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Expert Analysis

Defense for 'Twombly': Plausibility Standard Was Never More Plausible

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Last month, Senator Arlen Specter (D-Pa.) introduced the Notice Pleading Restoration Act[1] in an effort to overturn the U.S. Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*[2] by restoring the "notice pleading" standard as interpreted by the Supreme Court in *Conley v. Gibson*.[3] Senator Specter's bill comes on the heels of the Supreme Court's May 2009 decision in *Ashcroft v. Iqbal*,[4] clarifying that *Twombly's* "plausibility standard" for federal pleadings is not limited to antitrust cases brought under Section 1 of the Sherman Act, but applies to all federal civil cases.

The "plausibility standard" requires that a complaint contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.[5] Introducing the bill, Senator Specter asserted that the heightened pleading requirement articulated in *Twombly* and *Iqbal* effectively "den[ies] many plaintiffs with meritorious claims access to the federal courts and, with it, any legal redress for their injuries."[6] The bill, which currently has no co-sponsors, has been referred to the Senate Judiciary Committee for consideration.

Because we last addressed the *Twombly* decision soon after the case was decided, Senator Specter's bill allows us to reiterate *Twombly's* importance to the management of federal court litigation in general and to antitrust cases in particular. Twombly, in establishing the pleading requirements for conspiracy claims brought under Section 1 of the Sherman Act, expressly retired the often-cited "no set of facts" language of the *Conley* decision and held that plaintiffs must plead enough facts to make their claim plausible, rather than just possible.

When the Supreme Court decided *Twombly* in May of 2007, the case sent a tremor throughout the legal world. Supporters hailed the decision as a significant victory against the growing threat of frivolous lawsuits, brought for the sake of extracting in terrorem settlements from defendants who wanted to avoid costly and time-intensive discovery. Critics, however, assailed the decision as overturning more than 50 years of precedent and as violating the liberal pleading standards of the Federal Rules.

> The 'Twombly' standard at least offers defendants some assurance that the claims they are forced to respond to have some merit.

While *Twombly* and *Iqbal* certainly represent a significant shift in the law regarding the adequacy of pleadings, a close look at *Twombly* reveals that the Court took great pains to fashion a standard that was consistent with the language and purpose of Rule 8 of the Federal Rules of Civil Procedure. In rejecting *Conley's* "no set of facts" standard, the majority believed its holding to be consistent with how most lower federal courts were scrutinizing pleadings already. Additionally, in requiring that plaintiffs plead enough facts to render their theory of liability plausible, the majority attempted to strike a balance between the notice pleading standard and the desire to quickly weed out frivolous lawsuits, particularly given the rapidly increasing cost of discovery.

Senator Specter's proposed return to the *Conley* standard would only create more confusion and inconsistency in pleadings jurisprudence and exacerbate the threat of frivolous lawsuits. Moreover, although *Iqbal* confirmed *Twombly's* broad applicability, *Twombly's* plausibility standard was fashioned in the context of an antitrust case and remains particularly vital to antitrust defendants. Now, more than ever, when companies are struggling to survive and courts are inundated with lawsuits, the policy justifications for *Twombly's* plausibility standard ring truer than ever.

From 'Conley' to 'Twombly'

In *Conley*, the Supreme Court declared 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."[7] The Court reasoned that Rule 8 does not require a plaintiff "to set out in detail the facts upon which he bases his claim," but only that he make a "short and plain statement of the claim" showing that he is entitled to relief "that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[8] The Court's decision reflected the Federal Rules' rejection of a rigid, formalistic approach to pleading, and "the principle that the purpose of pleading is to facilitate a proper decision on the merits."[9]

However, in May 2007, the Supreme Court in *Twombly* abrogated the *Conley* standard.

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Twombly acknowledged that while Rule 8 does not require a plaintiff to make detailed factual allegations, Rule 8 still requires a plaintiff to make a "showing" that he is entitled to relief. Such a showing "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action;" it requires sufficient factual allegations "to raise a right to relief above the speculative level."[10] Noting this requirement, the Court stated that *Conley's* "no set of facts" standard "is best forgotten as an incomplete, negative gloss on an accepted pleading standard."[11]

The Court also discussed the practical significance of requiring plaintiffs to make such a showing. When allegations in a complaint are insufficient to raise a claim of entitlement to relief, the Court stated, "this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court."[12] The Court emphasized that this was particularly true in the antitrust context because of the "unusually high cost of discovery in antitrust cases."[13]

From 'Twombly' to 'Iqbal'

After the decision in *Twombly*, courts and commentators disagreed on the scope of its holding. While some viewed *Twombly* as merely an antitrust case,[14] many lower courts began to apply the plausibility standard to all causes of action.[15] The confusion over the breadth of *Twombly's* applicability can be traced to conflicting signals in Justice David H. Souter's majority opinion.

On the one hand, Justice Souter posed a rather narrow question presented—"whether a §1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in parallel conduct unfavorable to competition, absent some factual context suggesting agreement…."[16] In addition, Justice Souter's policy justification for the plausibility standard was closely tied to the particularly expensive and time-consuming discovery process in antitrust litigation. On the other hand, Justice Souter based the Court's decision on an independent interpretation of Rule 8 and entirely abrogated the language of *Conley*.[17]

The Supreme Court in *Iqbal*, however, put to rest any doubt as to the scope of *Twombly's* applicability, expressly holding that the *Twombly* standard applies to all federal civil cases.

The facts of *Iqbal* arose out of a massive investigation launched by the federal government shortly after the terrorist attacks of Sept. 11, 2001. As part of this investigation, federal officials arrested Javaid Iqbal, a Pakistani Muslim, on charges of fraud in relation to identification documents and conspiracy to defraud the United States.[18] Iqbal was designated a "person of high interest" and housed at a maximum security detention center, where he was kept in lockdown for nearly 24 hours a day.[19]

After serving his prison term, Iqbal filed a lawsuit alleging unconstitutional discrimination on the part of numerous federal officials, including John Ashcroft, former Attorney General of the United States, and Robert Mueller, the Director of the FBI. Iqbal alleged that the defendants designated him a person of high interest because of his race, religion and/or national origin, in contravention of the First and Fifth Amendments to the Constitution, and that the defendants knew of, condoned, and willfully and maliciously agreed to subject Iqbal to harsh conditions of confinement "as a matter of policy, solely on account of his religion, race, and/or national origin."[20]

'Twombly' and 'Iqbal' strike a balance between the interests of plaintiffs in having their legitimate claims heard on the merits, and defendants who need protection from unmeritorious claims.

The case wound its way to the Supreme Court, where the Court found the complaint insufficient to state a claim under Rule 8, pursuant to the standard set forth in *Twombly*. The Court held that Iqbal's allegations were bare assertions that amounted to "nothing more than a formulaic recitation of the elements of a constitutional discrimination claim," and failed to plausibly establish discriminatory purpose.[21] The Court reasoned that, as in *Twombly*, Iqbal's allegations were as consistent with discrimination as they were with a legitimate policy of arresting and detaining individuals because of their suspected link to the attacks, and not because of their race or religion.[22]

'Conley' Unworkable Today

Critics of *Twombly* and *Iqbal* argue that these cases go against the liberal pleading standard of the Federal Rules because they allow for a complaint to be dismissed on the merits before plaintiffs have the chance to develop facts obtained through discovery.

As Senator Specter stated in his introductory remarks, "Not until a plaintiff has had access to relevant information in the defendant's possession during the discovery process that follows the filing of a complaint as a matter of right can the plaintiff normally offer evidence to support the plaintiff's allegations."[23] This is because often many of the relevant facts and evidence are exclusively in the hands of one of the parties.

Justice Ruth Bader Ginsburg, in remarks made to the Second Circuit Judicial Conference in June, went so far as to say that the Court's majority in *Twombly* "messed up the Federal Rules."[24] Moreover, some commentators argue that *Twombly* and *Iqbal* authorize judges to make highly subjective judgments about the plausibility of complaints and advocate for a return to the more mechanical standard of *Conley*.[25]

However, a return to the *Conley* standard would only restore the confusion and uncertainty that existed prior to *Twombly* and eliminate the protections *Twombly* established against frivolous claims. As some commentators have noted, the *Conley* standard was not a model of clarity and, therefore, was never well-understood.[26] In addition, while for more than 50 years courts often uttered Justice Hugo L. Black's "no set of facts" language, as the Court noted in *Twombly*, many courts did not apply those words literally.[27] This suggests that application of the *Conley* standard was not as "mechanical" as some would suggest.

Additionally, the *Conley* standard does nothing to protect defendants from the costs of frivolous lawsuits. *Conley* was decided at a time when the costs of discovery were relatively limited as compared with modern-day discovery. Today, the proliferation of electronic discovery has increased exponentially the burden on parties in litigation, who now must invest significant money and effort in preserving, searching, and producing voluminous materials.[28] As one commentator recently wrote, "Examples are legion of the enormous direct costs of production of electronically stored information in today's litigation, often running into the millions of dollars in just one case."[29]

The looming threat of such costs increases the likelihood that cases will be settled, not on their merits, but rather on the in terrorem value of the lawsuit.[30] The *Conley* standard,

taken literally, is therefore unworkable in the modern litigation context. *Twombly* and *Iqbal*, however, strike a balance between the interests of plaintiffs in having their legitimate claims heard on the merits, and defendants who need protection from unmeritorious claims.

Safeguard for Defendants

Whatever the merits are of applying *Twombly* in all federal civil cases, *Twombly's* plausibility standard is clearly appropriate in the antitrust context. *Twombly* is first and foremost an important antitrust decision, decided in the context of a Sherman Act, Section 1 claim. In fashioning the plausibility standard, the majority in *Twombly* relied greatly on circumstances particular to antitrust litigation.

For example, in emphasizing the importance of exposing frivolous lawsuits at the pleading stage, the Court cited the particularly high cost of discovery in antitrust cases.[31] Because antitrust cases are often complex and involve large companies, the potential for large and sweeping discovery requests can quickly drive up the cost of discovery.[32]

The Court also explained at length the requirement that plaintiffs bringing a Section 1 case sufficiently plead facts suggesting a plausible agreement in restraint of trade and not just parallel conduct, or indeed a meeting of competitors. The Court emphasized this requirement because of the ambiguity and false inferences that may be drawn when competitors act in parallel or just even meet with each other at a trade association meeting. As the Court noted, allowing lawsuits to proceed solely on these bases could expose "any group of competing businesses" to litigation[33] and, therefore, could chill legitimate competitive behavior.[34]

This is particularly true today, given the weak state of the economy. Economic recession often will lead to an uptick in antitrust lawsuits primarily because of two main factors. First, market leaders will tend to act more aggressively during a recession to protect their sales and maintain or slow the decline in profits. Second, struggling firms who risk losing customers will often turn to antitrust litigation "as a last hope" to protect their businesses.[35] Such firms may be encouraged by the prospect of an award of attorneys' fees and treble damages.[36]

Moreover, as discussed in our previous columns this year, recent pronouncements from the Obama administration, the FTC, and the DOJ suggest that the government is stepping up its antitrust enforcement efforts. Private antitrust plaintiffs who were unwilling or unable to take on the expense of litigation alone may seize the opportunity to piggy-back off of large government investigations, thus increasing the likelihood that companies will be exposed to private antitrust litigation.[37]

As stated above, an increase in the likelihood of exposure to expensive antitrust lawsuits may hinder pro-competitive conduct at a time when the economy needs firms to compete. Firms who are forced to engage in the voluminous and complex electronic discovery inevitably involved in modern antitrust suits face the threat of significant negative financial impact and a substantial interference in their day-to-day business.[38] While plaintiffs with meritorious claims should have their day in court, the *Twombly* standard at least offers defendants some assurance that the claims they are forced to respond to have some merit. Therefore, particularly in the antitrust context, the plausibility standard of *Twombly* may be more plausible now than ever before.

1. S. 1504, 111th Cong. (2009).
2. 550 U.S. 544 (2007).
3. 355 U.S. 41 (1957).
4. 129 S. Ct. 1937 (2009).
5. Id. at 1949 (quoting *Twombly* 550 U.S. at 570).
6. 155 Cong. Rec. S7890-91 (daily ed. July 22, 2009) (statement of Sen. Specter)
7. *Conley*, 355 U.S. at 45-46.
8. Id. at 47 (quoting Fed. R. Civ. Proc. 8(a)(2)).
9. Id.
10. *Twombly*, 550 U.S. at 555.
11. Id. at 563.
12. Id. at 558 (quoting 5 Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure §1216, at 233-34 (3d ed. 2004))
13. Id. (citing William H. Wagener, 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)).
14. See, e.g., *Lewis v. Marriott Int'l, Inc.*, 527 F.Supp.2d 422, 424 n.1 (E.D. Pa. 2007) (stating that applicability of *Twombly* to non-Sherman Act claims is unknown); Keith Bradley, "Pleading Standards Should Not Change After *Bell Atlantic v. Twombly*," 102 Nw. U. L. Rev. Colloquy 117, 117 (2007) (arguing that it is a misreading of *Twombly* to extend "plausibility" beyond the antitrust context).
15. See, e.g., *Williams v. Gerber Prods. Co.*, 523 F.3d 934, 939-40 (9th Cir. 2008) (tort and breach-of-warranty claims); *Perez-Acevedo v. Rivero-Cubano*, 520 F.3d 26, 29 (1st Cir. 2008) (§1983 claim); *Napolitano v. Town Sports Int'l Holdings, Inc.*, Civ. Action No. 07-755, 2007 WL 1521217 (E.D. Pa. May 23, 2007) (breach of contract claim).
16. *Twombly*, 550 U.S. at 548-49.
17. See id. at 555-64.
18. *Iqbal*, 129 S. Ct. at 1943.
19. Id.
20. Id. at 1944.
21. Id. at 1951.
22. Id. at 1951-52.
23. 155 Cong. Rec. S7890-91 (daily ed. July 22, 2009) (statement of Sen. Specter upon introducing Senate bill S. 1504)
24. Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the U.S., Remarks for Second Circuit Judicial Conference (June 12, 2009).
25. See Adam Liptack, "Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits," N.Y. Times, July 21, 2009, at A10.
26. Michael C. Dorf, "Should Congress Change the Standard for Dismissing a Federal Lawsuit?" (July 29, 2009), http://writ.news.findlaw/dorf/20090729.html.; see also Douglas G. Smith, "The *Twombly* Revolution?," 36 Pepp. L. Rev. 1063, 1098 (2009) (characterizing *Conley* as a "heavily criticized and poorly worded formulation of the Rule 8(a) standard").
27. *Car Carriers v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (stating that *Conley* has never been interpreted literally); see also *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149 (9th Cir. 1989) (stating that "conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim"); *Obrien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976) (stating that, while it recognized the policies behind Rule 8 and the concept of notice pleading, "we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional action into a substantial one").
28. See *Smith*, supra note 26, at 1095-96 (discussing the challenges of electronic discovery).
29. Alfred W. Cortese, Jr., "Electronic Discovery Costs and Burdens Require New Rules," The Metropolitan Corporate Counsel, March 2009, p. 18.
30. *Smith*, supra note 26, at 1100.
31. *Twombly*, 550 U.S. at 558 (citing various authority discussing the high cost of discovery in antitrust cases).
32. See id. at 559 (noting the "reams and gigabytes of business records" that the many thousands of employees of America's largest telecommunications firms would be forced to produce as a result of vague allegations alleging conduct that occurred over a period of seven years).
33. Id. at 566.
34. See David S. Evans, "What you need to know about *Twombly*: The Use and Misuse of Economic and Statistical Evidence in Pleadings" (2009), http://www.lecg.com/files/upload/What%20You%20Need%20To%20Know%20About%20Twombly%20-%20Evans.pdf.
35. Michael L. Keeley, "In Whom We Antitrust," The Deal Magazine, Nov. 14, 2008, http://www.thedeal.com/newsweekly/community/in-whom-we-antitrust.php.
36. See *Wagener*, supra note 13, at 1887 ("From its inception, the grant of attorneys' fees and treble damages to successful plaintiffs in private antitrust lawsuits has been thought to encourage such suits....").
37. See Thomas E. Kauper & Edward A. Snyder, "An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-On and Independently Initiated Cases Compared," 74 Geo. L.J. 1163, 1165 (1986) (discussing how government antitrust investigations are likely to trigger the filing of private antitrust suits).
38. *Cortese*, supra note 29.