

WHAT *TWOMBLY* AND *MEAD* HAVE IN COMMON

Amy J. Wildermuth*

INTRODUCTION

The Supreme Court's recent opinion in *Bell Atlantic Corp. v. Twombly*¹ has already had enormous implications for pleading requirements under the Federal Rules of Civil Procedure. As of early April 2008—less than a year after it was issued—*Twombly* had been cited in almost 5,000 cases.² It also was an immediate—and continuing—source of much academic debate.³

I cannot help but notice a distinct parallel between *Twombly* and another opinion authored by Justice Souter, *United States v. Mead*.⁴ At first blush, these cases have little in common outside of their author: One was an antitrust dispute about what factual evidence must exist and be pled to defeat a Rule 12 motion on an alleged “parallel conduct” violation of Section 1 of the Sherman Act; the other was an administrative law case about the deference owed to agencies’ statutory interpretations that are not subjected to Administrative Procedure Act (APA) required process. What brings this odd couple together?

The most obvious shared trait is that the Court appears to have fundamentally altered procedural law in both decisions. That alone, however, does not mean much. Changing the law, even significantly, is the Court’s prerogative. The common denominator instead is the confusion one is left with after parsing both *Twombly* and *Mead*. It is one thing to know that the law has changed when the change—the new order, the new rule, the new way of operating—is clear. But these opinions offer no straightforward answers. Rather, on key issues in both cases, the court offers a similar formu-

* Associate Professor of Law, S.J. Quinney College of Law, University of Utah.

¹ 127 S. Ct. 1955 (2007) (link).

² As of April 6, 2008, Westlaw’s KeyCite service listed 4,910 cases that cite *Twombly*.

³ See, e.g., Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/31/LRColl2007n31Bradley.pdf> (link); Scott Dodson, *Pleading Standards after Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 121 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf> (link); Michael C. Dorf, *The Supreme Court Wreaks Havoc in the Lower Courts—Again*, FindLaw, <http://writ.news.findlaw.com/dorf/20070813.html> (Aug. 13, 2007) (link). See generally Scott Dodson, *The Mystery of Twombly Continues*, <http://prawnsblawg.blogs.com/prawnsblawg/2008/02/the-mystery-of.html> (providing list of articles and significant blog posts on *Twombly*) (link).

⁴ 533 U.S. 218 (2001) (link).

la of circular directions: it begins with a fairly clear description of the general legal test to apply, but then proceeds to detail exceptions or additions that have the potential to swallow the general rule.

These two cases are different, however, in one important way: the Court's ability to correct the confusion its decisions engender. Even if the Court were interested in revisiting the question of the proper deference to afford agency interpretations, it would need to wait for a good vehicle to address the many uncertainties *Mead* has generated. The confusion with respect to *Twombly*, however, can disappear quickly. Acting under its powers to revise the Federal Rules of Civil Procedure, the Court could revise either Rule 8⁵ or Rule 9⁶ and thus immediately end the speculation regarding what *Twombly* means.

I. THE CONFUSION WROUGHT BY *TWOMBLY* AND *MEAD*

Mead, the elder of this pair by about five years, involved the deference, if any, to be given to U.S. Customs Service's interpretation of the statute it administered, the Harmonized Tariff Schedule of the United States.⁷ The specific question before the Court was whether the agency's interpretation should be afforded *Chevron* deference, no deference, or some other kind of deference. The Court concluded that, where a statute is ambiguous, agency interpretations that carry the "force of law" qualify for *Chevron* deference, while agency interpretations lacking the "force of law" should be evaluated under *Skidmore*'s rubric to determine what amount of deference they will receive. *Chevron* deference is relatively clear—courts must defer to agency interpretations that are reasonable. In contrast, *Skidmore* employs an inherently malleable sliding scale of deference—from no deference to great deference—that evaluates the interpretation's weight based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."⁸

The murkiness created by *Mead* plays out on two fronts: First, what interpretations have the "force of law"? Second, given its sliding scale, when *Skidmore* applies, how much deference does a particular interpretation re-

⁵ FED. R. CIV. P. 8(a) provides that a claim must contain a jurisdictional statement, a demand for relief, and "a short and plain statement of the claim showing that the pleader is entitled to relief."

⁶ FED. R. CIV. P. 9 provides rules for pleading special matters including:

(b) . . . In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

. . .

(g) . . . If an item of special damage is claimed, it must be specifically stated.

⁷ See *Mead*, 533 U.S. at 221–22 (discussing the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202 (2000)).

⁸ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (link).

ceive? *Mead* left lower courts painfully confused on both questions.⁹ Even worse, because the analysis required by *Mead* is so complicated and unclear, courts often do not engage it fully but instead collapse it into something much simpler,¹⁰ thus making it more prone to results-oriented manipulation.¹¹

In addition to these overarching problems, the Court's analysis in *Mead* of what agency interpretations carry the force of law is particularly bewildering. It began by explaining that most of the time, the "fruits of notice-and-comment rulemaking or formal adjudication," that is, those interpretations that are the result of APA-required process, qualify.¹² If Congress, however, makes clear that it did not intend for certain interpretations to have the force of law adopted even when using these procedures, they will not. So far, all is clear.

But then the Court seems to circle back on itself: it is possible that an interpretation adopted not using APA-required procedures may carry the force of law and thus receive *Chevron* deference. In support of this proposition, the Court offered a single example, *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*,¹³ in which the Court held that the Comptroller of the Currency's interpretation of ambiguous provisions of the National Bank Act detailed in a letter were entitled to *Chevron* deference.¹⁴ The Court also provided additional factors that courts might consider when determining whether an interpretation has the force of law, including (1) whether the statute requires relatively formal procedures, (2) whether the agency may adopt rules that can be generalized to more than one case, and (3) whether like cases are required to be treated alike.¹⁵ These factors do not appear to be the only ones that may be considered and none of them,

⁹ See Amy J. Wildermuth, *Bringing Order to the Skidmore Revival: A Response to Hickman and Krueger*, COLUMBIA LAW REVIEW SIDEBAR, http://www.clrsidebar.org/replies/wildermuth_bringing_order_to_the_skidmore_revival (Dec. 16, 2007) (link) [hereinafter Wildermuth, *Bringing Order*]; Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1291 (2007) (link) ("It is apparent that the courts of appeals lack a coherent conception of how *Skidmore*'s sliding scale should function."); Amy J. Wildermuth, *Solving the Puzzle of Mead and Christensen: What Would Justice Stevens Do?*, 74 FORDHAM L. REV. 1877, 1890–99 (2006) (link) [hereinafter Wildermuth, *Solving the Puzzle*].

¹⁰ See Wildermuth, *Solving the Puzzle*, *supra* note 9, at 1892–96 (describing the shortcutting with respect to whether *Chevron* or *Skidmore* applies); *id.* at 1897–98 (describing shortcutting with respect to the amount of deference afforded when *Skidmore* applies).

¹¹ Cf. Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 820 (2004) (link) ("Rules are generally more predictable and easier to enforce than standards. Hence, they generally are a superior mechanism for controlling the behavior of subordinate actors within a hierarchy."); Wildermuth, *Bringing Order*, *supra* note 9 ("[T]he less straightforward the test, the easier it becomes to hide what is really going on.")

¹² *Mead*, 533 U.S. at 230.

¹³ 513 U.S. 251 (1995) (link).

¹⁴ *Mead*, 533 U.S. at 229–31, 231 n.13 (citing *Nations Bank of N.C., N.A.*, 513 U.S. at 256–57, 263).

¹⁵ See *Mead*, 533 U.S. at 230–34; Merrill, *supra* note 11, at 814.

nor any particular combination of them, appears to be determinative.¹⁶ With so little guidance, it is easy to imagine any number of agency actions potentially falling into this category and thus having the force of law, leading one to wonder why the Court bothered with a test for force of law at all.

The Court's lack of clarity on this issue has led commentators to propose a variety of solutions for determining what agency actions have the force of law.¹⁷ Despite their differences, one theme predominates throughout the proposals: the need for a much clearer rule from the Court.¹⁸

Twombly's murkiness, at least with respect to pleading requirements, bears an eerie resemblance to that of *Mead*'s handling of the force of law question. *Twombly* involved a class action claim that certain telephone companies, the Baby Bells, had conspired to restrain trade in violation of Section 1 of the Sherman Act.¹⁹ The plaintiffs based their claim on the defendants' parallel business conduct—in plain English, substantially similar behavior—that allegedly demonstrated an agreement to reduce competition. The central issue in the case was whether these allegations of parallel behavior plus a conclusory, “bare assertion”²⁰ of conspiracy was sufficient to state a Section 1 claim. Largely driven by concerns over the perceived ease with which plaintiffs may assert such a claim, the Court concluded that Section 1 plaintiffs must demonstrate that the asserted conspiracy is “plausible.”²¹ That is, a plaintiff must provide in its complaint “enough factual matter (taken as true) to suggest that an agreement was made.”²²

Others have debated, and will continue to debate, whether this is the correct rule as a matter of antitrust law, for the incentives it creates and behavior it inspires.²³ The bigger procedural question, however, is whether the Court's requirement to plead particular facts alters the well-known Rule 8 notice pleading standards outside of antitrust law. Here is where, as with *Mead*, things get hazy.

¹⁶ See *Mead*, 533 U.S. at 237 n.18; see also Merrill, *supra* note 11, at 813–14 (discussing the majority opinion in *Mead* as having “declined to identify any of these factors as being either necessary or sufficient conditions for finding the relevant type of delegation”).

¹⁷ See, e.g., Wildermuth, *Solving the Puzzle*, *supra* note 9, at 1900–04 (detailing several of the potential solutions).

¹⁸ See Merrill, *supra* note 11, at 833 (“The Court's decision to treat ‘force of law’ as a standard rather than a rule is regrettable.”).

¹⁹ *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1961–63 (2007) (link) (discussing the plaintiffs' claims under Section 1 of the Sherman Act, 15 U.S.C. § 1 (2000 & Supp. 2004)) (link).

²⁰ *Id.* at 1966.

²¹ *Id.* at 1965.

²² *Id.*

²³ See, e.g., Max Huffman, *The Necessity of Pleading Elements in Pleading Private Antitrust Conspiracy Claims*, 10 U. PA. J. BUS. & EMP. L. (forthcoming 2008), available at <http://ssrn.com/abstract=1013574> (link).

The opinion begins by tying its analysis to traditional notice pleading standards.²⁴ It then shifts to a more narrow discussion of plausibility and the importance of such a requirement in antitrust cases in which discovery is expensive.²⁵ Next, it returns to the issue of general notice pleading and discusses how puzzled the profession has been by *Conley v. Gibson*'s fifty-year-old test for all Rule 12(b)(6) motions:²⁶ "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."²⁷ The Court then retires the "no set of facts" language.²⁸ Finally, at the end of the opinion, the Court circles back to the more narrow ground for its decision, insisting that notice pleading has not been abandoned, that it is not impermissibly creating "heightened fact pleading of specifics," and repeating again that this case is simply about requiring plausibility.²⁹

Once the spinning sensation stops, much like *Mead*, we are left to wonder: Are we to adhere to the general rule of notice pleading but understand that *Twombly* requires an additional pleading requirement for a very specific type of antitrust claim? Or is the additional discussion of discovery costs and *Conley* meant to swallow the old notice pleading rule and replace it with a new kind of pleading system that requires pleaders to demonstrate plausibility, a "notice-plus" system, as Professor Scott Dodson has labeled it?³⁰

Those who attempt to limit *Twombly* to the antitrust context typically describe the Court's new requirement as an additional element to be pled.³¹ This makes sense because it has long been understood that Rule 8 requires pleadings to contain allegations in support of each material element of a claim. If plausibility was a new element of an antitrust claim, it would be fair to ask for an allegation to support it. The problem with this spin on *Twombly*, however, is that *Twombly* did not add any elements to Section 1 claims. To bring a Section 1 case before *Twombly*, the plaintiff had to prove an agreement; that is still required. *Twombly* simply calls for *more* to be alleged up front that will show the existence of an agreement. Accordingly, in contradiction to its other pronouncements that nothing can be re-

²⁴ Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964–65 (2007) (link).

²⁵ *Id.* at 1966–67.

²⁶ *Id.* at 1968–69.

²⁷ *Id.* at 1968 (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)) (internal quotation marks omitted).

²⁸ *Id.* at 1968–69.

²⁹ *Id.* at 1973–74 & n.14.

³⁰ Dodson, *supra* note 3, at 138.

³¹ Bradley, *supra* note 3, at 122 ("'Plausibility' is an element of a certain kind of antitrust conspiracy claim, not a standard for pleadings in general.").

quired beyond Rule 8 unless it is found in Rule 9 or a specific statute,³² this interpretation yields a judicially created special pleading rule for Section 1 claims based on parallel conduct.

On the flip side, although a new interpretation of Rule 8 for all cases is more consistent with the Court's statements against judicially created special exceptions, it is hard to imagine that the Court intended such wholesale change. Pronouncing that "notice pleading is dead for all cases and causes of action"³³ seems extreme, particularly given the opinion's plain statements that the majority intended nothing of the sort. This view is even harder to square with the Court's decision—less than a month after *Twombly* was decided—in *Erickson v. Pardus*,³⁴ a summary reversal that cited *Twombly* for the proposition that specific facts need not be pled: "the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"³⁵

Between these two extremes, there exists at least some middle ground. It may be that the Court intended to reinterpret Rule 8 to require a notice-plus system for certain kinds of cases. Drawing on the example of this particular antitrust claim, it could be that the Court wants more when it comes to cases in which the discovery is costly.³⁶ But this option, too, leaves us guessing because the opinion does not provide any guidance as to what might be costly enough to trigger *Twombly*'s heightened requirements. Moreover, the text of Rule 8 says nothing about this kind of requirement.

Most importantly, without clear guidance from the Court as to which of these is the correct reading, results-oriented manipulation could rear its head here too. That is, it may be that courts will dismiss certain types of suits or suits brought by certain kinds of plaintiffs on the ground that they were not pled correctly.

II. WHERE DO WE GO FROM HERE?

Our odd couple's mutual murkiness leaves lower courts and practitioners in quite a lurch. One possibility is for the Court to take a case that raises these issues and then clarify the rules. But this is unlikely, especially immediately.

³² See *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 513–14 (2002) (link); *Leatherman v. Tarrant County Narcotics, Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (link); cf. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2507–08 (2007) (link).

³³ Dodson, *supra* note 3, at 138.

³⁴ 127 S. Ct. 2197 (2007) (link).

³⁵ *Id.* at 2200 (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007)).

³⁶ *Twombly*, 127 S. Ct. at 1967 ("[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a § 1 claim." (quoting *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005))).

With respect to *Mead*, although many have suggested that the Court ought to clarify its ruling, in the several years since that decision, the Court has provided little help regarding the appropriate level of *Skidmore* deference to be afforded.³⁷ It has addressed *Mead*'s force of law test in two opinions but those appear to have been a step away from and then back to *Mead*. In 2002, *Barnhart v. Walton*³⁸ articulated an entirely new set of criteria for deciding what was to get *Chevron* deference, contributing even more confusion to the issue.³⁹ Last year, however, *Long Island Care at Home, Ltd. v. Coke*⁴⁰ appeared to signal a return to the *Mead* criteria by citing *Mead* and emphasizing the binding nature of the regulation at issue.⁴¹ The Court did not, however, attempt to further explain *Mead*'s force of law test, thus returning us exactly where *Mead* left us in 2001. Finally, because *Mead* has not one but two areas of confusion, finding a single case that would allow the Court to address both is more challenging.⁴²

With respect to *Twombly*, however, the Court could end the current confusion quickly without waiting for the right case to come along. Under the Rules Enabling Act,⁴³ the Court could revise Rule 9 to reflect a heightened pleading standard for certain antitrust cases, or it could revise Rule 8 to embody new pleading, notice-plus requirements.⁴⁴ Although it is not common for the Court to draft rules itself,⁴⁵ it has the power to do so. If the Court were to select this route, the revised rule must be promulgated by May 1st and would take effect on December 1st if Congress does not act to reject, modify, or defer the rule.⁴⁶

³⁷ See, e.g., *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 487–88, 494 (2004) (link) (applying some *Skidmore* factors but then using the language of *Chevron* to explain the agency's interpretation as a reasonable and permissible one); *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 448–49 & n.9 (2003) (link) (*Skidmore* analysis consisted of noting that agency interpretation was "not controlling—even though it may 'constitute a body of experience and informed judgment' to which we may resort for guidance." (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

³⁸ 535 U.S. 212 (2002) (link).

³⁹ *Id.* at 222 (listing four new factors for determining whether *Chevron* or *Skidmore* applied: "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time").

⁴⁰ 127 S. Ct. 2339 (2007) (link).

⁴¹ *Id.* at 2350–51. It is worth noting that Justice Breyer authored both *Barnhart* and *Long Island*.

⁴² But not impossible: a case involving the circuit split over RESPA §8(b) may provide the Court with a good vehicle to revisit both issues. See Jonathan P. Solomon, Note, *Resolving RESPA's § 8(b) Circuit Split*, 73 U. CHI. L. REV. 1487, 1496–98 (2006) (link).

⁴³ 28 U.S.C. §§ 2071–2077 (2000) (link).

⁴⁴ 28 U.S.C. § 2072 (2000) (link).

⁴⁵ Revision to the rules of civil procedure typically would begin in the Advisory Committee on Rules of Civil Procedure, then go through the Committee on Rules of Practice and Procedure (also known as the Standing Committee), and then to the Judicial Conference. See *The Rulemaking Process: A Summary for the Bench and Bar* (Oct. 2007), <http://www.uscourts.gov/rules/proceduresum.htm> (link).

⁴⁶ 28 U.S.C. § 2074(a) (2000) (link).

Revising Rule 9 would seem to be the preferred route if *Twombly* was intended to have only narrow application to certain antitrust claims. The Court, however, explained that Rule 9 was not appropriate because “our concern is not that the allegations in the complaint were insufficiently ‘particular[ized]’, [Fed. R. Civ. P. 9(b)–(c)]; rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs’ entitlement to relief plausible.”⁴⁷

The distinction that the Court draws here is confusing, to say the least, when it is understood that “particularized” in this context means that a plaintiff must allege additional information regarding the fraud or mistake that is claimed. The usual reason provided for requiring particularized pleading under Rule 9(b) is to prevent groundless claims that are perceived as more costly.⁴⁸ As such, the requirements of Rule 9(b) and the justification for them sound an awful lot like what was said in *Twombly*.

But the Court need not agree that its ruling requires particularity to add its *Twombly* requirement to Rule 9. Rule 9 contains the rules or requirements for the pleading of *any* special matter, not just those that must be pled with specificity or particularity. Accordingly, to clear up *Twombly*’s confusion, the Court could simply add a new subsection to Rule 9—say, subsection (i), “Sherman Act Section 1 Parallel Conduct Matters.” Such a provision could be straightforward: “When claiming a violation of Sherman Act Section 1 based on parallel business conduct, a plaintiff must provide sufficient facts to suggest an agreement between defendants.”

If, on the other hand, the Court intended to revise the pleading system in a more fundamental way, it might consider revising Rule 8. Specifically, the Court could amend Rule 8(a)(2) to require “a short and plain statement of the claim showing *that it is plausible* that the pleader is entitled to relief.” Or, if it does not intend this broad of a revision, it could modify Rule 8(a)(2) to require “a short and plain statement of the claim showing that the pleader is entitled to relief, *and must demonstrate that such relief is plausible in those cases in which discovery is particularly costly.*” These revisions lack the immediate clarity of a revision to Rule 9—what is necessary to show plausibility? and when is discovery particularly costly?—but would make clear the Court’s intentions.

CONCLUSION

In fairness, what I have described as the murkiness of *Mead* and *Twombly* could be described as a more nuanced or a more sophisticated

⁴⁷ Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1973 n.14 (2007) (link).

⁴⁸ 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1296, 37–38 (3d ed. 2004) (“[S]ome federal courts have expressed the view that allegations of fraud or mistake frequently are advanced only for their nuisance or settlement value and with little hope that they will be successful on the merits. . . . [F]ederal courts have [also] pointed out that the greater pleading specificity required by Rule 9(b) deters the filing of suits solely for discovery purposes.”).

analysis that, over time, may be shaped and adjusted to become more workable. My preference to draw clear lines might be faulted for lacking the flexibility that permits the law to develop, to allow it to percolate and be worked out over time. But I am not alone in my frustration when it comes to figuring out how to apply these tests now, as the uncertainty among practitioners and the academy already shows. Moreover, the particular murkiness here does not involve substantive law, which may well benefit from more nuanced analyses, but rather procedural law, which we typically prefer to embody in clear rules and statutes.

So is there any resolution in sight? Although it has no reason to pay me any attention, I have a deal for the Court: let's split the difference. I will be more patient with the Court's taking its time to revisit *Mead*. I will continue to evaluate its repercussions critically but will be more attentive to the positive developments that may result from the percolation. With respect to *Twombly*, however, consider revising the rules immediately to clarify what *Twombly* means. The more fitting and more narrow revision would seem to be a revision to Rule 9, but a revision to either Rule 8 or 9 along the lines described above would largely resolve the confusion left in *Twombly*'s wake—a confusion, I note, with a much larger numerical impact than that of *Mead*.⁴⁹

Do we have a deal? We will find out on May 1st.

⁴⁹ Compare *supra* note 2, (almost 5,000 citations to *Twombly* less than a year after the decision) with Hickman & Krueger, *supra* note 9, at 1259–61 (noting that there were only “450 federal appellate court opinions that cited *Skidmore*, *Christensen*, or *Mead*” in the five years after *Mead* was decided).