

Twombly: A Journey from the Conceivable to the Plausible

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The Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*¹ has shifted the balance between plaintiffs and defendants in antitrust litigation. While it has long been clear that a plaintiff must *prove* more than parallel conduct to win a Section 1 Sherman Act claim,² the Supreme Court has now held that a plaintiff must also *plead* more than parallel conduct to state a claim and survive a defendant's Rule 12(b)(6) motion to dismiss. The Court reversed long-standing notice-pleading precedent, and *Twombly* will have implications beyond Section 1 and antitrust cases.

Twombly

The by-now familiar facts in *Twombly* are as follows: The defendant Baby Bells, Bell Atlantic Corporation, Bell South Corporation, Qwest Communications International, Inc., SBC Communications, Inc. and Verizon Communications, Inc., emerged as regional monopolists from the 1984 breakup of AT&T and operated as Incumbent Local Exchange Carriers or ILECS. The Telecommunications Act of 1996 sought to introduce competition in the telecommunications market and created so-called Competing Local Exchange Carriers or CLECs. In this restructuring of the telecommunications market, the ILECs were obligated to sell local telephone services at wholesale rates, to lease unbundled network services, and to permit other carriers to interconnect to the ILECs' networks. These obligations were meant to give the CLECs and other ILECs access to local-access networks, making competition for local telephone services possible. At the same time, the Baby Bells were permitted to compete in the long-distance market. One of the expected consequences of the 1996 Telecommunications Act was a spate of litigation.³

According to the plaintiffs, another expected consequence has not occurred: meaningful competition in the telecommunications market. The *Twombly* defendants together allegedly control 90 percent of the national market for local telephone services. The heart of the complaint in *Twombly* is that the ILECs conspired to quell competition in that market by on the one hand preventing entry by CLECs and on the other hand agreeing not to enter each other's territories as competitors. Such a conspiracy would violate Section 1 Sherman Act, and the named plaintiffs brought suit on behalf of a putative class of "all subscribers of local telephone and/or high speed internet services." The plaintiffs based this claim of conspiracy on three main allegations:

- The defendant-ILECs territories are non-contiguous and sometimes loop around each other; therefore, the defendants' parallel conduct of not competing as ILECs in each other's territories would be "anomalous in the absence of an agreement among the defendants not to compete with each other."⁴

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¹ Bell Atl. Corp. v. Twombly, No. 05-1126, 2007 WL 1461066 (U.S. May 21, 2007).

² Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (at summary judgment stage, evidence must tend to exclude the possibility that the alleged conspirators acted independently).

³ See, e.g., Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999); Covad Commc'ns Co. v. FCC, 450 F.3d 528 (D.C. Cir. 2006).

⁴ Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 178 (S.D.N.Y. 2003).

- Given that the defendants were already operating as ILECs, competing as CLECs in adjacent territories would be an economically attractive proposition. Plaintiffs alleged that a statement by Qwest's CEO, Richard Notebaert, that competing as a CLEC "might be a good way to turn a quick dollar but that doesn't make it right,"⁵ suggested an agreement not to compete.
- The defendant-ILECs had an incentive to agree to thwart attempts by other telephone carriers to compete as CLECs, since a CLEC, once competing successfully in the territory of one ILEC, would be in a position to enter the territory of another ILEC.⁶

In the district court, Judge Lynch found these arguments were no more than allegations of parallel conduct, and dismissed the case on the defendants' Rule 12(b)(6) motions. Parallel conduct states a claim under Section 1 Sherman Act only, the district court held, if there are additional allegations of "plus factors," which tend to exclude the possibility of independent action (the familiar requirement for summary judgment motions).

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The Second Circuit reversed: Rule 8(a) requires nothing but a plain statement of the claim, and plaintiffs do not bear the burden to "plead with special particularity the details of the conspiracies whose existence they allege."⁷ Acknowledging the "sometimes colossal expense" of undergoing discovery, the Second Circuit found that it was up to the legislature or the Supreme Court to recalibrate the balance between notice pleading and the burdens placed on defendants in Section 1 actions based on mere allegations of parallel conduct.⁸

The Supreme Court's Holding

In a 7–2 decision handed down on May 21, 2007, the Supreme Court did re-calibrate this balance, making it harder for plaintiffs to survive Rule 12(b)(6) motions to dismiss in Section 1 cases.⁹ "The need at the pleading stage," writes Justice Souter for the majority, "for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"¹⁰

Twombly's New Pleading Standard. The emphasis has shifted from *Conley v. Gibson* and its holding that a complaint may 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,"¹¹ to the requirement of "showing that the pleader is entitled to relief." Taking as a starting point that parallel conduct can be as indicative of independent unilateral decisions as of (illegal) agreement by competitors, the Supreme Court reasons as follows: A showing that the plaintiff is entitled to relief requires more than labels and conclusions. In the context of Section 1, this means that there must be "enough factual matter (taken as true) to suggest that an agreement was made."¹² There must be "plausible grounds to infer an agreement."

⁵ *Id.* at 184.

⁶ *Id.* at 183–84.

⁷ *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 116 (2005).

⁸ *Id.*

⁹ *Bell Atl. Corp. v. Twombly*, 2007 WL 1461066 (U.S. No. 05-1126).

¹⁰ *Id.* at *6 (citation omitted).

¹¹ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

¹² *Twombly*, 2007 WL 1461066, at *6.

An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a Section 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 “entitlement to relief.”¹³

To reach this result, the majority had two obstacles to overcome. Dismissal for failure to state a claim has traditionally been disfavored by the courts given the inherent complexities of antitrust cases.¹⁴ The Court rejected this concern: district courts must retain the power to insist on some specificity in pleading before allowing a “potentially massive” case to proceed, and the burdens of discovery are extraordinary. The Court rejected the suggestion that the burdens of discovery could be lightened by staging discovery, that is, by first conducting discovery into the existence of conspiracy and reserving all other topics until after the plaintiff has had a chance to discover evidence of conspiracy and the defendants have had a chance to move for summary judgment.

The dissent, written by Stevens and joined by Ginsburg, takes issue with the majority’s hostility to staged discovery. While Stevens, had he been the trial judge, would not have permitted massive discovery on the allegations in the case, he would have given the plaintiffs a chance to depose Notebaert and executives of the other defendants.¹⁵

The second obstacle the Court had to overcome is the “no set of facts” formulation in *Conley* that has stood for fifty years, and has been the shield with which plaintiff’s lawyers have blocked myriad motions to dismiss in all types of cases. The Supreme Court in *Twombly* informed us that *Conley* has been misunderstood, and that *Conley* “described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of pleading to govern a complaint’s survival.”¹⁶ The Second Circuit erred, according to the majority, in taking the prospect of unearthing direct evidence of agreement among the defendants as sufficient to preclude dismissal.

The dissenters were dismayed at this abrupt departure from precedent: “[T]oday’s opinion is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation,”¹⁷ wrote Stevens. He insisted that *Conley*’s holding did set out the standard for notice pleading and reflected the policy choice of the Federal Rules of Civil Procedure. Stevens’s argument is strong, as far as it is based on Supreme Court precedent, but it seems insensitive to the struggles of the trial courts, which have long chafed against *Conley*. But the vigor of the dissent here demonstrates how thoroughly the *Twombly* ruling breaks with the past.

Just two weeks after *Twombly* came down, however, the Supreme Court in *Erickson v. Pardus* cited *Twombly* for the proposition that

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Specific facts are not necessary; the statement need only “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”¹⁸

¹³ *Id.*

¹⁴ *Peller v. CBS, Inc.*, 368 U.S. 464, 473 (1962) (“We believe that summary proceedings should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.”)

¹⁵ *Twombly*, 2007 WL 1461066, at *22.

¹⁶ *Id.* at *8.

¹⁷ *Id.* at *21.

¹⁸ *Erickson v. Pardus*, 127 S. Ct. 2197, 2220 (2007) (quoting *Twombly*, 2007 WL 1461066, at *1965 (quoting *Conley*, 355 U.S. at 47)).

The *Erickson* court noted, though, that it involved a *pro se* complaint, which “must be held to less stringent standards than formal pleadings drafted by lawyers.”¹⁹ Yet the quote suggests that *Conley*’s permissive pleading standard is not as dead as the *Twombly* dissenters fear.

The Supreme Court found nothing in the *Twombly* complaint but parallel conduct, and no plausible allegations of agreement. The Court discounted the defendants’ alleged economic incentives to resist the entry of CLECs in their territories as perfectly natural competitive behavior aimed at keeping regional dominance:

Even if the ILECs flouted the 1996 Act in all the ways the plaintiffs allege, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a Section 1 violation against almost any group of competing business would be a sure thing.²⁰

Asking about plausibility is an invitation to the parties and the courts to explore economic theories and to speculate about the incentives of competitors to conspire.

Plausibility, Conceivability, and Fact Pleading. We will have to wait and see which of *Twombly*’s phrases will evolve as the horn book formulation of what will plaintiffs have to show to “nudge their claims across the line from the conceivable to the plausible.”²¹ But two points emerge from a close reading of *Twombly*.

Enough factual matter. The Court is clear in requiring the pleading of specific facts suggesting an agreement between the defendants. The facts must “point toward a meeting of the minds;”²² and they must “raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”²³ The real standard seems buried in a footnote. There, responding to Stevens’s dissent, the Court explains what courts should consider to be “enough” factual matter:

Whereas the model form alleges that the defendant struck the plaintiff with his car while the plaintiff was crossing a particular highway at the specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place.²⁴

The passage suggests that a Section 1 claim now requires “who, when, where” allegations. The dissent rightfully points out that “in antitrust cases, where ‘the proof is largely in the hands of the alleged conspirators’ . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly”²⁵—a point the majority opinion, surprisingly, does not address.

Plausible, not conceivable. The Court requires that the factual matter must make an agreement “plausible.” This, and similar phrases in *Twombly*, are incompatible with *Conley*’s rule that a claim is well-pleaded if only it is logically consistent with a conceivable set of facts that could lead to liability. Instead, the test has become the plausibility of agreement between conspirators. Asking about plausibility is an invitation to the parties and the courts to explore economic theories and to speculate about the incentives of competitors to conspire.²⁶

¹⁹ *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

²⁰ *Twombly*, 2007 WL 1461066, at *9 (citation omitted).

²¹ *Id.* at *10.

²² *Id.* at *6.

²³ *Id.* at *6.

²⁴ *Id.* at *13 n.10.

²⁵ *Id.* at *20 (Stevens, J. dissenting) (citing *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976)).

²⁶ *Cf. id.* at *23. (Stevens, J., dissenting) (expressing fear that the new rule will invite “lawyers’ debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence.”)

To the majority in *Twombly*, a conspiracy among the ILECs is implausible because for a long time there was a monopoly in the telecommunications industry:

In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade preceding the 1996 Act, and well before that, monopoly was the norm in telecommunications, not the exception. The ILECs were born in that world, doubtless liked the world the way it was and surely knew the adage about him who lives by the sword.²⁷

But why does the adage about living by the sword not equally suggest an incentive to coordinate? “Let’s not fight among ourselves, we’ll all lose by cut-throat competition” is the mantra among Section 1 conspirators, after all, and the exact mindset the Sherman Act seeks to suppress. An actual conspiracy is not rendered legal by being implausible. If the *Twombly* Court is serious about settling for no less than “who, where, when” allegations of conspiracy, a tension might arise with the requirement that allegations must be plausible. The Court suggests that sometimes allegations of no more than parallel conduct will be sufficient to make an agreement plausible.²⁸ An equally plausible alternative to conspiracy as an explanation of the defendants’ behavior is enough for the Supreme Court in *Twombly* to dismiss the complaint and the majority is not troubled by the words of Qwest’s CEO that competing as a CLEC “might be a good way to turn a quick dollar but that doesn’t make it right.” The *Twombly* decision does not fully resolve the potential tension between factual allegations and plausibility.

These are quibbles. Ultimately, the Court has gotten it right in *Twombly* because antitrust liability, and the burdens of discovery, should not turn on the fast and loose words of company executives, or on sketchy economic theories. The Court’s willingness here to search for plausible grounds for unilateral conduct portend how hard future plaintiffs may find it to survive 12(b)(6) motions, just as summary judgment motions became much harder to win for plaintiffs after *Monsanto*²⁹ and *Matsushita*.³⁰

There is also an interesting point here about the telecommunications industry and antitrust: Congress clearly intended private antitrust actions to be a means of implementing the competitive scheme set out in the 1996 Telecommunications Act. Yet, while paying lip service to the legislative command to apply the antitrust laws, the Supreme Court in *Trinko* ultimately refused to apply the “slight benefits” of the Sherman Act.³¹ Now, in *Twombly*, the Court cites the monopolistic history of the industry as grounds for throwing out an antitrust suit.

***Twombly’s* Broader Implications**

There are two broader implications of the *Twombly* decision. The first concerns antitrust and the strengthened requirement to plead “who, when, where” facts to state a claim of an illegal conspiracy. While the Court does allow for circumstances in which parallel conduct itself may be sug-

²⁷ *Id.* at *10.

²⁸ *Id.* at *5.

²⁹ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (evidence in a Section 1 case must tend to exclude the possibility of independent action).

³⁰ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (conspiracy evidence at the summary judgment stage must tend to rule out the possibility of independent action).

³¹ *Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004).

gestive of agreement, those can be expected to be rare in practice. Since such direct evidence of agreement (which of the defendants' vice presidents of sales met in what hotel room during a trade show) will be difficult for private plaintiffs to come by, *Twombly* will tend to restrict private Section 1 actions to piggy-back law suits following government investigations.

The second implication goes far beyond Section 1 cases: There is nothing in *Twombly* that inherently limits the holding to Section 1 claims, and *Twombly* can be expected soon to put in an appearance in Section 2 cases, where economic plausibility is at the forefront of the parties' minds. *Twombly* will, no doubt, resonate in all areas of civil practice and be assured of a prominent spot in the civil procedure case books (including Stevens's eloquent dissent). With *Conley*'s "no set of facts"—the perhaps most widely cited formulation of the notice-pleading standard—gone, it will take some time before formulations like *nudging a claim across the line from conceivable to plausible* take on color inside the antitrust context, let alone outside of that context. ●