

Why *Twombly* Does Not (and Should Not) Apply to Hard-Core Cartels

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In *Bell Atlantic v. Twombly*,¹ the U.S. Supreme Court ruled that putative class plaintiffs' allegations of exclusively parallel conduct by major telecommunication providers did not state a conspiracy claim under Section 1 of the Sherman Act,² because an unlawful agreement could not "plausibly" be inferred from those allegations. Extending this ruling to a hard-core cartel is not justified based on the facts and nature of the claim in *Twombly* and would be unsound public policy. The existence of a hard-core cartel is typically concealed, and a government prosecution of cartel activities does not necessarily reveal the full scope and operation of the cartel. If *Twombly* is applied to hard-core cartels, then it will likely have an unintended chilling effect on private cartel enforcement and further injure cartel victims.

What Is a Hard-Core Cartel?

A hard-core cartel is the supreme evil of antitrust.³ It has no procompetitive justification and, by definition, operates in secret. Such a cartel consists of a relatively small number of firms engaged in a horizontal agreement not to compete through any of a variety of mechanisms, including fixing, maintaining, or stabilizing prices; restricting output; rigging bids; or allocating territories or customers.⁴ There is no "plausible" efficiency justification for such a cartel and, as a result, antitrust law treats cartel conduct as a per se violation of Section 1 of the Sherman Act.⁵

The duration of a hard-core cartel varies from case to case, as does its profitability.⁶ Hard-core cartels have cost customers and consumers billions of dollars in overcharges.⁷ Cartels remain

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¹ 127 S. Ct. 1955 (2007).

² 15 U.S.C. § 1.

³ See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), NEW INITIATIVES, OLD PROBLEMS: A REPORT ON IMPLEMENTING THE HARD CORE CARTEL RECOMMENDATION AND IMPROVING CO-OPERATION 11 (2000), available at <http://www.oecd.org/dataoecd/39/63/2752129.pdf> [hereinafter HARD CORE CARTELS] ("hard core cartels . . . [are] the most egregious violations of competition law"). One competition regulator described them as "cancers on the open market economy. . . . They cause serious harm to our economies and consumers [and] . . . undermine the competitiveness of the industry involved, because they eliminate the pressure from competition to innovate and achieve cost efficiencies."). Mario Monti, *Why Should We Be Concerned with Cartels and Collusive Behaviour?*, in FIGHTING CARTELS—WHY AND HOW? 14, 14 (Swedish Competition Authority ed., 2001), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/00/295&format=HTML&aged=0&language=EN&guiLanguage=en>; see also U.S. Dep't of Justice and Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors § 3.2 (Apr. 2000), available at <http://ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

⁴ See generally ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 81–90 (6th ed. 2007).

⁵ See *United States v. Topco Assocs.*, 405 U.S. 596, 607–08 (1972) (collecting cases); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

⁶ See Margaret Levenstein & Valerie Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801, 802, 805 (2004).

⁷ See HARD CORE CARTELS, *supra* note 3, at 13, 16, 23, 24, 44 n.2.

widespread in the global economy, including in the United States. Most of these cartels go undetected for reasons discussed below.⁸

Twombly

The plaintiffs in *Twombly* were two customers of their local telephone company. Their complaint, on behalf of a putative class of nearly all subscribers of local telephone and high-speed Internet services in the contiguous United States, alleged that the major incumbent local exchange carriers had conspired for seven years not to compete with each other for local customers outside their respective market areas. As a result of this alleged conspiracy, the plaintiffs maintained that they were unable to obtain, or had to pay more for, service from incumbent providers.

In support of this claimed conspiracy, the complaint alleged parallel anticompetitive practices by the defendants, including impeding rivals' ability to obtain local exchange access through unfair agreements, inferior communications, overcharging and other billing practices. The complaint also contained "a few stray statements" of an agreement by defendants to stay out of each other's markets,⁹ but made no mention of the "specific time, place or person involved in the alleged conspiracies."¹⁰ Despite the occasional reference in the complaint to an unlawful agreement, "[t]he nub of the complaint . . . is [defendants'] parallel behavior."¹¹

The Supreme Court held that the plaintiffs' allegations of parallel conduct failed to state a claim for relief under Section 1 because the complaint did not contain sufficient facts to support plausibly the inference of a conspiracy as distinct from identical, but independent, action.¹²

The Court could have relied on *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*,¹³ to rule that parallel conduct, without more, is not actionable under Section 1, and plaintiffs therefore did not state a claim for relief. Instead, however, the Court used the *Twombly* appeal to rule, first, that, in a parallel conduct case, a plaintiff cannot satisfy Rule 8(a) of the Federal Rules of Civil Procedure merely by alleging parallel conduct and then adding a conclusory allegation of "conspiracy;" and, second, to retire the fifty-year standard originated in *Conley v. Gibson*,¹⁴ 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."¹⁵

Twombly perhaps can be understood given its context. The appeal presented a very broad putative class that provided a platform to condemn antitrust class action lawsuits and the lawyers who bring them.¹⁶ That animus is undoubtedly connected, at least in part, to the billions of dollars

⁸ See Ann-Christin Nykvist, *Introduction*, in *FIGHTING CARTELS*, *supra* note 3, at 11 ("[I]t would be naive to believe that companies in general, which operate today in a more international environment than ever before, would obey strictly the anti-trust rules in one particular country and not in others"); Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 *LOY. CONSUMER L. REV.* 329, 336 n.24 (2004); Peter G. Bryant & E. Woodrow Eckard, *Price Fixing: The Probability of Getting Caught*, 73 *REV. ECON. & STAT.* 531 (1991).

⁹ *Twombly*, 127 S. Ct. at 1970.

¹⁰ *Id.* at 1970 n.10.

¹¹ *Id.* at 1970–71.

¹² *Id.* 1965–66; *see also id.* at 1961.

¹³ 346 U.S. 537 (1954).

¹⁴ 355 U.S. 41 (1957).

¹⁵ *Id.* at 45–46.

¹⁶ *See, e.g.*, Brief of the Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Petitioners, at 21, *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (No. 05-1126), 2006 WL 2474076; Brief of Mastercard International Inc. and Visa U.S.A. Inc. as Amici Curiae in Support of Petitioners at 21–22 & n.8, *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007) (No. 05-1126), 2006 WL 2474077; Brief

that corporations have paid to defend and settle private antitrust actions.¹⁷ These facts and circumstances notwithstanding, as the dissent in *Twombly* points out, “there is no reason to throw the baby out with the bathwater” by dismissing an antitrust complaint alleging an actual agreement among competitors in a hard-core cartel.¹⁸

***Twombly* Did Not Involve a Hard-Core Cartel**

Twombly did not involve allegations of a hard-core conspiracy. The decision, by its terms, applies only to a Section 1 claim based on parallel behavior giving rise to an inference of an alleged anti-competitive agreement. The majority opinion goes out of its way to state several times that *Twombly* only presents a circumstantial conspiracy case. In one passage, Justice Souter, writing for the majority, states that the “complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the [defendants].”¹⁹

Despite the Court’s express and clear limitation on *Twombly*’s application, arguments are now appearing that language in *Twombly*, and a footnote in particular,²⁰ apply not only to a circumstantial antitrust case based on parallel conduct but to a hard-core conspiracy case as well. Defendants now contend that even the latter case should be dismissed if the allegations of a “contract, combination, or conspiracy, in restraint of trade” are conclusory and the complaint lacks specific allegations of who met with whom, where and when.²¹

The logical implication of this position is that no hard-core cartel victim should be able to sue absent more detailed information about the conspiracy as revealed, if at all, in a guilty plea or

of the American Petroleum Institute as Amicus Curiae Supporting Petitioners at 7, *Twombly*, 127 S. Ct. 1955 (No. 05-1126), 2006 WL 2474078; Brief of Amici Curiae Legal Scholars in Support of Petitioners at 16–17, *Twombly*, 127 S. Ct. 1955 (No. 05-1126), 2006 WL 2474080.

¹⁷ The exact amount of those payments is not publicly known because defense costs and direct (as opposed to class) action settlements are typically not reported. See generally John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513 (2005) (current Sentencing Commission presumption that cartels overcharge on average by 10% is much too low). One inexact and conservative barometer of the amount corporations have paid to settle their civil damage exposure in cartel cases alone is the dollar amount they have paid in fines after pleading guilty to conspiring to fix prices. According to the U.S. Department of Justice, those corporations paying criminal fines of \$10 million or more have paid a total of \$3.778 billion as of August 1, 2007. See U.S. Dep’t of Justice, Antitrust Division, Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More, <http://www.usdoj.gov/atr/public/criminal/225540.htm>. By operation of law, all of that money went to the United States as opposed to the private victims of the cartels.

¹⁸ *Twombly*, 127 S. Ct. at 197 n.13 (Stevens, J. dissenting).

¹⁹ *Id.* at 1970.

²⁰ *Id.* at 1970 n.10, which reads as follows:

If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint’s references to an agreement among the [incumbent local exchange carriers] would have given the notice required by Rule 8. Apart from identifying a seven-year span in which the § 1 violations were supposed to have occurred (i.e., “[b]eginning at least as early as February 6, 1996, and continuing to the present”), the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form 9, which the dissent says exemplifies the kind of “bare allegation” that survives a motion to dismiss. Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four [incumbent local exchange carriers] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs’ conclusory allegations in the § 1 context would have little idea where to begin.

²¹ See, e.g., *In re Elevator Antitrust Litig.*, Docket No. 06-3128-CV, 2007 WL 2471805, at *2 (2d Cir. Sept. 4, 2007); Defendants’ Notice of Supplemental Authority re: Amended Motion to Dismiss, *In re Methyl Methacrylate (MMA) Antitrust Litig.*, No. 06-MDL-1768 (E.D. Pa. Sept. 6, 2007); see also *In re Insurance Brokerage Antitrust Litig.*, MDL Docket No. 1663, Civ. No. 04-5184 (GEB), 2007 WL 2533989, at *18–*19 (D.N.J. Aug. 31, 2007).

other (unlikely) public disclosure. The mantra of hard-core cartel participants would now appear to be “catch me if you can—and post-*Twombly* you cannot.”

A Hard-Core Cartel Operates in Secret

Reading *Twombly* to require a plaintiff to allege the details of a hard-core cartel ignores the realities of how such a conspiracy operates. An unlawful cartel often operates in secret. The U.S. Department of Justice (DOJ) has explained that “it is very difficult to detect cartel behavior or, once discovered, to compile sufficient evidence to successfully prosecute cartel members in court.”²² This difficulty exists because the very nature of cartels is to operate in ways that are undisclosed, difficult to track, and thus difficult to prove.

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For example, a cartel’s participants generally destroy incriminating documents. They may keep documents evidencing the conspiracy in their personal computer or even at their homes. They use falsified expense reports to conceal their movements or the people with whom they are meeting. They meet outside their corporate offices in places that make detection difficult, such as a hotel or conference room, an out-of-town restaurant, or an airport. Trade associations can provide a convenient “cover” for them to be together, as in the acid cartel,²³ and when meeting in person, many participants often avoid making a written record that details their pricing, market share and allocation deliberations.²⁴ In their internal communications and writings with each other, they use fake names and code words and prominent reminders on incriminating documents to “destroy after reading” or words to that effect. Cartel participants may communicate with each other using public telephones and public facsimile machines, and they typically confine knowledge of the cartel’s existence to a small circle of people. They mislead customers by informing them that price increases are the result of increases in raw material costs or supply and demand conditions. And they mislead law enforcement about the existence of the cartel.

Two cartel cases demonstrate the lengths to which conspirators will go to conceal their conduct. In the conspiracy relating to vitamins, two senior executives of F. Hoffmann-LaRoche Ltd. who were obligated to cooperate with the DOJ in connection with Roche’s guilty plea in the citric acid cartel, rehearsed lies they would tell the DOJ when questioned about a vitamins conspiracy. In those interviews, they falsely stated to the DOJ that there was no vitamins conspiracy, that Roche did not participate in such a cartel or in competitor communications not to compete on the sale of vitamins, and that they were unaware of any meetings or conversations between Roche and other vitamin manufacturers relating to a vitamins price-fixing conspiracy. In fact, both Roche executives knew at the time that they and others at the company had regularly communicated and met on at least a quarterly basis for years with competitors and discussed and agreed to fix prices, and to allocate volumes of and customers for certain vitamins manufactured by Roche.²⁵

²² Gerald F. Masoudi, Deputy Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Antitrust Division, Cartel Enforcement in the United States (and Beyond), Address to Budapest Cartel Conference 6 (Feb. 16, 2007), available at <http://www.usdoj.gov/atr/public/speeches/221868.pdf>; see generally Scott D. Hammond, Deputy Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Caught in the Act: Inside an International Cartel, Address Before OECD Competition Committee Public Prosecutors Program 2–5, 8 (Oct. 18, 2005), available at <http://www.usdoj.gov/atr/public/speeches/212266.pdf>.

²³ See e.g., *United States v. Andreas*, 216 F.3d 645, 652, 657 (7th Cir. 2000) (trade association formed to help cover up global citric acid cartel); see generally Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 587–90 (2004); 13 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2112 (2d ed. 2005).

²⁴ In a distinct minority of cases, participants took contemporaneous notes apparently because their corporate culture required them to report the cartel developments to their superiors.

²⁵ See Plea Agreement ¶ 5, *United States v. Sommer*, Criminal No. 3:99-CR-201-R (N.D. Tex. filed May 20, 1999).

Given the realities of how a cartel secretly operates, it is “mind boggling” to think that an antitrust plaintiff can reasonably be expected to know, before discovery, and particularly without government prosecution and/or public admission by a cartel member, about the details of a cartel’s operations.

In the cartel relating to carbon products, one co-conspirator attempted to conceal the existence of the conspiracy by falsely characterizing competitor communications as legitimate business meetings in response to law enforcement questions. He then sought to coordinate co-conspirators’ stories by circulating a script to them revealing what he had told the DOJ about the competitor contacts. To avoid leaving a paper trail, he reminded the others to destroy not only the script after reading it but also any other documents relating to or reflecting their competitor communications.²⁶

A cartel can and does maintain discipline to ensure secrecy, to enforce the unlawful agreement, and to deter members from abandoning the conspiracy. It typically does this through the threat or practice of retaliation against a member who does not abide by the agreement. Such retaliation can take the form of stealing market share, increasing prices of or cutting off raw materials supplied to a co-conspirator, or increasing output to drive prices lower for a time to inflict some measure of pain on those wavering in their allegiance to the cartel. Absolute discipline is not an essential element of a cartel, although it helps to maintain secrecy. Cheating may affect the impact and sometimes the duration of the conspiracy, not its existence. If cheating occurs, then cartel members realize supracompetitive pricing for whatever time period, short or long, that the collusion allowed.

A cartel also remains concealed because of the enormous costs to its members if it is exposed. Under U.S. antitrust law, cartel members (excluding the amnesty recipient) are subject to criminal fines, and individuals are also subject to imprisonment.²⁷ Firms and people also are jointly and severally liable under civil antitrust law for treble damages caused by the conspiracy. A company that receives amnesty from the United States may avoid these criminal and civil consequences, provided it complies with the requirements of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004.²⁸ Still, depending upon a firm’s volume of commerce involved in the conspiracy, its civil exposure for actual damages can be enormous. There also is a cost to the amnesty recipient in a global cartel case in terms of proceedings and potential additional fines in foreign jurisdictions.

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Reining in *Twombly*

Advocates claiming a broader interpretation of *Twombly* would prevent a civil cartel case from going forward absent a successful government prosecution or (an unlikely) public disclosure of the existence of a conspiracy and the details of its operation. But such an outcome is unsound policy that will lead to less cartel enforcement and deterrence.

That the DOJ decides not to prosecute firms for participating in an unlawful conspiracy does not mean they did not conspire. The government may choose not to prosecute a cartel for any of a number of reasons. For example, the evidence may not meet the “reasonable doubt” standard

²⁶ See Plea Agreement ¶¶ 5, 6, *United States v. Morganite, Inc.*, Criminal No. 02-733 (E.D. Pa. filed Nov. 4, 2002).

²⁷ The Antitrust Division has eliminated the no-jail plea agreement and “now insists on jail sentences for all defendants—domestic and foreign.” Masoudi, *supra* note 22, at 5.

²⁸ Pub. L. No. 108-237, title II §§ 212–13, 118 Stat. 665, 666–667 (codified as 15 U.S.C. § 1 notes).

²⁹ *Twombly*, 127 S. Ct. at 1984 (Stevens, J., dissenting).

³⁰ See *supra* note 21.

imposed by criminal law or the DOJ's own guidelines about the nature, quality, or quantity of proof; private antitrust enforcement may be considered sufficient to hold conspirators accountable without criminal proceedings; the DOJ may defer to foreign enforcement agencies that also have jurisdiction over the conduct; or the DOJ may not have the resources or manpower.³¹

Even when the DOJ does prosecute a cartel, the full scope of the conspiracy may not be revealed. A guilty plea merely reflects the minimum parameters of a conspiracy.³² To counter this reasoning, defense lawyers might argue that surely a firm will admit to all cartel conduct when pleading guilty to avoid an even harsher penalty later if additional incriminating facts are revealed. The DOJ's prosecution of Stolt-Nielsen S.A. in connection with the parcel tanker conspiracy is a case in point.³³ But firms negotiating with the government do their own cost-benefit analysis in deciding what to reveal. Further, the same evidentiary issues, limited resources, and amnesty assistance³⁴ that control what cases the government prosecutes in the first instance also inform the DOJ's judgment about the acceptable scope of a guilty plea. Thus, once a firm admits to a technical criminal violation, the products and time period covered by the plea are often negotiable terms of the contract.³⁵

The full scope of a cartel may not be revealed even when a foreign government commences an enforcement proceeding. Consider the European Commission (EC), which, next to the DOJ, has had the most active government cartel enforcement. Previously, firms subject to an EC cartel investigation voluntarily prepared written submissions setting forth their positions and detailing conduct within the scope of the investigation, including, on occasion, who met with whom, where, when, and what they discussed. However, in response to rulings by a few U.S. courts that those submissions were discoverable in civil antitrust cases, the EC amended its regulations in 2002 and thereafter to provide for oral submissions and to protect from disclosure written submissions that a company prepared and produced exclusively for the EC's investigation.³⁶

There remains an exception to the EC's regulations for a firm's pre-existing documents (e.g., records seized in an EC raid), which the EC acknowledges remain discoverable in civil cases in

³¹ See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-27.220–250 (2007), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm [hereinafter UNITED STATES ATTORNEYS' MANUAL]; see generally Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All, Address Before OECD Competition Committee at 5 & nn. 9–10 (Oct. 17, 2006), available at <http://www.usdoj.gov/atr/public/speeches/219332.pdf>; Masoudi, *supra* note 22, at 1; cf. Scot J. Paltrow, *Budget Crunch Hits U.S. Attorneys' Offices*, WALL ST. J., Aug. 31, 2007, at A1.

³² See *In re Vitamins Antitrust Litig.*, No. Misc. 99-197 (TFH), 2000 WL 1475705, at *11 (D.D.C. May 9, 2000) (“[T]he Court rejects the notion that the guilty pleas . . . foreclose a broader conspiracy. Guilty pleas are negotiated instruments which take into account not only the culpability of the accused but the Justice Department's resources and other cases requiring the government's attention.”).

³³ See Indictment, *United States v. Stolt-Nielsen, S.A.*, Criminal Action No. 06-CR-466(B WK) (E.D. Pa. filed Sept. 6, 2006).

³⁴ Although the government may seize an enormous volume of documents from targets pursuant to grand jury subpoenas, most of them may never even be read as prosecutors make their cases based on cooperation from amnesty applicants and their witnesses and still other co-conspirators who may subsequently plead guilty and also cooperate.

³⁵ See UNITED STATES ATTORNEYS' MANUAL, *supra* note 31, § 9-27.400(B) cmt. (“readily provable charges” may be dropped or bargained a way “because the United States Attorney's Office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the number of cases disposed of by the office.”); cf. Hammond, *Negotiated Plea Agreements*, *supra* note 31, at 7 & n.22.

³⁶ See Commission Notice on Immunity from Fines and Reductions of Fines in Cartel Cases No. 2006/C 298/11, ¶¶ 32–34, 40, 2006 O.J. (C 298) 17, 21–22 (Dec. 8, 2006), http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_298/c_29820061208en00170022.pdf; Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases No. 2002/C 45/03, ¶¶ 32–33 (Feb. 19, 2002), http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/c_04520020219en00030005.pdf.

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U.S. courts.³⁷ However, even these records only tell a part of the conspiracy story as they usually are focused on European conduct, while most cartels are global in character.³⁸ Moreover, defendants in civil antitrust cases in the United States attempt to block private plaintiffs from obtaining their EC records in discovery as they slice-and-dice the conspiracy to marginalize and distort its scope or effect.³⁹ Some federal courts have properly been unsympathetic with that tactic because a defendant's pre-existing EC documents, like its grand jury records, reveal only a portion of how the cartel operated.⁴⁰

Because of the limits on government enforcement actions, fewer unlawful conspiracies would be exposed, or their full scope revealed, if a civil case either had to await the completion of a government prosecution or was effectively confined in the pleadings and discovery to the four corners of the government's case. While cartel victims wait for the outcome of a government investigation and/or prosecution, they may be denied justice. The United States has a five-year statute of limitations on criminal antitrust violations. The EC may investigate a cartel for at least that long. During that time, documents may disappear, and witnesses may become unavailable, their memories may fade, or they may no longer be subject to a firm's control for purposes of producing witnesses to testify.⁴¹

The genius of the U.S. legal system is that it allows private parties to remedy wrongs, hold tortfeasors accountable, and deter future violations without government action. Congress intended no less in enacting the Sherman and Clayton Acts, which by their terms or through statutory construction allow a private litigant to recover treble damages and attorney's fees and costs if it prevails, hold defendants jointly and severally liable without a right to contribution, and deprive defendants of a pass-on defense. As the Supreme Court explained in *Radovich v. National Football League*, "Congress itself has placed the private antitrust litigant in a most favorable position."⁴² A pleading rule that ignores the realities of a hard-core cartel and handicaps a victim's right to seek relief is plainly inconsistent with that legislative intent. Courts "should not add requirements

³⁷ See Directorate General for Competition, European Commission, Submission to the Antitrust Modernization Commission at 1, 6, 9 (Apr. 4, 2006), http://www.amc.gov/public_studies_fr28902/international_pdf/060406_DGComp_Intl.pdf [hereinafter EC Submission].

³⁸ "International cartels ignore national borders and we find increasingly that cartels are global in scope. Industry and commerce expand on a world-wide basis, so do cartels." Monti, *supra* note 3, at 20. "In forty-five of the fifty-four instances in which the Antitrust Division has secured a corporate fine of \$10 million or greater, the corporate defendants were foreign-based. These numbers reflect the fact that the typical international cartel likely consists of a U.S. company and three or four of its competitors that are market leaders in Europe, Asia and throughout the world." Masoudi, *supra* note 22, at 2-3. In its submission to the United States Antitrust Modernization Commission, the EC observed that "[e]xperience has shown that any international cartel of significance is likely to affect the United States as well as Europe. EC Submission, *supra* note 37, at 8. A firm's pre-existing EC records thus provide an important piece of the puzzle in understanding how a global cartel operated.

³⁹ In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Supreme Court ruled in an antitrust case that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a 'whole.'" *Id.* at 699.

⁴⁰ See, e.g., *In re Plastic Additives Antitrust Litig.*, No. Civ. A. 03-2038, 2004 WL 2743591, at *14 (E.D. Pa. Nov. 29, 2004); *In re Automotive Refinishing Paint Antitrust Litig.*, MDL Docket No. 1426, 2004 U.S. Dist. LEXIS 29160, at *14-*17 (E.D. Pa. Oct. 29, 2004); *In re Vitamins Antitrust Litig.*, No. 99-197TFH, 2001 WL 1049433, at *11, *13 (D.D.C. June 20, 2001); see generally ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1243-44 (6th ed. 2007).

⁴¹ See *In re Scrap Metal Antitrust Litig.*, No. 1:02-CV-0844, 2002 WL 31988168, at *5 (N.D. Ohio Nov. 7, 2002); *In re Mid-Atlantic Toyota Antitrust Litig.*, 92 F.R.D. 358, 359 (D. Md. 1981).

⁴² 352 U.S. 445, 454 (1957).

to burden the private litigant beyond what is specifically set forth by Congress in th[e] [antitrust] laws.”⁴³

What Does *Twombly* Mean for Pleading a Hard-Core Cartel Case?

Because a cartel usually operates in secret, its details remain obscured when subject to Government investigation, and its full scope is not revealed even after a government prosecution, a plaintiff alleging a hard-core conspiracy claim usually cannot reasonably be expected to know the details of the cartel absent discovery.⁴⁴ The Supreme Court got it right long ago when it stated that “in antitrust cases” the “proof is largely in the hands of the alleged conspirators.”⁴⁵

Twombly states that there is not a heightened pleading standard for an antitrust case.⁴⁶ That said, if the case is to be read to avoid both a pleading nullity (i.e., a pleading standard that usually cannot reasonably be satisfied) and an implied prohibition against a private right of action against a hard-core cartel absent a successful criminal prosecution or other (unlikely) public disclosure of the conspiracy, then the decision cannot mean that to survive a Rule 12 motion a private plaintiff must allege that which it is not reasonably likely to know at the time its claim accrued. A contrary construction of the decision would have a chilling effect on private cartel enforcement—which runs counter to congressional intent in enacting the Sherman and Clayton Acts—and would mean that some not insubstantial number of unlawful conspiracies will go undetected and their full scope concealed because the DOJ does not prosecute every hard-core cartel and, when it does, the full scope of the conspiracy may not be charged. The stakes for customers and consumers victimized by hard-core cartels are high because the DOJ reports that there are approximately 130 sitting grand juries investigating suspected cartel activity, of which almost one-half involve suspected international cartels.⁴⁷

How, then, to read *Twombly* with respect to a hard-core cartel case? For starters, the *Twombly* majority should be taken at its word when it states that there is “no doubt” that the plaintiffs’ case was based on parallel, circumstantial conduct as opposed to an actual agreement. As such, *Twombly* is distinguishable on its facts from, and does not apply to, a hard-core conspiracy case that contains allegations of an unlawful agreement independent of parallel behavior. A hard-core cartel, unlike the alleged agreement in *Twombly* that the putative class circumstantially inferred from parallel conduct, has no legitimate legal explanation. A plaintiff pleading a cartel claim should use care to make this distinction explicit in its complaint.

Assuming for purposes of analysis only that *Twombly* applies even to a hard-core cartel case, and to reconcile the decision with the unique circumstances presented in such a conspiracy, a plaintiff should allege in its complaint the names of firms that conspired; the approximate time period of the conspiracy; the product(s) covered by the cartel; the characteristics of the product and industry that make them susceptible to cartelization; the elements of the unlawful agreement;

⁴³ *Id.*

⁴⁴ See *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 95 (3d Cir. 1988) (“Proving a conspiracy is usually difficult and often impossible without resort to discovery procedures.”) (citing *Poller v. CBS*, 368 U.S. 464, 473 (1962)), cited in *In re Auto. Refinishing Paint Antitrust Litig.*, No. MDL 1426, 2004 U.S. Dist. Lexis 29160, at *9 (E.D. Pa. Oct. 29, 2004).

⁴⁵ *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976).

⁴⁶ 127 S. Ct. at 1973–74.

⁴⁷ See Masoudi, *supra* note 22, at 2; U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION, WORKLOAD STATISTICS FY 1997–2006, <http://www.usdoj.gov/atr/public/workstats.pdf> (reporting inter alia on criminal investigations and cases, including grand jury investigations initiated, terminated, and pending).

available facts, which, at least upon information and belief, plausibly explain how the conspirators implemented the agreement (e.g., an explication or examples of the price changes, rigged bids, allocation or supply restraint); the geographic market(s) covered by the conspiracy; the connection between the conspirators' anticompetitive conduct and a domestic effect of the conspiracy giving rise to plaintiff's Section 1 claim; and how the conspirators concealed the cartel from detection.⁴⁸ In evaluating the legal sufficiency of such allegations, a court should be realistic about and sensitive to the fact that a hard-core cartel is per se unlawful and is rarely publicized in advance of a criminal prosecution. Even then, government enforcement agencies (to protect an ongoing investigation or honor confidences) or the conspirators themselves (to minimize risk exposure) often intentionally obscure its details from view by private litigants.

These allegations put defendants on notice of the legal claim, the time, place, and companies involved in the conspiracy (although *Twombly* mentions these characteristics in the disjunctive, not the conjunctive), and explain how conspirators' fraudulent concealment prevents a plaintiff from knowing more facts about a cartel's operation at the start of a case. Moreover, the allegations about the product and industry characteristics, coupled with an explanation or examples of how the conspiracy may have operated, provide context to explain "plausibly" how the conspirators were able to cartelize the market causing injury and damage to plaintiffs. Numerous cases and economic textbooks recognize the unremarkable principle that firms with sufficient market concentration that sell a commodity product can effectively conspire not to compete by increasing, maintaining, or stabilizing price, rigging bids, allocating territories or customers, or restricting supply.⁴⁹

These proposed pleading recommendations properly balance the realities and limitations of the interplay between government and private cartel enforcement, prudential concerns about emasculating the effectiveness of private attorneys general suing under the U.S. antitrust laws, the per se illegal character of a hard-core cartel, the realities of what is reasonably knowable by an antitrust plaintiff at the outset of a civil cartel case, and *Twombly's* reading of "plausibility" and notice requirements into Federal Rule of Civil Procedure 12.

Following the Supreme Court's *Twombly* decision, the notoriously business-friendly *Wall Street Journal* Editorial Page declared that the case represents a victory "for consumers and capitalists against self-styled 'consumer advocates' and their tort bar funders."⁵⁰ Are there abuses in the antitrust litigation process? Unfortunately, yes (on both sides). Does *Twombly* present an extreme set of facts and circumstances that may invite skepticism about the class action approach in that case? Yes. But *Twombly* is no victory for companies and consumers overcharged as a result of a hard-core cartel. Reading the decision to apply to a Section 1 claim against such a conspiracy means that suppliers who have cheated their customers and consumers may not be held accountable, or fully accountable, for that conduct. Surely no champion of capitalism would approve of that result. ●

⁴⁸ These allegations are not intended to be exhaustive of all allegations to be included in a Section 1 claim.

⁴⁹ See, e.g., DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 122–54 (4th ed. 2005); F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 235–74 (3d ed. 1990).

⁵⁰ *Justice Souter's Revelation*, Editorial, *WALL ST. J.*, May 23, 2007, at A16.