), <http://www.pennumbra.com/debates/debate.php?did=24> ("In initiating change through its power to decide cases and controversies, however, the Court lacked the information and diverse perspectives that the rulemaking process affords.").

136. See Spencer, *supra* note 6, at 453-54.

137. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

138. See *infra* Part II.B.

139. *Iqbal*, 129 S. Ct. at 1953.

140. See, e.g., Michelle Spiegel, *Ashcroft v. Iqbal: The Question of a Heightened Standard of Pleading in Qualified Immunity Cases*, 4 DUKE J. CONST. L. & PUB. POL'Y 375, 388 (2009).

litigation context, introduces a further element of nuance into any court's investigation of the "costs of litigation." If a nonmonetary cost like disruption of government officials' duties is a cost, then perhaps nonmonetary benefits like deterrence of defendant conduct or prosecution of wrong-doing may also be used to demonstrate the overall value of proceeding with litigation.

B. Scrutinizing Allegations of Defendant Conduct in Class Action Complaints

In this Section I argue that, although courts may be justified in requiring a higher degree of plausibility in actions when the cost of litigation is high, it is a mistake to use the label "class action" as a proxy for "high cost of litigation." The *Iqbal* decision clarifies that the *Twombly* standard's application is not limited to complex cases.¹⁴¹

There is still a risk, however, that judges will read *Twombly* to apply specially or almost automatically to complex cases because of the emphasis on the dangers of high cost litigation—a danger often assumed to be present in complex cases.¹⁴² Painting with such a broad brush fails to differentiate class actions from other potentially costly types of litigation and to differentiate among *types* of class actions. This approach also fails to account for the efficiencies that class actions are, themselves, supposed to create.

The size of the plaintiff class matters only in that it affects the dollar amount of a judgment or settlement. The settlement or judgment amount does not qualify as a cost of discovery. It also

141. *Iqbal*, 129 S. Ct. at 1953; see also Bone, *supra* note 6, at 887 n.70 (arguing that suggestions that the *Twombly* standard applies only to complex cases "fit[] the language of *Twombly* rather poorly"); Douglas A. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1084 (2009) (describing that limitation as "an imprecise oversimplification of the *Twombly* approach").

142. This fear is not limited to class actions or aggregated cases, as courts have identified single plaintiff cases as "complex" and potentially costly for the purposes of requiring heightened pleading. See *Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009) (holding that *Twombly* "teaches that a defendant should not be burdened with the heavy costs of pretrial discovery that are likely to be incurred in a complex case unless the complaint indicates that the plaintiff's case is a substantial one"). However, because class actions frequently are equated with complexity, this Part focuses on the danger of using "class action" as a stand-in for complex or costly litigation.

would be incorrect to classify the cost to the defendant of paying out a settlement or judgment as a “cost of litigation.” While these sums are part of the cost of a lawsuit, they are not part of the cost of moving through the *process* of the lawsuit. In other words, the size of a plaintiff class is, *by itself*, an insufficient basis for concluding that the costs of discovery, or even the costs of litigation more broadly, are high.

A cost of litigation analysis that accounts for the existence or size of a plaintiff class should include four factors: (1) a determination of whether the size of the plaintiff class increases the cost of discovery at all, (2) whether an increase in the cost of discovery due to additional plaintiffs is related to the question of whether the plaintiffs have stated a claim, (3) an examination of whether the defendants will bear a significant portion of the costs of this “extra” discovery, and (4) an evaluation of the magnitude of increased discovery costs in relation to the efficiencies of consolidated litigation.

1. Size of the Plaintiff Class

The first factor is to determine whether the number of plaintiffs is indeed the cause of higher discovery costs. In some situations, the size of the plaintiff class has little or no impact on the cost of discovery. *Twombly* itself is an example of such a case, but the opinion reinforces a common perception about class actions: the larger the plaintiff class, the more expensive the case will be to litigate.¹⁴³ Justice Souter worried that one cause of the “potential expense” was that “plaintiffs represent[ed] a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States.”¹⁴⁴ The intended inference was that with every member of the plaintiff class, the cost of discovery would increase.

There is, however, no reason to believe that the size of the plaintiff class drives up discovery costs in an antitrust action based on allegations of horizontal conspiracy like *Twombly*. As the Court itself observed, discovery in *Twombly* could be expensive because of

143. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

144. *Id.*

the documents from “America’s largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records).”¹⁴⁵ If evidence of the alleged conspiracy is found in the defendants’ business records and communications, then discovery should be more or less the same whether there is one plaintiff or one million.¹⁴⁶

Although the size of the plaintiff class in actions like *Twombly* does not affect the cost of discovery, there are some situations in which the size of the plaintiff class may be indirectly tied to the size and cost of discovery. For example, suppose a Hispanic woman who works for a large national retailer files an employment discrimination class action on behalf of other Hispanic women, alleging that a company-wide policy resulted in discriminatory promotional practices at the company’s retail outlets throughout the nation. In such a lawsuit, discovery for a nationwide class will increase in relationship to the number of regions, managerial centers, and stores that the plaintiffs will investigate. A higher number of class members thus corresponds to a larger amount of discovery insofar as the larger number of class members implicates a larger number of locations and decision makers.¹⁴⁷

Some class actions do in fact require plaintiff specific discovery; in other words, the addition of each individual or subclass requires discovery beyond what is needed if there is only one plaintiff. This is often the case in class actions when plaintiff injury or behavior plays some role in the lawsuit.¹⁴⁸ Although in these lawsuits the cost of discovery is most closely tied to the size of the plaintiff class, Rule 23’s mechanisms for prohibiting class action certification in suits involving unwieldy individual issues will apply to such situations.¹⁴⁹

145. *Id.*

146. Notice to class members is one possible aspect of class action litigation that often requires discovery that is directly related to the size of the plaintiff class. This issue is addressed *infra* in Part II.C in which I argue that *Twombly* may have an indirect impact on the doctrines of class certification and notice.

147. This hypothetical is also instructive of the fact that large plaintiff class size alone is an insufficient basis for concluding that discovery is “expensive” as it might be the case that proceeding as a nationwide class is ultimately more efficient than piecemeal litigation. See *infra* Part II.B.4.

148. Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 47-48 (2009).

149. See FED. R. CIV. P. 23(a)(2) (commonality requirement); *id.* 23(b)(3) (predominance

The risk here is that judges will use plaintiff class size as a reason to require a higher level of factual allegations in the complaint at the Rule 12(b)(6) phase rather than allow the class certification process to sort out situations when discovery of individual issues is too complicated to justify the maintenance of a class action.

2. Relationship Between Any Increase in the Cost of Discovery and Plaintiffs' Ability To State a Claim

Although there are some situations in which a larger plaintiff class does not necessarily correspond to a higher cost of discovery, there is no question that in other situations a larger plaintiff class results in higher discovery costs. The next step in discerning whether these discovery costs justify stricter pleading at the motion to dismiss stage is to determine whether the discovery costs are linked to the question of whether the plaintiff class is entitled to relief. There are several expenses associated with class action litigation that involve discovery but do not directly implicate the existence of a cause of action.

One expensive aspect of class action discovery relates to the requirement of giving reasonable notice and opt out opportunities to potential class members in a Rule 23(b)(3) class action. The named representatives are responsible for preparing and sending notice to potential class members.¹⁵⁰ This process is not, however, without cost to the defendants. Defendants are often the parties in possession of the records and materials used to generate the list of potential class members, and a district judge may use his discretion to allocate these costs to the defendant.¹⁵¹

Another potentially expensive facet of class actions concerns damages and the nature or amount of relief to which class members are entitled. These costs may manifest themselves as discovery costs, or they might appear later in the litigation as costs associated

requirement for 23(b)(3) actions).

150. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974).

151. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350 (1978) (“[W]here a defendant can perform one of the tasks necessary to send notice ... more efficiently than the representative plaintiff, the district court has discretion to order him to perform the task under Rule 23(d).”).

with administering an award or settlement to members of the class.¹⁵²

Courts should not understand such costs as “expensive discovery” for *Twombly* purposes because neither endeavor helps the court and parties determine *if* the plaintiffs are entitled to relief. Instead, these discovery efforts aid the parties in administering the lawsuit. These litigation expenses should not factor into any *Twombly* cost/benefit analysis, but these two examples should not be read as an exhaustive or rigid list. Rather, a court considering the possible expenses presented by a class action should ask whether the discovery in question is aimed at uncovering a basis on which relief can be granted.

This limitation stems from the Court’s reasoning in *Twombly* and *Iqbal* which expressed concern with the cost of breathing life into “anemic” claims.¹⁵³ The Court’s central claim about the gatekeeping function of pleading—that defendants should not be forced to defend against allegations when there is little chance that any evidence of wrongdoing actually will be found—is coupled with an intuition about the fairness of the costs involved.¹⁵⁴ In other words, defendants should not have to pay for the plaintiffs to search for basic elements of a cause of action. The cases do not say, however, that defendants can demand higher proof from the plaintiffs at the outset just because the overall cost of litigating might be high.

An application of the *Twombly/Iqbal* standard in this way would be to use it as a tool to disfavor actions that are administratively expensive *outside* of the question of whether a cause of action exists. Direct regulation of the litigation tasks and expenses associated with these lawsuits is the usual suggestion for ameliorating these problems.¹⁵⁵ Without dismissing that approach,¹⁵⁶ it is not unreasonable to envision a role for gatekeeping in the quest to avoid lawsuits

152. See Keith N. Hylton, *When Should a Case Be Dismissed?: The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39, 61 (2008).

153. See *supra* notes 132-34 and accompanying text.

154. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-58 (2007).

155. See Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 59-60 (1997).

156. One should note, however, that repeated calls for managing the costs of discovery by amending the discovery rules themselves rarely result in meaningful change. See Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167, 191 (2006), <http://thepocketpart.org/images/pdfs/82.pdf>.

with high administrative costs. But a generalized plausibility pleading standard like that in *Twombly* is an inappropriate mechanism for regulating lawsuits with high administrative expenses. However, Congress might identify particular causes of action that, when brought as class actions, tend to generate high costs of litigation and require a higher pleading standard.

The PSLRA, for example, requires particularized pleading of certain elements in a securities class action.¹⁵⁷ There, Congress was concerned about a specific type of allegation made in the context of a specific type of class action.¹⁵⁸ Assuming that regulation in the securities class action context is substantively necessary, it is this sort of targeted regulation that is preferable to the use of a generalized heightened pleading standard to address all costs of complex litigation without regard to their underlying source.

A final source of confusion regarding the difference between the overall costs of complex litigation and costs associated with uncovering the existence of a cause of action is the fear that class actions are more expensive than normal actions because they entail higher agency costs of class representation. To the extent that these increased costs would be used to demand heightened pleading from class action plaintiffs, this fear is misplaced.

The agency problem in class action litigation rests on the gap between the class lawyers and unnamed class members. At its worst, agency problems are blamed for actions in which plaintiffs' lawyers walk away with hefty fees from a favorable settlement or judgment whereas plaintiffs recoup little, if any, of the award.¹⁵⁹ The scope, causes, and possible solutions to this problem have been explored extensively in class action literature.¹⁶⁰ The important

157. See *supra* notes 32-36 and accompanying text.

158. See *supra* note 32 and accompanying text.

159. See, e.g., Debra Lyn Bassett, *The Defendant's Obligation To Ensure Adequate Representation in Class Actions*, 74 UMKC L. REV. 511, 512-13 (2006) (noting the agency problem but arguing that most cases of high attorney awards and low class member recovery are the result of collusion between counsel for plaintiff and defendant or poor court oversight); Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1345-48 (2005) (summarizing class action settlements in which attorneys earned high fees and consumers were awarded coupons, often of dubious value).

160. See, e.g., L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 208-27 (2004); John C.

point here is that any extra expense that agency costs add to class action litigation is unrelated to the question of the existence of a cause of action¹⁶¹ and therefore should not be factored into the price of a lawsuit in which plaintiffs must allege more facts than in a case in which such costs do not exist.

3. *Who Bears the Cost of Discovery?*

The third factor is to examine the extent to which either the plaintiffs, the defendants, or both parties will bear a significant amount of the cost of plaintiff-related discovery. In most situations, the costs of producing discoverable materials fall on the party from whom such materials are requested.¹⁶² This does not mean, however, that discovery is costless to the other party—they still must bear discovery costs such as the expenses involved in reviewing documents or taking depositions.¹⁶³ An assessment of this factor need not establish exact dollar amounts or determine which party must pay more. Rather, the analysis should focus on the relationship between the costs and the parties who bear them.¹⁶⁴

First, if the defendants bear a significant portion of the costs of this sort of discovery, then it is appropriate for a court to consider whether this extra expense supports *Twombly*'s apprehension of rising costs. The *Twombly* Court framed this in terms of two related

Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519; Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 341-42; Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765 (1998); Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 305-06 (1996); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2056-58 (1995); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 572-73 (1997).

161. See Bassett, *supra* note 159, at 515 (stating that adequate representation, not cost, is relevant to the existence of an action).

162. See *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (recognizing the presumption that the responding party pays the costs of production).

163. See Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 451, 455-56 (1994).

164. Bone, *supra* note 6, at 928-30 (discussing "incentive-shaping rules").

concerns. One is a general discomfort with the fairness of the expenses themselves; the Court intimated that defendant payment of discovery expenses itself is unjust when there is little reason to believe that a claim exists.¹⁶⁵ The other worry is that high discovery costs will pressure defendants into settling “anemic” claims.¹⁶⁶ Under either reading, the Court’s concern was for *defendant* discovery costs, not discovery costs in general.

To the extent that the Court evinced a concern for the cost to the court, those costs can be separated from the costs of conducting discovery itself. In such instances, the so-called “fishing expedition” for the existence of a claim is not present. Class action litigants should not be uniquely punished because *other* aspects of the litigation could be costly. The costs to the court more heavily fall in the area of motion practice and trial.¹⁶⁷ Discovery is perhaps the *least* judicially intensive phase of a lawsuit, as it is conducted largely outside of the presence of the judge.¹⁶⁸

Beyond *Twombly*’s doctrinal reasons to consider the source of the cost of discovery, plaintiffs show more confidence in their claims when they must bear a greater portion of the discovery costs. Contrast the portrayal of discovery in a case like *Twombly*, in which lopsided costs would fall on the defendants with the plaintiffs merely bearing the costs of reviewing documents produced by the defendants,¹⁶⁹ with discovery in cases when the plaintiffs must produce information about their actions or conditions, or rely on the reports of handsomely paid experts. In fact, “the available data suggest that most pretrial costs are either roughly equal as to plaintiffs and defendants, or that they favor defendants rather than plaintiffs.”¹⁷⁰

165. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007).

166. *Id.* at 559.

167. See D. Theodore Rave, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 876 (2006).

168. Caroline Harris Crowne, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1781 (2001).

169. See *Twombly*, 550 U.S. at 548-49, 559.

170. Stancil, *supra* note 118, at 124. Stancil identifies certain classes of cases as “high risk,” and thus warranting a stricter pleading standard. *Id.* at 128-30, 146-48. Such categories, however, are derived from understanding the underlying claim or cause of action at issue, and he does not suggest that the category “class action” is a meaningful predictor of high risk cases. Furthermore, Stancil observes that claims in which defendants are more likely to bear

Such discovery is less likely to be a “fishing expedition” in which plaintiffs search for the claim itself.¹⁷¹ Plaintiff discovery, in other words, requires plaintiffs to “put their money where their mouths are” and is unlikely to result in the expensive and open-ended searching that so bothered the Court in *Twombly*.¹⁷²

Examining plaintiffs’ discovery costs relative to those of defendants therefore defeats the idea, implicit in the *Twombly* opinion, that the undifferentiated category of “cost of discovery” is either an indicator or result of meritless claims. The available data demonstrate that expenses borne by plaintiffs are a significant part of pretrial litigation costs, and that this is true even for some types of claims that are the frequent subject of class action lawsuits.¹⁷³ Once one accepts the fact that, in most cases, plaintiffs’ pretrial costs are nontrivial, economic modeling of litigant behavior suggests that plaintiffs’ pretrial litigation costs are a meaningful constraint on a plaintiff’s willingness to file a meritless claim.¹⁷⁴

Economists and other scholars utilizing game theory to model litigant behavior disagree on the details of manner and strength of these constraints. All models, however, are inconsistent with the

a large share of discovery expenses are the same cases in which there is a higher risk of Type II error (erroneous dismissal of meritorious claims). *Id.* at 146. This conclusion is consistent with an oft-repeated critique of the *Twombly* and *Iqbal* decisions, that the cases most likely to be dismissed for lack of plausibility are the ones in which plaintiffs are the most in need of court assisted discovery.

171. *See, e.g., id.* at 147.

172. *Id.* at 126 (“[T]he risk of cost arbitrage increases as the plaintiff’s internal pretrial costs of litigation decrease relative to the defendant’s.”).

173. *Id.* at 127 (“According to a 1988 Rand study, the cost disparity actually favored defendants for aviation accident claims; defendants paid an average of \$49,000 the plaintiffs’ \$72,000. And though a 1980s study of asbestos claims showed a small disparity favoring plaintiffs, by the 1990s, that disparity had been reversed.” (citation omitted)).

174. BONE, *supra* note 134, at 45-50, 150-55; Hylton, *supra* note 152, at 47 (“[T]he plaintiff’s prediction of prevailing ... is the best candidate to serve as a measure of the profit of the typical lawsuit.”); David Rosenberg & Steven Shavell, *A Model in Which Suits are Brought for Their Nuisance Value*, 5 INT’L REV. L. & ECON. 3, 5 (1985) (“Suppose for example that the Plaintiff would have a 70 per cent chance of winning at trial; that the Judgment amount would be \$300; that his litigation costs would be \$250; and that the defendant’s defense costs would be \$200. Then as the Plaintiff’s expected Judgment would be only \$210, he would not be willing to go to trial.”). *But see* Lucian A. Bebchuk, *A New Theory Concerning the Credibility and Success of Threats To Sue*, 25 J. LEGAL STUD. 1, 24 (1996) (“If the litigation process in these cases is sufficiently divisible, this divisibility might by itself provide plaintiffs with a credible threat, and it therefore might by itself provide the defendant with an ‘economic’ reason to pay.”).

assertion that the presence of high discovery costs is synonymous with a situation in which plaintiffs breeze through discovery at no or little cost to themselves while imposing the entirety of the high costs on defendants. The category of high discovery costs demands attention to the allocation of expenses between plaintiffs and defendants.

4. Whether the Class Action Promotes or Reduces Relevant Efficiencies

Class actions and other consolidation devices have gained popularity for their perceived efficiencies. Over the past forty years, class actions and other consolidation devices have grown in popularity because many practitioners and commentators believed that “[i]t is efficient to centralize cases in order to gain economies of scale in decision making, avoid costly repetition of discovery, and perhaps spur private settlement to resolve cases without further expenditure of court resources.”¹⁷⁵ Although commentators have criticized some aspects of this conclusion,¹⁷⁶ and Congress has become somewhat wary of large aggregate cases,¹⁷⁷ the enthusiasm for consolidating cases on the grounds of judicial economy continues.¹⁷⁸

175. Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2382 (2008); see also Robert A. Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211, 221 (1977); Issacharoff, *supra* note 160, at 363; Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 933-34 (1995) (“Today’s interest in class actions stems in part from a vision of them as efficient, particularly in arenas like mass torts ... serv[ing] as a means of processing the expected high quantity of claims that will be brought individually.”).

176. See, e.g., Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 642-43 (1981) (describing jurisdictional redundancy and its uses); see also Robin J. Effron, *Event Jurisdiction and Protective Coordination: Lessons from the September 11th Litigation*, 81 S. CAL. L. REV. 199, 231-49 (2007) (questioning the value of an ex ante congressional decision to consolidate all claims arising out of September 11 before a single judge in the Southern District of New York); Lahav, *supra* note 175, at 2374-81 (arguing that there is value to some jurisdictional redundancy in litigating complex cases).

177. See Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: “The Political Safeguards” of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929, 1944-49 (2008) (arguing that statutes such as CAFA show Congress’s disfavor of aggregate actions in state courts).

178. See DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS

The class action suit is a procedural device that is supposed to boost judicial economy. From the defendant's perspective, it is cheaper to litigate a claim in one or a small number of cases rather than many times over.¹⁷⁹ The consolidation of claims reduces the number of redundant pretrial issues that must be resolved and avoids the need to conduct redundant discovery exercises.¹⁸⁰ The class action is also efficient, if not vital, from the plaintiffs' perspective. The classic 23(b)(3) class action scenario involves multiple plaintiffs with small dollar value claims.¹⁸¹ No plaintiff would file an individual suit,¹⁸² so the class action device takes multiple negative value suits and turns them into a positive expected value suit.¹⁸³ Notably, the plaintiffs' perspective is not just about fairness and giving plaintiffs a tool for pursuing a remedy; the device is thought to remedy an inefficiency that results when defendants are insulated from liability simply because no one plaintiff has the means or incentive to sue.¹⁸⁴ The resulting situation is inefficient because a certain class of conduct goes undeterred,¹⁸⁵ and the money that the defendant does not pay out is a windfall, or unjust enrichment.¹⁸⁶

The question of efficiency of class action and aggregate litigation has been heavily debated in the academy.¹⁸⁷ Leading the charge against claims of class action efficiency, John Coffee has argued that

FOR PRIVATE GAIN 99 (2000); Shapiro, *supra* note 100, at 928.

179. See Lahav, *supra* note 175, at 2382.

180. See *id.*

181. See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980).

182. See *id.* (recognizing that individual plaintiffs are deterred from filing suits because of the cost of litigation); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (observing that in an action in which each plaintiff only claimed around seventy dollars, "[n]o competent attorney would undertake [the plaintiff's] action to recover so inconsequential an amount").

183. See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 8-9 (1991).

184. See *Roper*, 445 U.S. at 339.

185. See *Ting v. AT & T*, 182 F. Supp. 2d 902, 918 (N.D. Cal. 2002) (stating that a lack of class action device "would serve to shield AT & T from liability even in cases where it has violated the law"); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 868 (Cal. Ct. App. 2002) (noting that contractual clauses that preclude class actions give defendants "a license to push the boundaries of good business practices to their furthest limits").

186. *Eastman v. Conseco Fin. Servicing Corp.*, No. 01-1743, 2002 WL 1061856, at *3 (Wis. Ct. App. May 29, 2002) ("Because each individual plaintiff suffered less than \$200 actual damage, the cost and inconvenience of separate actions would result in no recovery for most plaintiffs and substantial unjust enrichment to Conseco.").

187. For an overview of these debates, see BONE, *supra* note 134, at 259-98.

conflicts of interest and asymmetric information lead to inefficient settlements for both plaintiff class members and defendants.¹⁸⁸ Others have countered that “the efficiencies of group litigation make possible a higher level of investment in discovery and trial preparation.”¹⁸⁹

This debate remains unresolved, with little empirical data to support what are largely theoretical conclusions.¹⁹⁰ Moreover, arguments about the efficiency of class actions encompass far more than the questions of procedural efficiency, attempting instead to capture whether class actions are the best mechanism for promoting other goals of private law enforcement such as deterrence, compensation, and repose for defendants.¹⁹¹

There is no need to resolve the debate over class action efficiency in this Article. The question of *total* efficiency of class actions is misplaced¹⁹² when discussing whether class actions should be

188. See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1384-421 (1995); John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 853-54 (1995); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 896-917 (1987).

189. BONE, *supra* note 134, at 262 (citing Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377 (2000)); see also Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 61 (1975).

190. See Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. REV. 879, 897 (“[E]ven the most forceful justification for consolidation—judicial economy—may, upon examination, prove to be an ambivalent one.”).

191. See, e.g., Edward Brunet, *Improving Class Action Efficiency by Expanded Use of Parens Patriae Suits and Intervention*, 74 TUL. L. REV. 1919, 1921 (2000) (proposing that class action efficiency could be improved by the use of “either intervention or state *parens patriae* litigation”); Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479, 483-84 (1997) (suggesting a new framework that would promote the interests of the class by removing distorted counsel incentives); Shapiro, *supra* note 100, at 928, 933 (“For the system itself, the ability to resolve a mass dispute in a single, consolidated proceeding, while not without difficulties of management and control, offers distinct advantages over the task of managing scores, or even thousands, of suits in state and/or federal courts throughout the country.” (footnotes omitted)); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 92-99 (2004) (arguing that class actions are an efficient means of enforcing consumer rights).

192. If the debate over class action efficiency is conclusively resolved in favor of limiting class actions, then class actions themselves should be regulated, eliminating the need for a generalized pleading rule of thumb that requires higher scrutiny of class action complaints for facts about defendants’ conduct.

singled out as a category for high discovery costs. Courts are justified in using the “cost of litigation prong” (if at all) to curb the procedural costs of using class actions as a vehicle for litigation. The question, then, is whether class actions lead to higher *discovery* costs vis-à-vis other modes of litigation, such as litigating each case individually.

In most cases, consolidation of discovery proceedings into one case will reduce, not raise, the cost of discovery.¹⁹³ In cases of negative value suits, there might be a temptation to argue that the cost of discovery in the class action will always be higher because there is, in effect, no realistic “individual suit” with which to compare discovery costs. This, however, is a misplaced gripe with the use of class actions to litigate negative value suits, and not a reason to impose a higher pleading standard. In effect, by assuming that the relevant cost comparison is between the class action lawsuit and no lawsuits at all, higher pleading standards would be required for these lawsuits simply because they exist. Making assumptions about the costs of class actions is ironic because it relies on the same conclusory statements unsupported by facts that a judge would never tolerate in a complaint under *Twombly* itself.¹⁹⁴

C. *The Existence of the Second Gate*

The four factors outlined above distinguish the costs of discovery associated with determining whether there is a cause of action and the costs of discovery (or even the case as a whole) associated with other parts of litigation. This distinction serves to narrow the potential abuses in utilizing the plausibility standard as a gatekeeper by identifying litigation costs that fall outside of the scope of *Twombly*.

The fact, however, that certain costs of litigation should not be included as part of a case-screening decision at the motion to dismiss stage does not make these costs disappear. One possible

193. See, e.g., Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1870 (1992) (“The benefits generally attributed to class actions ... are ... the economies of shared discovery ... costs.”); Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1617, 1643 (2006) (concluding that consolidation will reduce litigation costs by “mitigat[ing] exposure to overlapping discovery obligations”).

194. See *supra* notes 56-61 and accompanying text.

objection to my argument is that class actions and other complex cases are unique procedural creations that require unique gatekeepers. To the extent that this is true, critics should not forget that a gatekeeping mechanism for class actions already exists, the class certification process.¹⁹⁵

Gatekeeping procedures are those that weed out, and thus end, nonmeritorious lawsuits.¹⁹⁶ Although Rule 23 class certification is not technically a dispositive motion, it often functions as such.¹⁹⁷ A denial of certification does not mandate the dismissal of the lawsuit.¹⁹⁸ The reality of many 23(b)(3) class actions,¹⁹⁹ however, is that class certification has the same effect as a motion to dismiss because individual plaintiffs would be unable or unwilling to maintain the lawsuit on their own.²⁰⁰ The rule drafters themselves recognized this “death knell” principle in amending Rule 23 to allow for interlocutory appeal of class certification decisions.²⁰¹ A grant of certification is also often the end of the lawsuit because, “with vanishingly rare exception, class certification sets the litigation on

195. See Allan Erbsen, *From “Predominance” to “Resolvability”: A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1003 n.12 (2005) (“The certification decision is therefore the pivotal moment in the life of a putative class action, with the judge acting as a gatekeeper to the procedural benefits of Rule 23.”).

196. See *id.*

197. See *id.*

198. See *id.*

199. Federal courts may certify three types of class actions, which are described in greater detail. See *supra* text accompanying notes 102-07.

200. See *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001) (“[D]enying or granting class certification is often the defining moment in class actions (for it may sound the ‘death knell’ of the litigation on the part of the plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of the defendants).”); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (“For some cases the denial of class status sounds the death knell of the litigation, because the representative plaintiff’s claim is too small to justify the expense of litigation.”); see also 4 ALBA CONTE & HERBERT NEWBERG, *NEWBERG ON CLASS ACTIONS* § 14:6, at 571 n.61 (4th ed. 2002) (“Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually ... this lawsuit involves claims averaging about \$100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.” (alterations in original) (internal quotation marks omitted) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985))).

201. FED. R. CIV. P. 23(f) (“A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule.”); see Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), a Good Rulemaking*, 69 TENN. L. REV. 97, 103 (2001) (“[T]he Advisory Committee Note conceptually resuscitates interlocutory appeals for both death-knell and reverse-death-knell class certification orders.”).

a path toward resolution by way of settlement,”²⁰² and some class actions are certified *expressly* for the purpose of settlement.²⁰³

Unlike the gatekeeping envisioned by proponents of a plausibility standard, however, class certification is not a quick and clean procedure. Discovery is a regular and often integral part of the proceedings.²⁰⁴ When plaintiffs move for class certification, or defendants move for a denial of class certification, a court will consider evidence and hear oral argument before ruling on the issue of certification.²⁰⁵ The scope and cost of discovery on issues related to class certification varies widely depending on the type of litigation and the issues of class certification that the parties are contesting.²⁰⁶ District judges enjoy broad discretion over the scope of class certification discovery.²⁰⁷

For this reason, class certification might be viewed as a suboptimal case-screening mechanism for complex lawsuits. Although an imperfect process, class certification is a superior gatekeeping mechanism for considering the overall costs of litigating a complex suit in comparison to the limited utility of a Rule 12(b)(6) motion to dismiss.

One of the most contested aspects of class certification discovery is the extent to which it spills over into discovery of the merits of the

202. Nagareda, *supra* note 101, at 99; *see also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (arguing that defendants “will be under intense pressure to settle” when certification is granted in large products liability class actions); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1291 (2002) (“[T]he vast majority of certified class actions settle, most soon after certification.”). *But see* Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1360 (2003) (refuting various forms of the “blackmail” thesis of class certification).

203. FED. R. CIV. P. 23(e); *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619-22 (1997) (holding that a class action certified for purposes of settling a case must still meet the other relevant Rule 23 requirements for certification).

204. *See, e.g.*, Bone & Evans, *supra* note 202, at 1281.

205. *See id.*

206. *See* Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 924 (noting that products liability actions require more factual development than “typical mass torts” before class action certification can occur (internal quotations omitted)).

207. *See, e.g.*, *Teamsters Local 445 Freight Div. Pension v. Bombardier Inc.*, 546 F.3d 196, 204 (2d Cir. 2008) (noting that “district courts retain ‘ample discretion’ to limit discovery” in class certification proceedings (citing *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006))); *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 209 (9th Cir. 1975).

case itself.²⁰⁸ In 1974, the Supreme Court held that Rule 23 proceedings should not include preliminary inquiries into the merits of the case.²⁰⁹ Even when faced with such a simplistic injunction, and in the wake of *Eisen*, the lower courts have struggled with the very same problems that now confront them in the pleading context: how to conduct a meaningfully efficient gatekeeping proceeding without sacrificing the nuance that a fact-based inquiry into the merits can provide.²¹⁰

It will not always be easy to separate the issue of class certification from the question of whether the class as a whole has stated a claim. However, when there is a question of whether the sufficiency of class allegations should be tested by a Rule 12(b)(6) motion to dismiss or a Rule 23 motion to grant or deny class certification, a court should use the class certification procedure to ensure that meritorious claims are not swept away by preliminary suspicions concerning the existence of a class. Because class certification is itself a threshold mechanism, eschewing a motion to dismiss in favor of class certification does not open the door to full and unlimited merits-based discovery.

While sometimes clunky, the class certification procedure does provide a second gatekeeping point for evaluating the concerns that drive many critics to label class actions as costly or difficult.²¹¹ Moreover, some of the requirements for certification, such as commonality,²¹² superiority,²¹³ and difficulties in managing the action,²¹⁴ directly address these concerns, allowing a judge to focus on the content and consequences of specific costs of the litigation at

208. See John Randall Whaley et al., *Precertification Discovery: A User's Guide*, 80 TUL. L. REV. 1827, 1866-71 (2006) (discussing the merits of bifurcating discovery between “class certification” issues and “merits” issues).

209. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (“We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”).

210. See Whaley et al., *supra* note 208, at 1868 (citing two cases in which courts have refused to bifurcate discovery out of concern for efficiency and inability to distinguish between “class” discovery and “merit” discovery).

211. For a discussion of criticisms of class action suits on the basis of their high costs, see *supra* Part II.A.

212. FED. R. CIV. P. 23(a)(2).

213. *Id.* 23(b)(3).

214. *Id.* 23(b)(3)(D).

hand. Finally, because these costs do not pertain to the question of whether the action is frivolous or meritless, the justification for the quickest and earliest case-screening method possible evaporates. Therefore, the existence of class certification as a middle-ground “second gate” should not be forgotten when a court considers the relevant costs of proceeding with a class action at the motion to dismiss phase of a lawsuit.

III. APPLYING THE *TWOMBLY/IQBAL* STANDARD TO ALLEGATIONS OF PLAINTIFF, GROUP PLAINTIFF, AND CLASS CONDUCT

The debates surrounding the *Twombly/Iqbal* plausibility standard focus on the plaintiff's quest to uncover information about suspected wrongdoing by the defendants they are suing.²¹⁵ Pleadings sometimes lack factual detail because the plaintiff does not have access to information about the defendant's conduct or motivations.²¹⁶ Consequently, much of the debate over the soundness of the *Twombly* and *Iqbal* decisions has centered around the fairness of requiring the plaintiff to possess this sort of information before filing a lawsuit.²¹⁷

When one views the plausibility standard from this perspective, it might sound strange to speak of plaintiffs “speculating” about their own behavior. After all, plaintiffs do not need judicially supervised discovery to access their own information, nor do they have an incentive to “hide” their conduct from each other. In complex litigation, however, some plaintiffs file complaints that speculate as to facts about their own conduct or condition, or the conduct or condition of unnamed class members.²¹⁸ This Part investigates whether *Twombly* and *Iqbal* place limitations on this aspect of pleading and the scope of any such limitation.

215. See Spencer, *supra* note 6, at 459 (“[T]he [*Twombly*] standard will be more demanding in the context of claims in which direct evidence supporting the wrongdoing is difficult for plaintiffs to identify at the complaint stage.”).

216. See Cavanagh, *supra* note 11, at 889.

217. See Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 20, 2009, at A10 (summarizing reactions of litigants, judges, and academics to *Iqbal*'s question of how much information a plaintiff must possess about defendant actions).

218. See *infra* Part III.B.1.

A. *The Plaintiff Neutrality Principle*

The plaintiff neutrality principle guides the application of the *Twombly/Iqbal* standard to allegations the plaintiffs make about their own conduct or condition. Stated simply, “neutral” allegations—statements that give rise to multiple explanations, only some of which are the result of wrongdoing—are sufficient as plausible allegations for plaintiff conduct but are insufficient to describe defendant or third party conduct.

The plaintiff neutrality principle rests on the premise that the *Twombly/Iqbal* plausibility standard applies to all statements in a complaint subject to Rule 8(a)(2), including statements about a plaintiff’s conduct or condition. The *Iqbal* decision emphasizes that *Twombly* “expounded the pleading standard for ‘all civil actions.’”²¹⁹ Although the statement answers the question whether the plausibility standard applies to all types of civil actions, not just complex cases or antitrust suits, the Court’s broad and decisive language indicates that it applies to other types of statements within a complaint as well.²²⁰

The effect of applying *Twombly/Iqbal* standard allegations of plaintiff conduct or condition is the same as applying the standard to any other allegations in a complaint. That is, if the statements do not meet the plausibility standard, then the lawsuit will be dismissed under Rule 12(b)(6).²²¹ The fact that the plausibility standard applies to all aspects of a Rule 8(a)(2) complaint, however, does not mean that “plausibility” will have the same meaning in all contexts. Just as the bar for plausibility varies with the cost of

219. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (quoting FED. R. CIV. P. 1).

220. *Id.* Even without the strong language of *Iqbal*, there is precedent for understanding Rule 8(a)(2) as the background or default standard for pleading. For example, courts interpreting the application of the Rule 9(b) PSLRA pleading standards have maintained that Rule 8(a) is the standard applicable to the aspects of a complaint that fall outside of these specialized pleading rules. *See supra* note 37 and accompanying text. Because Rule 9(b) and the PSLRA apply only to allegations of defendant conduct, this indicates how courts would treat any “division” of allegations into those about plaintiffs and those about defendants—Rule 8(a) is the default background standard applicable to allegations about both plaintiffs and defendants. Because the plausibility standard applies to all statements made under Rule 8(a)(2), this standard is now the “default.”

221. The other alternative in class action cases would be to deny class certification. This, however, is not an option because *Twombly* and *Iqbal* do not directly apply to the issue of class certification. *See supra* Part I.C.

litigation,²²² the definition of plausible also may vary depending on whether the allegation is one describing defendant or plaintiff conduct.

The Supreme Court's decision in *Erickson v. Pardus* is a useful starting point.²²³ This case, decided only a few weeks after *Twombly*, concerned a plaintiff's allegation about his own condition or conduct. Erickson, the plaintiff, was a prisoner who filed a pro se lawsuit alleging that the prison officials had denied him his Hepatitis C medication in violation of his Eighth Amendment rights.²²⁴ The complaint alleged that "he was suffering from 'continued damage to [his] liver' as a result of the nontreatment."²²⁵ Thus, the allegation at issue did not involve *any* speculation about the conduct of persons beyond the plaintiff's own personal knowledge. After reviewing the complaint, the district court held, and the court of appeals affirmed, that this allegation was conclusory, and that he needed to allege further facts to support the allegation that he suffered "a cognizable independent harm" due to the removal of the medication.²²⁶ In a short per curiam opinion, the Supreme Court reversed and held that plaintiff's allegation that he had Hepatitis C and the medication had been withheld was sufficient to allege that he suffered liver damage.²²⁷

Commentators greeted *Erickson* with confusion and skepticism because of the Court's cryptic citation of *Twombly* in support of the *Conley v. Gibson* notice pleading ideal.²²⁸ However, once it is set in the broader context of allegations concerning defendant *and* plaintiff conduct, one understands that *Erickson* serves to assuage the inevitable post-*Twombly* doubts that notice pleading had been

222. See *supra* Part II.A; see also Spencer, *supra* note 66, at 4 ("[T]he type of factual detail needed to achieve this goal varies depending on the legal and factual context in which a claim is situated.").

223. 551 U.S. 89 (2007).

224. *Id.* at 91-92.

225. *Id.* at 91 (quoting Colo. Dept. of Corr. Offender Grievance Form (June 30, 2004)).

226. *Id.* at 93 (quoting *Erickson v. Pardus*, No. 06-1114, 2006 WL 2640394, at *4 (10th Cir. Sept. 14, 2006)).

227. *Id.* at 92-94. The Court also noted that his complaint should be read with particular deference because he was a pro se litigant. *Id.* at 94.

228. See, e.g., Bone, *supra* note 6, at 883 ("To confuse matters even further, just three weeks after the Court decided *Twombly*, it upheld the sufficiency of a complaint in *Erickson v. Pardus* without even mentioning the plausibility standard.").

completely cast aside. *Erickson* is an illustration of the concept that I have labeled the “plaintiff neutrality principle.” According to this principle, factual allegations of a plaintiff’s own conduct, or condition for which there are both lawful and unlawful explanations, are sufficient to state a claim.

The *Twombly* opinion prominently features concerns about discovery and the cost of litigation—worries that are noticeably absent in *Erickson*. This is not surprising, however, since proof of the allegation would not require the defendants to engage in lengthy or expensive discovery. When it comes to a plaintiff’s medical condition, the plaintiff himself is assumed to possess the relevant knowledge, and to the extent to which the allegations require discovery for proof, the cost will fall on the plaintiff.²²⁹

One can make sense of this position by arguing that the Supreme Court tacitly assumed that allegations made by the plaintiff about his own condition were the clearest to single out as “safe” from accusations of speculativeness and conclusory nature. *Erickson*, taken together with *Twombly* and *Iqbal*, illuminates the utility of the “neutrality” concept in discerning which allegations meet the plausibility standard.

This is not the only possible reading of the *Erickson* case. One might eschew the effort to draw any principles at all from the decision, choosing instead to dismiss the per curiam opinion as a decision of little consequence in which the Court simply set the very outer boundaries for when a judge may dismiss a case for factual insufficiency on a 12(b)(6) motion. There are, however, independent reasons to support the plaintiff neutrality principle within the operation of the *Twombly/Iqbal* standard. Even if the plaintiff neutrality principle does not spring directly from *Erickson*, it is, at least, consistent with the holding and reasoning of that case.

As outlined earlier, when addressing allegations of defendant conduct, the Supreme Court cast a skeptical eye on “neutral” allegations.²³⁰ It was precisely this neutrality that led the Court to demand that the plaintiffs in both *Twombly* and *Iqbal* supply

229. See, e.g., *Erickson*, 551 U.S. at 92-94.

230. See *supra* text accompanying note 85.

additional facts to “nudge” the allegations from neutral territory into the realm of the plausible.²³¹

Plaintiff conduct, however, appears to be different. Allegations about plaintiff conduct or condition are the mirror image of the neutrality principle for allegations regarding defendant or third-party conduct. When there are multiple possible explanations for defendant conduct, the plaintiff must plead extra facts to show the plausibility of the explanation based on unlawful conduct.²³² In most ordinary lawsuits, however, when a plaintiff’s conduct or condition rests in this neutral world of multiple explanations, no extra facts are needed.²³³

The plaintiff neutrality principle, then, considerably narrows the world of allegations that are affected by the plausibility standard. This observation lends support to those who have claimed that *Twombly* and *Iqbal* do not, in fact, represent a major shift in pleading doctrine.²³⁴ However, rather than arguing that *Twombly* and *Iqbal* have not changed pleading requirements in a meaningful way, the plaintiff neutrality principle demonstrates that the plausibility requirement operates in a constrained class of allegations. When the plaintiff neutrality principle is conceptualized as a constraint on the scope of *Twombly* and *Iqbal*, it shows that *Twombly* and *Iqbal* have a narrower application than once thought, but it also demonstrates that the plaintiff neutrality principle maintains some of the stability of the old pleading regime.

The plaintiff neutrality principle does not, however, give plaintiffs a free pass into the implausible. In its concern with *neutral* allegations, the principle ensures that plaintiffs will not have to supply extra facts to bolster a claim for which at least one plausible

231. See *supra* text accompanying notes 88-89.

232. The Court adopted this approach by explicitly rejecting the Tenth Circuit’s argument that the plaintiff’s harm could have been caused by “the discontinuance of the treatment itself shortly after it began” or the harm “he already faced from the Hepatitis C itself.” *Erickson*, 551 U.S. at 93 (internal quotation marks omitted) (quoting *Erickson v. Pardus*, No. 06-1114, 2006 WL 2640394, at *4 (10th Cir. Sept. 14, 2006)).

233. This insight throws into doubt the contention that the Court has not abandoned the principle that when a court decides a Rule 12(b)(6) motion to dismiss, it must draw all inferences in favor of the plaintiff. The differing neutrality requirements reveal that in some cases the court will resolve inferences in favor of the plaintiff, and in others, the court will refuse to do so.

234. See *supra* notes 66-67 and accompanying text.

allegation exists that suggests the existence of wrong-doing. It does not sanction any allegation a plaintiff makes about his own conduct or condition simply *because* it is about the plaintiff himself. For example, the allegation “I ate twinkies. Twinkies caused my hepatitis to worsen” would be insufficient.

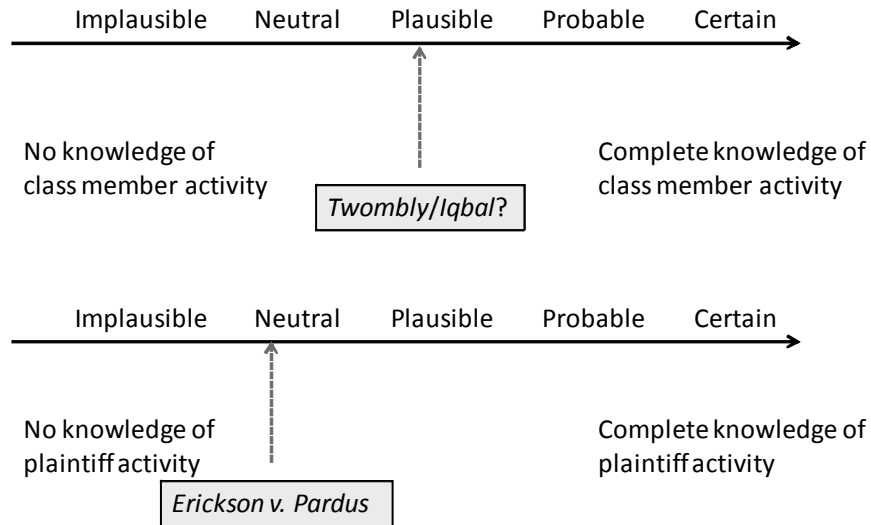
The plaintiff neutrality principle is consistent with recent accounts of *Twombly* as operating on a “baseline” or “presumption-based” theory of behavior. Professor Spencer’s presumption-based theory posits that some sets of facts, such as “*B* struck *A* with his motor vehicle[,] ... suggest wrongdoing and thus enjoy the presumption of impropriety” because people do not ordinarily strike others with their cars.²³⁵ Other sets of facts, such as “*B* fired *A* from her job and *B* was damaged” are not entitled to the presumption of impropriety because such events “in our society [do] not ordinarily or presumptively [occur] for inappropriate reasons.”²³⁶ Professor Bone has explained this concept in terms of a “baseline” of “normal state[s] of affairs for situations of the same general type as those described in the complaint.”²³⁷ *Twombly* thus requires “allegations that differ in some significant way from what usually occurs in the baseline and differ in a way that supports a higher probability of wrongdoing than is ordinarily associated with baseline conduct.”²³⁸ The plaintiff neutrality principle instructs that a court should accept a plaintiff’s assertions about his own status as the appropriate baseline for conduct. This concept is illustrated by the following graph:

235. Spencer, *supra* note 66, at 15.

236. *Id.* In explaining *Twombly*, Spencer proposed that speculative propositions cannot overcome a presumption of propriety. *Id.* at 16.

237. Bone, *supra* note 6, at 885.

238. *Id.* at 885-86. Bone argues that his baseline theory provides clarity that Spencer’s presumption theory lacks, but the differences between the two seem trivial. *Id.* at 888.



In other words, the mirror image of the *Twombly* rule for defendants is that the factually neutral statements about plaintiff's condition that the Court accepted as plausible under *Erickson* could be "nudged" back into the territory of implausibility when conditions of speculation hold.

The plaintiff neutrality principle should hold even when the condition that the plaintiff alleges is not something that persons routinely experience. Suppose, for example, the plaintiff alleges that he suffers from a rare disease. There are three reasons to treat this sort of allegation as plausible, even if it is statistically rare. First, the relevant cause of action would most likely include a causation element so that the existence of the condition is moored to other facts that involve the defendant or third parties. Second, as explained before, the plaintiff is in the best position to make allegations about his own condition.²³⁹ Finally, costs of discovery imposed on the defendant are relatively low because the plaintiff is not seeking to uncover the relevant information from the defendant itself.²⁴⁰

239. Rule 11 continues to function as a backstop against wholesale lying. FED. R. CIV. P. 11.

240. See Stancil, *supra* note 118, at 129-32 (describing the internal and external defense

The plaintiff neutrality principle, then, offers a more complete account of a “baseline” theory because it demonstrates that the relevant baseline for *Twombly* purposes is inseparable from the vantage point of the claimant.

B. The Group Plaintiff Neutrality Principle

The plaintiff neutrality principle outlined in the previous Section states that when a plaintiff makes a statement or allegation concerning her own condition or conduct that is neutral (subject to inferences of both lawful and unlawful conduct on the part of the defendant), it is not speculative and is therefore entitled to a presumption of truth for the purposes of deciding a Rule 12(b)(6) motion to dismiss.

This interpretation of *Twombly*, *Iqbal*, and *Erickson*, however, does not mean that any allegation of plaintiff conduct or condition should carry an automatic presumption of truth. Those allegations that a court might consider “facially implausible” (for example, beyond the realm of neutrality) are addressed in Part III.C. Allegations of plaintiff conduct that might be considered “speculative” are addressed here.

The plaintiff structure of complex litigation is one in which allegations of plaintiff conduct or status do not conform to the baseline of normal conduct that underpins the plaintiff neutrality principle. When one plaintiff makes allegations of conduct that apply only to herself, the plausibility of these allegations is presumed, but when these allegations apply not only to herself but to other plaintiffs who are either unnamed class members or other litigants in a mass tort litigation who utilize a standard form complaint, the plausibility of these allegations is less clear. This context challenges one premise of the plaintiff neutrality principle—that allegations about plaintiff conduct or condition are not speculative because they do not involve the conduct or condition of other persons. This Section addresses that problem and suggests that these contexts require a different principle, the “group plaintiff neutrality principle,” which states that allegations of plaintiff

costs in ordinary cases, such as those where an individual plaintiff's condition is at issue).

conduct or condition that are neutral should be understood as plausible unless the relevant baseline for that group's condition suggests otherwise.

1. Nonspeculative Allegations of Group Plaintiff Conduct

Class action complaints are least speculative of plaintiff behavior when the cause of action requires very little conduct on the part of a plaintiff and the conduct is easily ascertainable. This will be the case when the cause of action requires no allegation of plaintiff conduct, or when the only conduct required of the plaintiff is definitional to the class itself.

Some causes of action focus completely on the actions of the defendant. Two examples would be class actions alleging ERISA violations such as an unlawful plan violation or "stock drop" cases alleging a breach of fiduciary duty. These cases typically allege that the defendants' conduct toward class members was uniformly wrongful.²⁴¹ In such cases, the named plaintiffs need not speculate in the complaint as to behavior of other plaintiffs in order to establish that a cause of action exists. This is true even in cases in which the ultimate measure of monetary relief might differ among plaintiffs.²⁴²

Other causes of action in this category require some minimal action by the plaintiff, but the only plaintiff conduct at stake is that which defines the plaintiff as a class member in the first place. *Twombly* itself is an example of such a class action. The *Twombly* complaint alleged an illegal agreement among the ILEC telecommunication providers.²⁴³ To qualify, a plaintiff class member only

241. See, e.g., *In re Ford Motor Co. ERISA Litig.*, 590 F. Supp. 2d 883, 895 (E.D. Mich. 2008). Because of this fact, these cases are often certified as Rule 23(b)(1)(A) actions seeking declaratory or injunctive relief. See, e.g., *Allen v. Holiday Universal*, 249 F.R.D. 166, 188-90 (E.D. Pa. 2008). I do not mean to argue, however, that all lawsuits that would qualify for 23(b)(1)(A) or 23(b)(1)(B) certification (no opt out) would never involve speculative plaintiff behavior.

242. See *In re Ikon Office Solutions, Inc.*, 191 F.R.D. 457, 465 (E.D. Pa. 2000) ("[T]he appropriate focus in a breach of fiduciary duty claim is the conduct of the defendants, not the plaintiffs. Even if there are significant differences in the damages ... both groups must prove the same core issues: whether there were misrepresentations and whether the defendants even acted as fiduciaries." (citation omitted)).

243. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 550 (2007).

needed to have subscribed to “local telephone and/or high speed internet services” during the relevant class period.²⁴⁴ In other words, the named plaintiffs did not speculate about unnamed class members’ actions in subscribing to telephone or Internet services because any person who was not a subscriber was not a member of the putative class.²⁴⁵

2. *Speculative Allegations of Group Plaintiff Conduct*

While some class actions do not require speculation about class member conduct by the named plaintiff, other class actions do involve complaints in which the named plaintiff makes assertions about the conduct or condition of unnamed class members. For example, consumer products liability class actions often require that the plaintiffs relied upon a statement or warranty by the manufacturer or used a product in a given way.²⁴⁶

The most delicate aspect of applying the *Twombly/Iqbal* standard to these statements in class action complaints is to disaggregate the question of existence of a cause of action from the question about whether a certifiable class exists under Rule 23. The plausibility pleading standard in a Rule 12(b)(6) motion to dismiss must not be used as a shortcut to the denial of class certification.²⁴⁷

Judges already have seized upon *Twombly* and *Iqbal* to squelch class actions on the ground that the plaintiff speculated as to the facts of other class members. For example, in *Hodczak v. Latrobe Specialty Steel Co.*, four former employees of Latrobe Specialty Steel filed an age discrimination lawsuit under the ADEA claiming that they were unlawfully terminated on the basis of age.²⁴⁸ The plaintiffs filed on behalf of a class of “all present salaried employees

244. *Id.*

245. Issues relating to speculation in the definition and certification of the class itself are addressed *supra* in Part I.C.

246. Many securities and fraud actions also require some measure of reliance on the part of the plaintiff, and although parts of *defendant* conduct are governed by Rule 9(b) or the PSLRA, the statements about plaintiff conduct remain under the *Twombly/Iqbal* Rule 8(a) standard. See *supra* notes 35-38 and accompanying text.

247. See *supra* note 109 and accompanying text for an example of a case cautioning courts not to decide issues of class certification under the guise of a motion to dismiss for failure to state a claim.

248. No. 08-649, 2009 WL 911311, at *1 (W.D. Pa. Mar. 31, 2009).

of Latrobe who are least 40 years of age and who are, therefore, at risk of being terminated by Latrobe.”²⁴⁹ The magistrate judge, in a report and recommendation adopted by the district judge, held that the individual named plaintiffs had stated a claim but that the putative class had not.²⁵⁰ The court held that the plaintiffs’ allegations as to the class members were “devoid of any facts which would support a collective action or which suggest that other class members even exist.”²⁵¹ The court further stated that the allegations were mere conclusions, “purely *speculative* and insufficient to state a claim under *Twombly*.”²⁵² Barely three months later, another district court concluded that “[a]fter *Twombly*, courts in this circuit have found that class allegations must also comply with Rule 8(a) in order to proceed to class discovery.”²⁵³

It is improper for a court to decide issues of class certification during a motion to dismiss.²⁵⁴ Beyond the doctrinal bar of deciding Rule 23 issues in a Rule 12 motion, there is an added danger that this practice could squeeze some legitimate class actions out of existence. Similar to the fear that *Iqbal* will prevent plaintiffs from using the litigation process to uncover wrongdoing by government officials because “information about wrongdoing is often secret,”²⁵⁵ a requirement that named plaintiffs not “speculate” about the activities of unnamed or unknown class members could be similarly

249. *Id.*

250. *Id.*

251. *Id.* at *9. The relevant paragraphs of the complaint stated:

26. Hodeczak’s termination, along with three other employees in their late fifties or early sixties, on November 8, 2007, is part of a systematic pattern and practice of terminating older employees. LSS has targeted a class of employees over the age of forty for termination based largely, if not exclusively, on their age. In fact, the four that were fired, were among the oldest in the company.

27. Each of the victims of LSS’s age discrimination, including each of the three who were terminated with Hodeczak, is similarly situated to the others, and Hodeczak is similarly situated to all of them.

Id.

252. *Id.* (emphasis added).

253. *Nicholas v. CMRE Fin. Servs., Inc.*, No. 08-4857, 2009 WL 1652275, at *4 (D.N.J. June 11, 2009).

254. *See supra* Part I.C.

255. *See Liptak, supra* note 217, at A10 (“Plaintiffs claiming they were the victims of ... a policy of harsh treatment in detention may not know exactly who harmed them and how before filing suit.”).

self-defeating for class actions. Motions to dismiss should not become shadowed by impoverished class certification proceedings.

This problem calls for a principle consistent with Rule 8(a) doctrine that enables courts to distinguish the occasional *genuinely* implausible class action complaint²⁵⁶ from instances in which a named plaintiff makes speculative allegations of other plaintiffs' conduct that are permissible, and in fact, necessary to the structure of the class action.

The "group plaintiff neutrality principle" builds on the foundation of the plaintiff neutrality principle. Once the court has established that the named plaintiff or plaintiffs have stated a claim for relief, the inquiry should shift to the question of whether it is plausible that there are other similarly situated persons who would make up the plaintiff class. If the pleading rules required the named plaintiff to state facts about all of the other plaintiffs, this would defeat the purpose of the class action vehicle.

Any "plausibility" inquiry, then, will focus on the existence of a group *qua* group, rather than a group as the aggregate actions or conditions of individuals. The class certification process accounts for the fact that actual differences in class member condition and behavior ultimately will determine the scope and content of any classes and subclasses.

In other words, the question is whether the *class has a cause of action*, not whether it is plausible that, given the requirements of Rule 23, a class would be certified. The class should be entitled to a similar, but slightly weaker, presumption of plausibility concerning neutral facts. The neutral facts should cut in the same direction of the named plaintiff; because the named plaintiff already has knowledge about his own conduct or condition, this suggests plausibility for at least one person. After that, a court should be aware of baseline conditions that would raise red flags about a group of people all having the same cause of action.

As a complement to the weaker presumption of plausibility, the judge who goes so far as to dismiss a class action complaint for lack

256. Even before *Twombly* some courts held that, on rare occasion, an extremely unlikely putative class could be dismissed on the merits instead of through a Rule 23 proceeding. *See, e.g.,* Morency v. Evanston Northwestern Healthcare Corp., No. 98-C-8436, 1999 WL 754713, at *2-5 (N.D. Ill. July 14, 1999).

of factually sufficient allegations of plaintiff conduct or condition should do so without prejudice. This permits plaintiffs to refile claims after further investigation and tailoring of its own members, thus protecting members of the group whose allegations were always factually sufficient, but whose sufficiency might have been drowned in the sea of the group complaint.

C. Twombly, Iqbal, and Multidistrict Litigation Master Complaints

The plaintiff neutrality principle and the group plaintiff neutrality principle address the question of how a court should treat neutral allegations of plaintiff conduct or condition. This Section considers the question of whether a plaintiff's allegation about his own conduct or condition violates the *Twombly/Iqbal* principle on the basis that it is facially implausible. When publicly available data cast doubt on the possibility that a large number of plaintiffs could all have the condition that they allege that they have, then a court may be justified in using the plausibility standard to dismiss these complaints without prejudice.

A general inquiry into facial implausibility of allegations (concerning both plaintiff and defendant conduct) is beyond the scope of this Article and has been addressed by several other commentators. The important point to remember for purposes of this Article is that the plaintiff and group plaintiff neutrality principles are devices for identifying the role of *neutral* facts in a complaint. Although they allow a plaintiff to proceed on allegations that suggest multiple interpretations, some signifying defendant wrongdoing and others suggesting causes that do not implicate defendant wrongdoing, these principles do not entitle plaintiffs to assert fanciful allegations, or allegations for which there are *zero* interpretations suggesting defendant wrongdoing.

1. Attacking the Sufficiency of a Master Complaint

A multidistrict litigation (MDL) is a method of aggregating a large number of cases that are pending in several federal judicial

districts.²⁵⁷ The Judicial Panel on Multidistrict Litigation (JPML) can order the transfer of cases with “common questions of fact ... to any district for coordinated or consolidated pretrial proceedings.”²⁵⁸ Although the transferee judge must send cases back to the original district for trial,²⁵⁹ the MDL is a powerful aggregation device because most cases settle before trial.²⁶⁰ The procedural requirements for class actions litigated in federal court have made class certification increasingly difficult over the past few decades. Therefore, mass tort actions that cannot be litigated as class actions because individual issues of causation and injury predominate over common issues are often aggregated using the MDL device.²⁶¹

Although each plaintiff in an MDL technically sues in her own name, many mass tort MDLs have come to function much like class actions in the pretrial phase.²⁶² Judges appoint committees of lead plaintiffs’ and defendants’ attorneys to coordinate discovery and other pretrial practice.²⁶³ Although each plaintiff technically has her

257. See 28 U.S.C. § 1407(a) (2006).

258. *Id.*

259. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 33-36 (1998) (holding that the transferee court must return cases to the transferor court when pretrial proceedings have finished).

260. See, e.g., Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2329-30 (2008); Resnik, *supra* note 175, at 928 (“[F]unctionally MDL is the end point of many cases.”); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2206 n.4 (2008) (“Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court.”).

261. See, e.g., Stier, *supra* note 206, at 913-15; Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 543-46 (2002); James M. Wood, *The Judicial Coordination of Drug and Device Litigation: A Review and Critique*, 54 FOOD & DRUG L.J. 325, 337-41 (1999). Another common problem is that a nationwide class action relying on state law causes of action would require the application of the laws of all fifty states. Such class actions thus do not meet the Rule 23 requirements of commonality and manageability. See *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (en banc); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995).

262. See Marcus, *supra* note 190, at 890-92 (describing the loss of control over master complaints and other common documents in MDL litigation); Resnik, *supra* note 175, at 930-31 (noting certain ways in which “MDLs function as temporary de facto class actions”).

263. See, e.g., Pretrial Order No. 6, *In re Vioxx Prods. Liab. Litig.*, 2005 WL 850962 (E.D. La. Apr. 8, 2005) (No. 1657) (appointing attorneys for plaintiffs’ and defendant’s steering committees); Case Management Order No. 2 at 5-8, *In re World Trade Ctr. Disaster Site Litig.*, 270 F. Supp. 2d 357 (S.D.N.Y. Feb. 10, 2005) (No. 21 MC 100 (AKH)) (appointing plaintiff and defendant liaison counsel); see also Resnik, *supra* note 175, at 931 (“[U]nder the MDL rubric, trial judges may also appoint lead counsel and plaintiff steering committees,

own lawyer, in practice, she is often more or less represented by the lead counsel.²⁶⁴ This structure has been praised for streamlining litigation costs and facilitating global settlements of mass torts, and criticized for replicating some of the problems that beset both plaintiffs and defendants in the class action context.²⁶⁵

Consider the comparison of pleadings across the two procedural devices. In a class action, the named representative files a complaint on behalf of the class. In an MDL, each plaintiff files her own complaint. Even though a number of plaintiffs are joined together in one action, an MDL is different from a class action because each plaintiff is still identified by name, and must be joined properly as a plaintiff under the Federal Rules²⁶⁶ or consolidated pursuant to an order of the JPML.²⁶⁷ Despite this requirement, many plaintiffs in mass tort MDLs file a complaint that resembles the class action complaint of a named class representative insofar as it follows a form or is part of a master complaint.²⁶⁸ These complaints are often approved by the supervising judge. Use of such pleadings facilitates a degree of uniformity across the litigants so that the court and parties may more easily see the scope of causes of action, injuries alleged, and damages demanded across the field of plaintiffs.

One consequence of this practice is that a master complaint may come to look a good deal like a class action complaint in which one document alleges the claims for relief of many.²⁶⁹ MDL complaints should differ from class action complaints in that an MDL complaint

transforming these attorneys into lawyers for a group.”).

264. See Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 *FORDHAM L. REV.* 989, 999 (1995) (“[T]he court may (and usually does) impose a structure and set ground rules for a ‘steering committee,’ and decisions of the committee bind all of the aggregated claims.”).

265. See Erichson, *supra* note 160, at 519-30.

266. See *FED. R. CIV. P.* 19(a), 20(a).

267. 28 U.S.C. § 1407 (2006).

268. For example, in *In re World Trade Center Disaster Site Litigation*, thousands of rescue and clean-up workers at the World Trade Center site filed lawsuits alleging respiratory injuries. See Effron, *supra* note 176, at 208-15 for a detailed account of these lawsuits. Judge Alvin K. Hellerstein has organized a system of “check-off” complaints. *Id.* at 212. Under this system, several master complaints allege claims for relief for relevant groups of plaintiffs. *Id.* Then, each plaintiff submits a “check-off” complaint in which he fills in a form that alleges the time and place of exposure, the injury alleged, and the compensation sought. *Id.*

269. For these limited purposes, it is useful to think of the MDL as an “entity” along the lines that David Shapiro has proposed for class actions. See Shapiro, *supra* note 100, at 913-42.

must also contain an individualized aspect in which each plaintiff alleges her own injury, causation, and damages. Given this distinction there should be no speculation on the part of MDL plaintiffs about other plaintiffs.

If, however, the MDL complaint is treated as a quasi-class action complaint with just a few “minor” individualized differences, the possibility of speculation begins to appear. The defense bar is unlikely to jettison the entire master complaint model because defendants themselves reap significant efficiency benefits from litigating an aggregated claim.²⁷⁰ They might, however, reach for *Twombly* and *Iqbal* to help them in reducing the number of lawsuits at the beginning of the litigation. As one lawyer for the pharmaceutical industry opined,

while we don't mind standardization of allegations across large numbers of complaints, we may be better off putting plaintiffs to their pleadings individually. If Rule 12 requires a plaintiff at least to plead in good faith one fact affirmatively indicating that the defendant's promotion affected his or her prescriber, then that requires more than a cookie-cutter complaint churned out by a mindless word processor. So defendants should consider whether master complaints do them any good after *Twombly/Iqbal*.²⁷¹

Twombly and *Iqbal* recently have been used to attack the factual sufficiency of MDL master complaints. The master complaint, once a relatively uncontroversial procedural device, has become a new battleground for testing the merits of cases brought by groups of claimants. The district judge overseeing the NuvaRing contraceptive MDL denied a defendant's motion to dismiss for lack of plausibility because “the master consolidated complaint in this action was simply meant to be an administrative tool to place in one document all of the claims at issue in this litigation.”²⁷² Therefore, he concluded,

270. See generally David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393 (2000) (detailing the benefits that defendants enjoy from preparing general defenses and strategies to similar claims).

271. Reconsidering the Master Complaint, <http://druganddevicelaw.blogspot.com/2009/08/reconsidering-master-complaint.html> (Aug. 20, 2009, 09:30 EST).

272. *In re NuvaRing Prods. Liab. Litig.*, No. 4:08MD1964 RWS, 2009 WL 2425391, at *2 (E.D. Mo. Aug. 6, 2009); see also *In re Traysol Prods. Liab. Litig.*, No. 08-MD-1928, 2009 WL

a Rule 12(b)(6) motion to dismiss cannot be brought against a master complaint. Another MDL judge faced with a similar motion admitted uncertainty in determining “how a master complaint should be treated when it is challenged via Rule 12(b)(6)” in the post-*Twombly* and *Iqbal* era given the existence of case law emphasizing the MDL master complaint’s role as an administrative tool “as opposed to being a primary operative pleading.”²⁷³

These decisions already have touched off a spirited debate among practitioners about the proper response to a motion to dismiss a master complaint for factual insufficiency.²⁷⁴ In the same way that *Twombly* and *Iqbal* have forced courts to clarify the boundaries between motions for class certification and motions to dismiss because a class has not stated a claim, these cases have moved the question of the precise pleading role of a master complaint to the forefront of MDL practice. The *NuvaRing* judge’s conclusion that a MDL master complaint is not an appropriate target for a motion to dismiss is a rather blunt tool for protecting the integrity of aggregated claimants at the outset of litigation, especially because it gives rise to the not unreasonable charge that the judge has carved out MDL complaints as an exception to the *Iqbal* standard for pleadings. As an alternative, judges should use the plaintiff and group plaintiff neutrality principles to evaluate plaintiff directed allegations in a complaint and dismiss a master complaint for insufficient factual allegations in only two situations: (1) when the allegations of defendant or third-party conduct are implausible according to the *Twombly* and *Iqbal* standard, or (2) when allegations of plaintiff conduct or condition are *facially implausible*.

2. *Plausibility by the Numbers*

One aspect of facial implausibility that directly implicates allegations of plaintiff condition or conduct in complex litigation is

577726 (S.D. Fla. Mar. 5, 2009) (cited by the *NuvaRing* court for the proposition that judges should curtail motion practice against master complaints).

273. *In re Digitek Prods. Liab. Litig.*, MDL No. 2:08-md-01968, 2009 WL 2433468, at *8 (S.D. W. Va. Aug. 3, 2009).

274. See Drug and Device Law, <http://druganddevicelaw.blogspot.com/2010/01/nuvaring-cycle-revisited.html> (Jan. 12, 2010, 08:00 EST); Paul D. Rheingold & Hunger J. Shkolnik, *NuvaRing Meets Iqbal*, LAW 360, Jan. 6, 2010, <http://www.Law360.com/articles/141676>.

the use of statistical data to examine the plausibility of an allegation. This applies equally to actions filed as class actions, as well as those that are litigated as MDLs.

One can find an egregious illustration of the phenomenon of “cookie-cutter” complaints resulting in plaintiff speculation in the silicosis MDL litigated before Judge Janis Jack in the Southern District of Texas.²⁷⁵ The silicosis litigation involved 10,000 lawsuits alleging personal injury after exposure to silica.²⁷⁶ Silica is a mineral found in the earth’s crust, and workers in “occupations such as abrasive blasting (i.e. ‘sandblasting’), mining, quarrying, and rock drilling” may be exposed to the substance.²⁷⁷ Inhalation of silica particles can lead to silicosis, a disease that can cause a host of respiratory problems, cancer, and autoimmune disease.²⁷⁸ Although silicosis is relatively rare, the spate of silicosis lawsuits appeared in Mississippi and the surrounding states in a very short period of time.

Judge Jack uncovered a host of unethical practices used by the plaintiffs’ lawyers to amass the thousands of litigants in this MDL.²⁷⁹ The plaintiffs’ lawyers primarily employed litigation screening companies to identify and screen workers who might have been exposed to silica.²⁸⁰ These screenings involved little more than an X-ray which was then examined by one of a handful of doctors employed by the screening companies, none of whom had any actual contact with the “patient.”²⁸¹ Some doctors screened up to sixty patients per day.²⁸²

In the silicosis litigation, Judge Jack did not directly address the meritoriousness of any of the individual lawsuits because the rulings were confined to the admissibility of the expert testimony under *Daubert*.²⁸³ The implication of excluding the testimony,

275. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

276. *Id.* at 573.

277. *Id.* at 570.

278. *Id.* at 569.

279. *Id.* at 580, 596-600.

280. The use of “litigation screening” companies is not a new phenomenon. See generally Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221 (2008) for a strong critique of this practice.

281. *In re Silica*, 398 F. Supp. 2d at 580, 596-600.

282. *Id.* at 616.

283. *Id.* 563, 566-69 (summarizing rulings). Many of the cases were remanded to state court for lack of subject matter jurisdiction. *Id.*

however, was obvious. Thousands of plaintiffs based their claims for relief on a diagnosis of a disease, and the judge found that the doctors' diagnoses of silicosis were inadmissible. It was unlikely that such cases would survive a motion for summary judgment, and the plaintiffs dropped the majority of the lawsuits.

In her opinion, Judge Jack attacked the assertions of each doctor who made a silicosis diagnosis as well as the screening companies and technicians involved in soliciting and diagnosing plaintiffs.²⁸⁴ The findings that the diagnoses were inadmissible as a group undermined the basis for the diagnosis of plaintiffs on an individual basis. The *Daubert* decisions, however, reveal a larger skepticism of the epidemiological basis of the MDL on the part of the court, a skepticism that motivated and bolstered the individual findings as to each doctor.²⁸⁵ In short, the court found it implausible that such a high number of silicosis diagnoses were made in a short period of time in a relatively dense geographic area.²⁸⁶

If this logic is applied to the motion to dismiss context, one reason to doubt the diagnosis of any individual plaintiff was that the diagnoses *in the aggregate* were implausible because they were part of a "phantom epidemic."²⁸⁷ Consider a complaint in which the plaintiff alleges that (1) plaintiff worked at ABC Corporation worksite where silica particles were present from X date to Y date, and (2) plaintiff now suffers from silicosis. Before *Twombly*, these allegations would most likely be presumed true for the sake of deciding the motion to dismiss.²⁸⁸ Now, however, the statement "plaintiff suffers from silicosis" is subject to further scrutiny, and a court might deem it to be "conclusory" under *Iqbal's* two-step process.²⁸⁹ Taken individually, the statements should be plausible under *Erickson* and the plaintiff neutrality principle that I proposed in Part III.A. Each plaintiff makes allegations about his own work pattern and medical condition, and although the statement about silicosis is neutral (subject to multiple inferences), a court should treat that statement as plausible. Even if the probability that an

284. *Id.* at 612-20.

285. *Id.* at 572, 620.

286. *Id.*

287. *Id.* at 572.

288. See *supra* notes 10-16 and accompanying text.

289. See *supra* notes 78-86 and accompanying text.

individual has a certain condition is relatively low, the court should still treat the allegation as plausible.²⁹⁰

In the silicosis litigation, however, the court was not looking at each complaint in a vacuum, but at thousands of complaints, each alleging the same illness. The publicly available data that the defendants cited in their opposition brief pointed to two points of implausibility regarding the plaintiffs' claims as a group. First, the court reported the incidence of silicosis in the general population and compared it to the "silicosis crisis" in Mississippi.²⁹¹

"[B]ased on data from NIOSH's silicosis surveillance system ... there would be between 36 and 73 cases of silicosis diagnosed in Mississippi per year,"²⁹² which was consistent with the number of silicosis cases filed in Mississippi in 2000 and 2001.²⁹³ The complaints filed in the silicosis litigation, however, looked quite different because "[t]his explosion in the number of silicosis claims in Mississippi suggests a silicosis epidemic 20 times worse than the Hawk's Nest incident."²⁹⁴

290. *See supra* Part III.A.

291. *In re Silica*, 398 F. Supp. 2d at 571-72.

292. *Id.* at 571 n.8.

293. *Id.* at 571.

294. *Id.* at 571-72. Judge Jack's full analysis is worth repeating:

[I]n 2002, the number of new Mississippi silicosis claims skyrocketed to approximately 10,642. In 2003 and 2004, the number of new silicosis claims in Mississippi continued to be shockingly high, at 7,228 claims in 2003 and 2,609 claims in 2004. By way of comparison, in 2002, on average, more silicosis claims were filed per *day* in Mississippi courts than had been filed for the entire *year* only two years earlier. And during 2002-2004, the 20,479 new silicosis claims in Mississippi are over five times greater than the total number of silicosis cases one would expect over the same period in the entire United States.

This explosion in the number of silicosis claims in Mississippi suggests a silicosis epidemic 20 times worse than the Hawk's Nest incident. Indeed, these claims suggest perhaps the worst industrial disaster in recorded world history.

And yet, these claims do not look anything like what one would expect from an industrial disaster. One would expect an industrial disaster to look like the Hawk's Nest incident: presenting cases of acute silicosis (with relatively brief incubation periods), emanating from a single worksite or geographic area with an extremely high concentration of silica. To the contrary, virtually all of these silicosis claims are for chronic or classic silicosis (with incubation periods in excess of 15 years). The claims do not involve a single worksite or area, but instead represent hundreds of worksites scattered throughout the state of Mississippi, a state whose silicosis mortality rate is among the lowest in the nation.

Id.

This and other observations led Judge Jack to conclude that “this appears to be a phantom epidemic, unnoticed by everyone other than those enmeshed in the legal system.”²⁹⁵

The second problem was that at least 4031 of the plaintiffs from one screening company were also plaintiffs in asbestos litigation claiming asbestosis.²⁹⁶ Judge Jack noted how unlikely this outcome was given that, “outside of the small cadre of doctors who diagnose for screening companies, even a single case of a dual diagnosis of silicosis and asbestosis is extremely rare.”²⁹⁷

The court presented some of this information as general background context for the decision, and other publicly available information came in the context of the *Daubert* motions to exclude the diagnoses.²⁹⁸ It reads, in other words, like the skepticism of a judge looking at the information in a complaint and the arguments of a defendant moving for a Rule 12(b)(6) dismissal. Judge Jack even used the language of plausibility, agreeing with an expert that the diagnoses were “not scientifically plausible.”²⁹⁹

Some interpretations of *Twombly* suggest that judges may use statistical data to demonstrate implausibility because “the baseline in *Twombly* follows from an application of economic theory to the particular conditions of the telecommunications industry as alleged in the complaint and revealed through publicly available sources.”³⁰⁰ The statistical data in a case like the silicosis litigation often

295. *Id.* at 572-73.

296. *Id.* at 603.

297. *Id.* at 628-29 (citing Dr. David Weill, Senate Judiciary Committee Testimony, Fed. Doc't Clearinghouse at 4 (Feb. 3, 2005) (“Even in China, where I saw workers with jobs involving high exposure to asbestos and silica (such as sandblasting off asbestos insulation), I did not see anyone or review chest radiographs of anyone who had both silicosis and asbestosis.”); Dr. Paul Epstein, Senate Judiciary Committee Testimony, Fed. Doc't Clearinghouse at 3 (Feb. 2, 2005) (“[I]t is my professional opinion that the dual occurrence of asbestosis and silicosis is a clinical rarity.”); Dr. Theodore Rodman, Senate Judiciary Committee Testimony, Fed. Doc't Clearinghouse at 2 (Feb. 2, 2005) (“Among the thousands of chest x-rays which I reviewed in asbestos and silica exposed individuals, I cannot remember a single chest x-ray which showed clear-cut findings of both asbestos exposure and silica exposure.”)).

298. *Id.* at 570-72. The lengthy rulings on the diagnoses made by the nine doctors who worked for the litigation screening companies reveal facts that make the complaints even less credible, such as the fact that many of the doctors did not even conduct physical examinations or take basic medical histories of the litigants. *Id.*

299. *Id.* at 629.

300. Bone, *supra* note 6, at 887-88.

suggests that the complaints filed are far afield from the relevant baseline—in the silicosis litigation, the normal occurrence of silicosis in the relevant population.

This limited use of publicly available statistics is compatible with the plaintiff neutrality principle (applicable to MDL complaints) and the group plaintiff neutrality principle (applicable to class actions). These principles address the question of how a court should treat *neutral* allegations in a complaint, and most allegations pertaining to plaintiff conduct or condition are neutral. The silicosis hypothetical, however, describes a situation of *facial implausibility* when the allegations of the group are viewed as a whole.

The use of statistics to assess the plausibility of a group of claimants leads to a potentially troubling implication: if it is permissible to use statistical rarity to condemn a group of claimants, then what is to stop a court from using statistical rarity in individual cases to demand that claimants state additional facts to suggest the plausibility of their claim? In other words, plausibility by the numbers would appear to carve out an exception to the plaintiff neutrality principle or swallow it altogether.

By way of illustration, the objection takes the following form. Imagine lawsuits arising from the incidence of a medical condition, Q. Medical Condition Q is associated with exposure to Product X. Publicly available epidemiological data suggest that a very small percentage of adults exposed to product X for a one-year period develop Medical Condition Q. Some adults develop Medical Condition Q without any known exposure to Product X.

In Hypothetical 1, one plaintiff files a complaint stating, in relevant part, “I was exposed to Product X for a one-year period. I developed Medical Condition Q on Date O. Product X was the cause of my medical condition.” In Hypothetical 2, a group of 10,000 plaintiffs file individual complaints at roughly the same time, and the cases are consolidated before a single judge. The plaintiffs, who are all represented by the same three law firms, file complaints that follow a master complaint that state, “I was exposed to Product X from [date] to [date]. I developed Medical Condition Q on [date range A-B]. Product X was the cause of my medical condition.”

In Hypothetical 1, the defendant manufacturer of Product X uses publicly available epidemiological data to show that the plaintiff had a 1 percent chance of developing Medical Condition Q at all, and

that the plaintiff only had a 0.1 percent of developing Medical Condition Q as the result of exposure to Product X. In Hypothetical 2, the defendant manufacturer of Product X uses publicly available epidemiological data to show that, of the 10,000 persons who filed claims, only 100 would be expected to develop Medical Condition Q during date range A-B and only 10 would be expected to develop Medical Condition Q as a result of exposure to Product X.

In each of these hypotheticals, the defendant is making an argument about the plausibility of the allegations. In each situation, there are two points at which the defendant attacks the plausibility, first, in suggesting that it is implausible that a person would develop Medical Condition Q at all, and second, that it is even less likely that a person would develop Medical Condition Q as a result of exposure to Product X. Each of these likelihoods must be examined under the plaintiff neutrality principle or the group plaintiff neutrality principle and analyzed for the possibility of facial implausibility.

In the case of the individual plaintiff, the plaintiff neutrality principle would apply. There are explanations for the allegations that suggest wrongdoing on the part of the defendant, and allegations that suggest a wholly innocent explanation for the plaintiff's condition. The plaintiff is permitted to assert that indeed he does suffer from Medical Condition Q. Even though there is only a small chance that any given adult would have Medical Condition Q, the plaintiff is in the best position to know directly or to investigate his own condition prior to filing a lawsuit. The causation question is also subject to the plaintiff neutrality principle. The plaintiff has a good, if not perfect, opportunity to assess the likelihood of causation prior to filing, and to the extent that this will require discovery resources, the plaintiff will be responsible for a sizeable portion of the expense of the investigation,³⁰¹ serving as an outward sign of his confidence in the truth of the allegations.³⁰²

This result fits many people's intuitions about pleading. Why punish a plaintiff simply for suffering from a disease that is rare? To the extent that the plaintiff has alleged facts sufficient to show that

301. See Stancil, *supra* note 118, at 127 ("A 1986 Rand Corporation study found rough parity between plaintiff's nominal litigation costs and defendant's costs in tort cases generally.")

302. See *supra* notes 170-72 and accompanying text.

the illness and its causation are *possible*, then the plaintiff should be allowed to go forward with the lawsuit.³⁰³

It is troubling, then, to arrive at precisely opposite intuitions in Hypothetical 2. One wonders how it could possibly be true that all or even half of the plaintiffs suffer from Medical Condition Q at all. However, the probabilities in each hypothetical are exactly the same. In other words, as a matter of statistical likelihood, the *plausibility* of the allegations in each hypothetical is identical, and since each plaintiff technically files his own complaint, the reasoning behind the plaintiff neutrality principle should remain constant.

The realities of modern MDL litigation, however, suggest that the plaintiff neutrality principle should not be fully extended to this situation. In order to determine if it would be appropriate to set aside the plaintiff neutrality principle in the context of an MDL, a court should examine whether the conditions that define a genuinely individual plaintiff are absent or greatly diminished. That is to say, the plaintiff, when making allegations about his own conduct or condition, is genuinely the narrator of his own story, that is, he is not the subject of speculation by another plaintiff.³⁰⁴

The group plaintiff scenario adds an extra inference to the world of possible interpretations of facts. In the individual plaintiff scenario, the possible inferences about the plaintiff-centered allegations are either that the plaintiff has the condition alleged, or that he does not. In the group plaintiff scenario, the additional possible inference is that the *conduct of a third party* has interfered with the plaintiffs allegations of his own conduct or condition. This could be the result of blatantly unethical or even fraudulent behavior on the part of lawyers or litigation screeners, or it could simply reflect that lawyers with a large number of clients have fallen short of their Rule 11 duties of reasonable investigation.

The key to understanding why this situation is different from the individual plaintiff situation is to comprehend the structural differences in large-scale joinder devices. The proper analog for abandoning the plaintiff neutrality principle is the class action, not the MDL. This is because in the class action situation, the judge

303. These are the same intuitions and reasoning about plaintiffs' motivations and access to information that motivated the Supreme Court holding in *Erickson* and the resulting plaintiff neutrality principle. See *supra* notes 223-29 and accompanying text.

304. See *supra* notes 267-70 and accompanying text.

would treat the allegations of the *group as a whole* as implausible, and the remedy would mirror the problem, that is, the complaint of the group itself would be dismissed.³⁰⁵ However, in an MDL, this is not the case. When publicly available data suggest that the claims of the group are implausible, this serves to upend the plaintiff neutrality principle. It does not, however, mean that the group *qua* group must *itself* come forward with allegations indicating that the group, as a whole, has stated a claim.

Notice, however, that the rules of civil procedure already contain protections against dismissing the claims of an entire group—these are the procedures meant to ensure that class certification is supported by the evidentiary foundations that a Rule 23 proceeding is designed to unearth. A refusal to apply the plaintiff neutrality principle to some MDLs would not doom the entire enterprise. Rather, it would ensure that each litigant is a genuine claimant. This is quite different from using the plausibility standard to attack a class action as a whole, and in doing so, ending the entire lawsuit for all class members. The argument is limited to the question of how a judge should treat the *group* of complaints when data indicate a plausibility problem with that group, and most MDLs do not show such deficiencies.

I do not mean to condemn the use of master complaints and other group pleading measures in their entirety. These devices can ease the burden on litigants and the court in organizing many complex cases. For example, after the *NuvaRing* judge declined to allow the defendants to bring a Rule 12(b)(6) motion against the master complaint, the defendants filed individual motions to dismiss against each and every claimant.³⁰⁶ To the extent that these were directed at allegations about defendant conduct that were common to all of the complaints, these motions defeat some of the efficiencies that MDLs are supposed to bring. Rather than attacking the institution of the master complaint, the judge should determine if any of the common allegations are about plaintiff conduct or condition, and if so, whether these should be subjected to the group

305. However, as argued earlier, courts must take care not to conflate the issue of the *existence* of a class with the issue of whether the class has stated a claim for which relief can be granted. *See supra* notes 209-11 and accompanying text.

306. Rheingold & Shkolnik, *supra* note 274.

plaintiff neutrality principle or even treated as facially implausible based on publicly available data.

The argument presented here—that it is permissible under the *Twombly/Iqbal* standard to use publicly available data to determine plausibility—is limited to cases involving (a) group plaintiffs and (b) allegations about *plaintiff* conduct or condition only. These limitations build in a few protections for plaintiffs that are absent in the “typical” *Twombly* scenario.

First, because the claims are about the plaintiff and not the defendant, a finding of implausibility does not deny the plaintiffs access to information about the defendants via discovery. It does require some investigation on the part of the plaintiff before filing, but it is not unreasonable, burdensome, or impossible without judicial intervention. Second, it is possible for the court to dismiss an individual case without prejudice, or to rule for a more definite statement under the Federal Rules.³⁰⁷

Second, if used properly, the *Twombly/Iqbal* standard can protect defendants and plaintiffs³⁰⁸ from lawyers looking to cast an unnecessarily wide net. Those plaintiffs with genuine claims will not have the value of any settlement or judgment diminished by the presence of plaintiffs with unmeritorious claims or the money spent to dismiss them from the action.

The kind of information that individual plaintiffs could supply to supplement a master complaint should not be particularly onerous to plaintiffs. The claimants should be required to provide further detailed allegations about their own specific condition, for example, to provide detail about dates and extent of symptoms experienced.³⁰⁹ Another possibility would be to supply allegations that negate the inference that the plaintiff’s allegations are the product of speculation by other plaintiffs.

CONCLUSION

Despite its grounding in the class action context, the *Twombly* plausibility standard does not apply directly to the class certification

307. See FED. R. CIV. P. 12(e).

308. Plaintiffs do not go unharmed in these situations, as they are often subjected to unnecessary tests, X-rays, etc.

309. This was utilized in the 9/11 complaints.

context. The importance of applying a plausibility pleading standard in the class action context is magnified by recent efforts to “federalize” class actions in which Congress has made it easier for defendants to remove state law complex cases to federal court.³¹⁰ These actions are then subject to the procedural hurdles that many defendants perceive to be advantageous.³¹¹ A plausibility pleading standard might be viewed as an additional procedural benefit to litigating class actions in a federal forum.

The close examination of the plausibility standard in other aspects of class action litigation, however, reveals that complex litigation does indeed occupy a special place in pleading.

The nuanced and careful analysis that I suggest for applying the *Twombly/Iqbal* standard to questions surrounding claims for relief in complex litigation pleadings is not limited to that context. Rather, a resistance to the urge to use “class action” or “complex case” as a shortcut through tempered consideration of the actual costs and merits of a case is a method applicable to all areas of pleading.

310. See, e.g., Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); Multiparty, Multiforum Trial Jurisdiction Act of 2002, Pub. L. No. 107-273, 116 Stat. 1826 (codified in scattered sections of 28 U.S.C.).

311. See Effron, *supra* note 176, at 228-29 (outlining the perceived advantages to defendants for a federal forum in complex cases).