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IF IT TAKES TWO TO TANGO, DO THEY CONSPIRE?: *TWOMBLY* AND STANDARDS OF PLEADING CONSPIRACY

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The potentially malign results to competition of parallel decisions made by members of an oligopoly have long drawn academic attention. The two poles of the debate have conventionally been defined by Professor Donald Turner on the one hand, and then-Professor Richard Posner on the other. Professor Turner argued that Section 1 of the Sherman Act, 15 U.S.C. Section 1, should generally not provide a remedy for such actions absent additional evidence of an agreement among the parties to refrain from competing. Professor (now Judge) Posner argued that Section 1 in principle covered such conduct, observing that in an oligopolistic setting the economic outcomes of "conscious parallelism" can mimic those that result from explicit cartels, and should receive similar legal treatment.[1]

The risks of anticompetitive behavior by firms in highly concentrated markets, or oligopolies, have been problematic for antitrust law and policy.[2] In an oligopoly, there are few competing firms, and economists have argued that these firms can increase prices above competitive levels without expressly communicating with each other.[3] Because the principal United States antitrust law dealing with collusive conduct among multiple firms, Section 1 of the Sherman Act, requires proof of agreement, or "conspiracy," antitrust law has proven ill-suited to address the anticompetitive impact of parallel conduct by firms in oligopolies.[4]

In a series of cases decided between 1939 and 1954, the Supreme Court grappled with the subject of parallel conduct by oligopolists.[5] In the first two of these cases, *Interstate Circuit* and *American Tobacco*, the Supreme Court employed language implying that in some cases parallel conduct – standing alone – could be sufficient to prove conspiracy. With perhaps more interest in creating a bright line for lower courts and market participants than in addressing the potentially adverse economic impacts of "ordinary" oligopolistic behavior, the Supreme Court in *Theatre Enterprises* pulled back, decreeing that parallel action alone, even if undertaken with knowledge of the likely response of other market participants, does not violate Sherman Act Section 1.[6] As these cases

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1 *Compare* Donald F. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962), *with* Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562 (1969). Section 1 of the Sherman Act provides that "[e]very contract, combination . . . or consipiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. Section 1. Section 4 of the Clayton Act, 15 U.S.C. Section 15, provides a private right of action for injunctive relief and treble damages against violators of the Sherman Act.

2 Herbert Hovenkamp, Federal Antitrust Policy, Section 4.2 (1994).

3 *Id.*

4 *Id.*

5 *See Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

6 *Theatre Enters.*, 346 U.S. at 541 (stating that "[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not read conspiracy out of the Sherman Act entirely").

and their lower-court progeny illustrate, the federal courts have struggled to define the proof required to establish – and consequently the pleading required to allege – the existence of an agreement in parallel conduct cases.[7]

This term, in *Bell Atlantic Corp v. Twombly*,[8] the Supreme Court returned to the subject of standards of pleading conspiracy in an oligopolistic setting – the market for local telephone and internet services. The Supreme Court granted certiorari in *Twombly* to review a decision of the United States Court of Appeals for the Second Circuit which held that a plaintiff asserting a conspiracy claim under Section 1 of the Sherman Act can survive a motion to dismiss by pleading only parallel conduct among the defendants. In *Twombly*, the plaintiffs brought a putative class action on behalf of themselves and all others who purchased local telephone or high-speed internet service in the continental United States on or after February 8, 1996, the effective date of the Telecommunications Act of 1996.[9] Plaintiffs' Amended Complaint alleged – wholly on information and belief – that defendants, four of the "Baby Bell" regional local telephone and internet companies, (a) conspired to prevent competitive entry into each of their local telephone and internet service markets and (b) agreed not to compete with each other and to allocate customers and markets.

The United States District Court for the Southern District of New York dismissed plaintiffs' Amended Complaint because plaintiffs alleged only that the defendants engaged in parallel conduct which was consistent with each of their individual economic interests. Because plaintiffs failed to plead any "plus factors" – facts that tend to exclude independent action as an explanation for defendants' parallel conduct – the district court found that the factual allegations of the Amended Complaint, even if true, failed to establish a cause of action.[10]

In an opinion authored by Judge Sack, a panel of the Second Circuit reversed, finding the pleading standard imposed by the district court inconsistent with the standards of Federal Rules of Civil Procedure 8 and 12.[11] The Second Circuit noted that while, in the absence of direct evidence of conspiracy, a plaintiff must show "plus factors" to prevail on a Section 1 claim at summary judgment and trial, a plaintiff need not allege "plus factors" to avoid dismissal at the pleading stage.[12] The court sympathized with the defendants' argument that allowing scant complaints to survive a motion to dismiss will open the doors to burdensome discovery and induce defendants to settle meritless claims to avoid the "colossal expense" of antitrust discovery, but declined to adopt what it characterized as a heightened pleading requirement in conspiracy cases under Section 1.[13] Instead, the court expressly invited Congress or the Supreme Court to "re-calibrate" the balance between the liberal pleading requirements of the Federal Rules and the realities of costly litigation.[14]

The Supreme Court accepted the invitation and reversed the Second Circuit, holding that a complaint alleging a Section 1 claim based on parallel conduct and a bare assertion of conspiracy will not survive a motion to dismiss.[15] However, the Supreme Court did not stop there, and proceeded to articulate a new "plausibility" standard for pleading Section 1 claims.[16] To survive a motion to dismiss under this standard, a Section 1 complaint must state "plausible grounds to infer an agreement" or, as the court explained, a complaint must contain "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [an] illegal agreement."[17] In articulating its new standard of "plausibility," the court expressly rejected the 50-year-old formulation of Justice Black in *Conley v. Gibson* that a complaint may only be dismissed if a plaintiff "can prove no set of facts in support of his claim."[18]

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7 The Sedona Conference has also previously explored the issue of proof of agreement, though more in the context of summary judgment motions than standards in initial pleadings. *See, e.g.*, Tyler A. Baker, *Proof of Conspiracy in Vertical and Horizontal Price-Fixing Cases: The Intersection of Law, Economics, Policy & Precedent*; William S. Comanor, *Demonstrating an Agreement Under the Sherman Act: Posner vs. Turner*; and Robert L. Hubbard, *Grunts, Winks & Nods: What Meets the Agreement Element of a Section 1 Claim*?," all papers presented at The Fifth Annual Sedona Conference on Antitrust Law & Litigation, Oct. 2003.

8 *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 550 U.S. ___ (May 21, 2007).

9 Pub. L. No. 104-104, 110 Stat. 56 (codified at various sections of Titles 15 and 47 of the U.S. Code).

10 *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174, 189 (S.D.N.Y. 2003) (Gerald Lynch, J.).

11 The panel consisted of Judges Sack, Raggi, and Hall.

12 *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 118 n.5 (2d Cir. 2005) (stating that "plaintiffs pursuing section 1 actions are not required to plead 'plus factors' to state a claim of conspiracy based on parallel anticompetitive conduct").

13 *Id.* at 117.

14 *Id.*

15 *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1961, 550 U.S. ___ (May 21, 2007).

16 *Id.* at 1965-66.

17 *Id.*

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

The Supreme Court clearly articulated its concerns with the skyrocketing cost of antitrust litigation, particularly during the discovery phase. Indeed, the court explained in detail its opinion on the negative aspects of large-scale discovery common (but not unique) to antitrust litigation.[19] The court emphasized that judges are unable to place meaningful controls on such discovery and that the financial costs of sweeping discovery "will push cost-conscious defendants to settle even anemic cases."[20]

In antitrust law, it appears that *Twombly* has harmonized the pleading standard in Section 1 cases with the proof standard required to survive summary judgment under *Matsushita*.[21] The more onerous pleading standard announced in *Twombly* could increase the number of Section 1 cases resolved on motions to dismiss, and will certainly deter future plaintiffs from asserting Section 1 claims based on parallel conduct with no detailed facts indicating proof of agreement.

While *Twombly* need not necessarily apply outside the context of Section 1 cases, just as *Matsushita* has come to be generally relied on throughout the law of Rule 56 summary judgment, *Twombly's* "plausibility" standard could soon come to dominate Rule 12 jurisprudence. In addition, the dicta from *Twombly* discussing the negative repercussions of large-scale discovery will undoubtedly find its way into countless briefs supporting motions for protective orders in complex cases. This article reviews the facts and law that brought the Supreme Court to reaffirm the principal of *Theatre Enterprises*, to reject *Conley v. Gibson*, and to set a new course in reviewing the adequacy of pleading under the Federal Rules of Civil Procedure.

I. *TWOMBLY'S* ALLEGATIONS

On April 14, 2003, plaintiffs William Twombly and Lawrence Marcus filed an Amended Class Action Complaint against defendants Bell Atlantic Corporation (and its successor in-interest Verizon Communications, Inc.); BellSouth Corporation; Qwest Communications International, Inc.; and SBC Communications, Inc.[22] The Amended Complaint alleged that the defendants had conspired to prevent competitive entry into each of their local telephone and internet service markets and agreed not to compete with each other in violation of Section 1 of the Sherman Act. All of the substantive allegations contained in the Amended Complaint were based on "information and belief pursuant to the investigation of counsel."[23]

The defendants were the four regional local telephone service providers that resulted from the 1984 divestiture of AT&T's local telephone business, commonly known as the "Baby Bells."[24] Each of the defendants is a local exchange carrier, which provides customers with local telephone service.[25]

Until 1996, state regulatory authorities granted local exchange carriers exclusive franchises that allowed them to operate in their defined geographic areas without competition.[26] However, the Telecommunications Act of 1996 (the "Act") attempted to stimulate competition in the local telephone markets in which local exchange carriers had enjoyed government-granted monopolies. Specifically, the Act required incumbent local exchange carriers that controlled access to the network infrastructure (such as defendants), to grant competitors access and connections to their lines and equipment on just, reasonable, and non-discriminatory terms.[27] The Act also required local exchange carriers that provided telephone exchange services to a defined area on the February 8, 1996 effective date of the Act to provide competitors with the same quality of service that they provide to themselves or their customers.[28]

19 *Bell Atlantic v. Twombly*, 127 S. Ct. at 1966-67.
20 *Id.* at 1967.
21 *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (holding that a plaintiff must show evidence tending to exclude the possibility that the alleged conspirators acted independently to survive summary judgment under Section 1).
22 Mr. Twombly filed his initial Complaint on December 23, 2002, making virtually identical allegations to those contained in the Amended Complaint.
23 Amended Compl. at p. 1.
24 *Id.* at Paragraph 21. Initially, the divestiture of the Bell System by AT&T resulted in seven Regional Bell Operating Companies. However, by the time the Amended Complaint in Twombly was filed, later mergers and acquisitions had trimmed the number of Baby Bells to the four named defendants. *Id.* (During the pendency of the case, BellSouth acquired AT&T, and took the AT&T name for the new combined company.)
25 *Id.* at Paragraph 22.
26 *Id.* at Paragraph 23.
27 47 U.S.C. Section 251(c); Amended Compl. Paragraph 27.
28 47 U.S.C. Section 251(c)(2)(C); Amended Compl. Paragraph 28.

A. *Twombly's* Conspiracy Allegations

The Amended Complaint recited a host of declarations and quotations gleaned from newspaper articles and statements by consumer advocacy groups claiming that the defendants "have refrained from engaging in meaningful head-to-head competition in each other's markets."[29] Plaintiffs asserted that this lack of competition "is strongly suggestive of conspiracy"[30] and that it was "especially unlikely" that neighboring defendants would have refrained from competing in each other's adjacent geographic territories "[i]n the absence of an agreement not to compete."[31] Finally, the Amended Complaint quoted a newspaper article reciting a statement from the CEO of Qwest that it would be fundamentally wrong to compete in SBC's territory and that "it might be a good way to turn a quick dollar but that doesn't make it right."[32] The Amended Complaint summarized the defendants' failure to compete with each other as indicative of their "strategy . . . to divide the country into local phone 'fiefdoms,' not to compete against each other, and to devote their collective efforts to 'eliminating would-be competitors in local service.'"[33]

Plaintiffs alleged that the defendants "do indeed communicate amongst themselves" through various trade associations and that these associations provided them with the opportunity to coordinate their alleged conspiracy.[34] However, plaintiffs did not allege that defendants actually communicated in furtherance of their purported conspiracy.

Most notably, plaintiffs alleged that "[d]efendants have engaged in parallel conduct in order to prevent competition in their respective local telephone and/or high speed internet services markets."[35] Specifically, plaintiffs claimed that defendants committed "one or more of the following wrongful acts in furtherance of a common anticompetitive objective:"

- failing to provide competitors with the same quality of service as provided to customers;
- failing to provide access to "operational support systems," such as customer service records, on a nondiscriminatory basis;
- delaying the delivery of "unbundled elements" which precludes competitors from offering their customers service as attractive as that offered by defendants;
- billing their former customers after the customers converted service to a competitor, which resulted in double-billing and caused customer relations problems;
- providing interconnection between their networks and the networks of competitors at a lower quality than the interconnection that each defendant provided itself;
- refusing to sell competitors access to unbundled network components on just, reasonable, and nondiscriminatory terms;
- refusing to sell competitors local telephone and high-speed internet services at just, reasonable, and nondiscriminatory wholesale prices;
- refusing to allow competitors to connect to essential facilities, including local telephone lines and equipment, on just, reasonable, and nondiscriminatory terms;
- using "discriminatory and error-filled methods" to bill competitors, which discouraged competition "by making it virtually impossible for competitors to audit the bills they received from Defendants;"

29 Amended Compl. at Paragraphs 37-39, 42, 44-45.
30 *Id.* at Paragraph 40.
31 *Id.* at Paragraph 41.
32 *Id.* at Paragraph 42.
33 *Id.* at Paragraph 44 (quoting *Illinois CLECS Assail Notebaert*, State Telephone Regulation Report, Comment, Vol. 20, No. 22 (Nov. 8, 2002)).
34 *Id.* at Paragraph 46.
35 *Id.* at Paragraph 47.

- imposing "slow and inaccurate manual order processing" that caused competitors to devote "significant time, effort, and expense" to correct problems and ensure that orders were processed correctly;

- using their monopoly power to gain a competitive advantage in the retail market for local telephone and high-speed internet services; and

- using their monopoly power and superior bargaining power to compel competitors to agree to unfair terms in exchange for access to local telephone networks.[36]

Plaintiffs provided maps showing in particular the balkanized service areas of defendant Verizon, which plaintiffs alleged should have induced competitive entry from other carriers.

B. Market Structure Allegations

Plaintiffs alleged that the structure of the market for local telephone services facilitated the alleged conspiracy. Plaintiffs alleged that the four defendants controlled 90% or more of the local telephone market within the continental United States.[37] Thus, according to plaintiffs, "[e]laborate communications . . . would not have been necessary to enable Defendants to agree to allocate territories and to refrain from competing with one another."[38]

Plaintiffs further alleged that the structure of the market for local telephone services facilitated a geographic market allocation scheme because the defendants would have quickly discovered if one of them began competing in the territory of another.[39] According to the Amended Complaint, this ease of detection made "a territorial allocation agreement among the Defendants more feasible, more readily enforceable, and more probable."[40]

The Amended Complaint also alleged that had each defendant not illegally excluded competitors from their geographic territories, "the resulting competitive inroads into that Defendant's territory would have revealed the degree to which competitive entry . . . would have been successful in other territories in the absence of such conduct."[41] Plaintiffs also claimed that had a competitor made "substantial competitive inroads" into one of the defendants' territories, it would have been more likely that other competitors would have made gains into the other defendants' territories.[42] Thus, plaintiffs concluded that the defendants "had compelling common motivations to include in their unlawful horizontal agreement an agreement that each of them would engage in a course of concerted conduct calculated to prevent effective competition" in each of their allocated territories.[43]

II. THE DISTRICT COURT'S DECISION

The defendants moved to dismiss the Amended Complaint on the ground that plaintiffs failed to allege facts sufficient to infer a conspiracy under Section 1 of the Sherman Act.[44] The district court granted defendants' motion to dismiss, holding that the plaintiffs' bare allegations of parallel conduct – which the court concluded coincided with each defendant's individual economic interests – were insufficient, as a matter of law, to survive a motion to dismiss under Rule 12(b)(6), Fed. R. Civ. P.[45]

The court began its analysis by reciting the rule of *Theatre Enterprises* that parallel business behavior alone is not unlawful. The court also observed that although "parallel action is a common

36 *Id.*
37 *Id.* at Paragraph 48.
38 *Id.*
39 *Id.* at Paragraph 49.
40 *Id.*
41 *Id.* at Paragraph 50.
42 *Id.*
43 *Id.*
44 *Twombly*, 313 F. Supp. 2d at 178. The district court did not address various other grounds asserted by defendants in support of their motions to dismiss. *Id.* at 178, 189 n.6.
45 *Id.* at 189.

and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions," parallel behavior can sometimes suggest that competing firms have entered into an illicit agreement.[46]

To determine whether parallel behavior is the product of legitimate market activity or an illegal conspiracy, the Second Circuit has required plaintiffs to show at least one "plus factor" that tends "to exclude independent self-interested conduct as an explanation for defendants' parallel behavior."[47] Plus factors include facts demonstrating that the parallel behavior was contrary to the economic interests of individual defendants or that a strong common motive to conspire existed among defendants. The district court acknowledged that the Second Circuit has only required plaintiffs to show plus factors at the summary judgment stage, but concluded that plaintiffs must allege plus factors to show that they have stated a claim for relief and that they are entitled to engage in discovery:

> [P]laintiffs must always assert facts that, if true, support the existence of a conspiracy, such as motivation or conduct that lends itself to an inference of an agreement. In the context of parallel conduct allegations, simply stating that the defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement, would be equivalent to a conclusory "bare bones" allegation of conspiracy. Viewed in this light, the plus factors are simply examples of allegations that are sufficiently suggestive of a conspiracy to warrant discovery.[48]

The court noted the tension between requiring plaintiffs to allege "specific facts suggesting a conspiracy", and Rule 8, Fed. R. Civ. P., which requires only a "short and plain statement of the claim."[49] However, the court explained that requiring a plaintiff to plead plus factors is consistent with the liberal requirements of Rule 8 for two reasons. First, parallel conduct often lawfully results from competitors with similar economic interests making decisions on the same information. Thus, allowing a plaintiff to open the door to discovery by pleading only allegations of parallel conduct "circumvents" both the foundational requirement of Section 1 that defendants actually engaged in a conspiracy and Rule 8's requirement that complaints must state a claim for relief.[50] Second, pleading plus factors gives defendants notice of the plaintiff's legal theories and "how and why" the defendants allegedly conspired.[51]

The court stated that a plaintiff asserting parallel conduct claims must allege facts that render the parallel conduct and state of the market "suspicious enough to suggest that defendants are acting pursuant to a mutual agreement rather than their own individual self-interest."[52] These facts include "background propositions about how the market works when firms are competing, what it might look like if subject to an anti-competitive agreement, the economic interests of the market actors, and how those interests would cause them to act."[53] The court conceded that these questions are similar to the factual issues in a summary judgment motion.[54]

The district court applied these standards to analyze the allegations of the Amended Complaint. The court noted that the geographic allocation alleged by plaintiffs did not show a conspiracy because the market had historically been insulated from open competition and the defendants' geographic markets have been shaped by "decades of state and federal regulation."[55] Accordingly, the operative questions were whether defendants' alleged (a) efforts to keep competitors out of their territories and (b) refusal to compete in the territories of other defendants were products of the defendants' individual economic interests or an illegal conspiracy.

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46 *Id.* at 179.
47 *Id.*
48 *Id.* at 180 (internal citations omitted).
49 *Id.* at 180-182.
50 *Id.* at 181.
51 *Id.* at 181-82.
52 *Id.* at 182.
53 *Id.*
54 *Id.*
55 *Id.* at 183.

The court assessed plaintiffs' allegations that defendants conspired to prevent competitive entry into their territories and burdened competitors after they entered defendants' territories. The plaintiffs failed to allege any reasons to believe that defendants would have acted differently – as by welcoming competition into their territory – absent the illegal agreement alleged by plaintiffs. The court found that even if defendants discouraged competitors from entering their respective territories and made it difficult for competitors to survive after they did so, such actions were wholly consistent with each defendant's individual economic interests.[56] Since the plaintiffs had not alleged any basis to infer that each defendant's behavior was attributable to anything beyond pursuing its individual economic interests, the court dismissed plaintiffs' claim that the defendants illegally agreed to suppress competition in their territories.[57]

The court then reviewed plaintiffs' claim that each defendant agreed not to compete in the other defendants' territories and acknowledged that this theory "present[ed] a closer question."[58] The court questioned plaintiffs' theory that defendants' refusal to compete with each other was against their individual economic interests because defendants could not be expected to enter new markets unless they believed that doing so would be profitable.[59]

The court accepted defendants' arguments that a defendant seeking to compete in another defendant's territory would necessarily be forced to adopt a vastly different business model than it employs in its own territory. Indeed, each defendant, as the incumbent local exchange carrier ("ILEC") in its territory, controls and maintains the telecommunications network in its territory and determines the prices at which it offers customers (including competitive local exchange carriers, or "CLECs," who buy network time from incumbent carriers at wholesale for resale to retail customers) access to the network. If a defendant wishes to compete in the territory of another ILEC, it must obtain access to the network on the best terms it can negotiate from that ILEC. Then, the potential competitor must purchase access to the ILEC's network at wholesale and repackage the network time and sell it at a profit to retail customers in that territory.[60]

To the extent each defendant enjoys name recognition and goodwill in its territory, these intangible assets purportedly have very limited value outside of the defendant's territory because each defendant's ability to compete outside its territory depends heavily on its ability to obtain network access on favorable terms from the ILEC for that territory. Thus, each defendant cannot easily use its intangible assets to influence the market for local telephone and internet services outside of its territory. Accordingly, the district court hypothesized, each defendant would lose the inherent advantages of controlling the network infrastructure if it chose to enter markets outside of its territory.[61]

In addition, the court rejected plaintiffs' allegations that defendants operating in geographic proximity have competitive advantages in the territories of neighboring ILECs.[62] The court reemphasized that being an incumbent carrier and controlling the telecommunications network is a vastly different business than being a competing carrier and having to buy access to the network. According to the court, given the purchase and resale structure created by the Telecommunications Act, it would be "impossible" or "undesirable" to build a competing network (or to expand the existing network) into a competing territory.[63] Indeed, a defendant seeking to compete in an adjacent territory could not "leverage geographical proximity into independence, and therefore is not materially different from a . . . [competing local exchange carrier] without a nearby territory of its own."[64] Therefore, if a defendant sought to compete in another defendant's territory, it would face the same market challenges and entry barriers as any other local exchange carrier.[65] The court mentioned plaintiffs' allegations that each defendant has successfully thwarted competitive entry into its territory

56 *Id.*
57 *Id.* at 184, 189.
58 *Id.* at 184.
59 *Id.* at 185.
60 *Id.* at 185-186.
61 *Id.* at 186.
62 *Id.* at 185-189.
63 *Id.* at 186.
64 *Id.* at 186-87.
65 *Id.* at 187.

and stated that plaintiffs failed to plead any facts to create doubt about each defendant's unilateral ability to frustrate the competitive entry into its territory by another defendant.[66]

The court held that plaintiffs failed to generate an inference that the defendants' actions were the product of an illegal agreement because the Amended Complaint stated no basis to believe that any defendant would perceive an economic interest in competing in another defendant's territory.[67] Further, the court ruled that plaintiffs did not sufficiently allege that defendants had a common motive to conspire.[68] Thus, the court held that the plaintiffs alleged "no reason to believe that defendants' parallel conduct was reflective of any agreement" and concluded that plaintiffs failed to state a cause of action under Section 1 of the Sherman Act because the Amended Complaint "alleges nothing more than parallel conduct that appears to accord with the individual economic interests of the alleged conspirators."[69]

As the cited excerpts show, the district court engaged in what looks like fact-finding. The level of analysis is unusual in the context of a motion to dismiss and appears more akin to the summary judgment analysis mandated by *Matsushita*.

III. THE SECOND CIRCUIT'S OPINION

The Second Circuit reversed, holding that the district court applied an incorrect standard for evaluating a complaint challenged on a motion to dismiss.[70] The court reiterated that no heightened pleading standards apply in antitrust cases.[71] Instead, the liberal standard of Fed. R. Civ. P. 8 applies to conspiracy claims, such as those asserted by plaintiffs.[72] Rule 8 provides that a plaintiff must allege a "short and plain statement of the claim showing that the pleader is entitled to relief." The appellate court noted that while Rule 8 only requires a complaint to contain "minimal" facts in support of its claims, a complaint having "nonexistent" facts should not survive a motion to dismiss.[73] Thus, a "bare bones" complaint lacking any factual predicate for conspiracy claims should be dismissed, as should a complaint that alleges an "implausible" conspiracy on the facts pleaded or that is premised on "unlikely speculations."[74]

The disagreement between the district court and the Second Circuit centered around the factual allegations necessary in a conspiracy case to survive a motion to dismiss. The district court's holding would require plaintiffs alleging an antitrust conspiracy based on parallel conduct to allege "plus factors" – facts which tend to exclude independent self-interested conduct as an explanation for the defendants' parallel behavior.[75] Otherwise, a plaintiff could survive a motion to dismiss by alleging facts that, even if true, fail to establish liability.

The Second Circuit acknowledged that a plaintiff in a parallel conduct case must prove the existence of "plus factors" to avoid summary judgment.[76] However, in the context of a motion to dismiss, a plaintiff must allege only the existence of a conspiracy and "a sufficient supporting factual predicate" for the conspiracy allegations.[77] According to the Second Circuit, the factual predicate for conspiracy claims need only "***include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss***."[78] Thus, under the Second Circuit's test, a plaintiff may – but is not required to – plead plus factors in support of a conspiracy claim based on parallel conduct. According to the Second Circuit, in order to dismiss a conspiracy claim based on parallel conduct, "***a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence***."[79]

66 *Id.* at 189.
67 *Id.* at 187.
68 *Id.* at 188.
69 *Id.* at 189.
70 *Twombly*, 425 F.3d at 102.
71 *Id.* at 107-09.
72 *Id.* at 108-09.
73 *Id.* at 109.
74 *Id.* at 109-111.
75 *Twombly*, 313 F. Supp. 2d at 179-80.
76 *Twombly*, 425 F.3d at 113-14.
77 *Id.* at 114.
78 *Id.* (emphasis added).
79 *Id.* (emphasis added).

Applying this test, the Second Circuit held that the allegations of the Amended Complaint gave defendants "fair notice" of the claims asserted against them and the grounds upon which those claims were based.[80] The court acknowledged that while the Amended Complaint failed to "identify specific instances of conspiratorial conduct or communications," it did state "the temporal and geographic parameters of the alleged illegal activity and the identities of the alleged key participants."[81] The court recognized that plaintiffs alleged that defendants have "frequent opportunities to organize and conduct their conspiracy through industry organizations."[82] The court further opined that the Amended Complaint alleged that defendants shared a "common incentive" to conspire to prevent any competitive local exchange carrier from tasting success in one of the defendant's territories, which could embolden other local exchange carriers to enter into the defendants' territories.[83] Of course, similar allegations could be made in the abstract about virtually any industry characterized by oligopoly.

While the First, Sixth and Tenth Circuits had concluded that a complaint alleging a Section 1 claim based on parallel conduct had to allege "plus factors" in order to survive a motion to dismiss,[84] the Second Circuit was not alone in holding that a plaintiff need not plead "plus factors" to state such a claim. The Third Circuit said as much in 2004 in *Lum v. Bank of America*,[85] in a unanimous decision in which then-Judge Samuel Alito joined. *Lum* based its holding on the 1977 case of *Bogosian v. Gulf Oil Corp*.[86] *Bogosian*, in turn, held that the existence of collusion in a highly concentrated market characterized by interdependent decision-making among its participants was too complex to be decided based on the complaint alone:

> If these theories are to be tested, it should be done on a fully developed factual record which probes the conflicting economic facts on which they are premised. The complaint is much too blunt an instrument with which to forge fundamental policies regarding the meaning of competition in concentrated industries.[87]

Bogosian thus implied that a complaint alleging conscious parallelism can state a Section 1 claim. In *Twombly* the Second Circuit cited *Lum* only in passing[88] and *Bogosian* not at all.

The Court of Appeals also noted the district court's "well-founded concern" that allowing conspiracy cases to proceed solely on allegations of parallel conduct would "condemn defendants to potentially limitless 'fishing expeditions' – discovery pursued just 'in case anything turn[s] up' – in hopes, perhaps, of a favorable settlement."[89] In addition, the court recognized the other concerns articulated by the district court that, in its view, made requiring plaintiffs to plead plus factors "sensible": (1) the antitrust laws do not prohibit parallel conduct; and (2) a complaint should give defendants notice of plaintiffs' theory of conspiracy.[90] On appeal, the defendants had argued that if plaintiffs need not plead plus factors, then "any claim asserting parallel conduct [would] survive a motion to dismiss."[91]

In response to these concerns, the Second Circuit merely stated:

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80 *Id.* at 118-19.
81 *Id.* at 117.
82 *Id.* at 118.
83 *Id.*
84 *See DM Research, Inc. v. College of American Pathologists*, 170 F.3d 53 (1st Cir. 1999); *NHL Players Association v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005); *Cayman Exploration Corp. v. United Gas Pipe Line Co*., 873 F.2d 1357 (10th Cir. 1989).
85 *Lum v. Bank of America*, 361 F.3d 217, 230 (3d Cir. 2004), *cert. denied*, 543 U.S. 918 (2004) ("Since conscious parallelism is an evidentiary rule that relates to how a plaintiff may prove the existence of an agreement, a plaintiff need not allege the existence of these plus factors in order to plead an antitrust cause of action.").
86 *Bogosian v. Gulf Oil Corp*., 561 F.2d 434 (3d Cir. 1977).
87 *Id.* at 447 (citing Posner, *supra* note 1, Turner, *supra* note 1, L. Sullivan, Law of Antitrust Section 122 (1977), and *White Motor Co. v. United States*, 372 U.S. 253 (1963)). The explicit judicial grappling with the theoretical and practical problems for antitrust law posed by oligopolies seen in *Bogosian* was not presented to the Supreme Court in the parties' briefs in *Twombly* (nor reflected in the court's ultimate decision). Instead the parties' arguments focused on less relevant market structures (*i.e*., perfect competition) and less relevant areas of law (i.e., the employment law decision in *Swierkiewicz v. Sorema N.A*., 534 U.S. 506 (2002)).
88 *Twombly*, 425 F.3d at 114 n.9.
89 *Id.* at 115-16 (alteration in original).
90 *Id.* at 116.
91 *Id.* (alteration in original).

> We are not unsympathetic to these concerns, but we find the arguments based on them ultimately unconvincing. At the pleading stage, we are concerned only with whether the defendants have "fair notice" of the claim, and the conspiracy that is alleged as part of the claim, against them – that is, enough to "enable [the defendants] to[, *inter alia*,] answer and prepare for trial," not with whether the conspiracy can be established at trial.[92]

In support of its holding, the court reemphasized that neither the Federal Rules of Civil Procedure nor Supreme Court precedent place a heightened pleading burden on plaintiffs alleging an antitrust conspiracy.

In an unusual passage undercutting the public policy of the lenient federal pleading rules on which it based its decision, the Second Circuit then invited Congress or the Supreme Court to re-evaluate the proper pleading standard:

> We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted. If that balance is to be re-calibrated, however, it is Congress or the Supreme Court that must do so.[93]

The Second Circuit's comments on the purported costs of discovery and prevalence of nuisance settlements were asserted without specific support. Nonetheless, the court essentially invited review – and reversal – by the Supreme Court.

IV. SUPREME COURT BRIEFING

Defendants filed a petition for a writ of certiorari to review the Second Circuit's opinion, asserting several grounds in support of review. First, they argued that because unilateral parallel conduct is not unlawful, a complaint alleging a Section 1 violation based on parallel conduct must allege a factual basis to support an inference of conspiracy. Second, defendants claimed that the Second Circuit's decision conflicted with the law of the Tenth, First, and Sixth Circuits, which require plaintiffs alleging a conspiracy under Section 1 to plead facts in support of their conspiracy claims. Third, defendants made policy arguments concerning the potential explosion of frivolous litigation, fishing expeditions, and ransom settlements, and the corresponding burdens on courts and businesses.

Several entities filed *amicus curiae* briefs urging the Supreme Court to reverse the Second Circuit. Of particular interest are the positions articulated by a group of economists and by the United States.

The economists argued that parallel behavior is a common feature in competitive markets. Firms should be expected to react similarly to market changes, such as demand and supply shifts, changes in consumer preferences, and technological changes.[94] The economists claimed that allowing plaintiffs to conduct discovery solely on pleadings alleging parallel conduct could discourage firms from "responding efficiently to market signals in ways that might seem to be mimicking the conduct of rivals if they faced the prospect that actions similar to those taken by competitors could support at least the discovery phase of antitrust claims."[95] Thus, the economists argued that the Second Circuit's decision and the corresponding risk of burdensome litigation would cloud the ability of firms to make legitimate business decisions taken by all firms, such as pricing, market entry and withdrawal, and

92 *Id*. (alterations in original; internal citations omitted).
93 *Id*. at 117.
94 Brief of Amici Curiae Economists in Support of Petitioners, *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 550 U.S. ___ (No. 05-1126), 2006 WL 2506633 (Aug. 25, 2006).
95 *Id*. at *3.

marketing strategies. In addition, the economists argued that the inability of courts to dismiss meritless claims early in the litigation process will create negative repercussions including imposing unnecessary direct costs on firms and deadweight costs on the economy.

The economists' brief did not address the actual market structure at issue in *Twombly*, an oligopoly (or perhaps a series of interrelated local monopolies), and the serious question of regulating – or not regulating – the adverse impacts to competition that can arise from that market structure. The economists posit only a caricature of the issues raised by plaintiffs' Amended Complaint, asserting that, if affirmed, the Second Circuit's decision would allow a price-fixing class action "against virtually any set of two or more competing firms in the economy" to proceed to discovery.[96] Surely such cases would fall prey even to the Second Circuit's vaguely-stated "plausibility" standard. The economists failed to engage the Supreme Court in the proper application of Section 1 to the specific market structure at issue in *Twombly* – the distressingly resilient oligopoly in local telephone and internet service.

The United States claimed that it has a substantial interest in this case because of the negative effects of meritless antitrust suits, which include creating economic inefficiencies, chilling pro-competitive conduct, and acting as a drain on the economy because of the significant costs incurred by defendants, whether in the form legal fees and expenses or *in terrorem* settlement payments to avoid burdensome discovery.[97] The United States argued that the Second Circuit applied the wrong standard in analyzing the Amended Complaint in light of the defendants' motion to dismiss.[98] The United States contended that parallel activity "is a hallmark of competitive markets" because over time, firms tend to adopt similar business practices and strategies that have proven to be reliable and efficient.[99] Thus, the United States argued, parallel action, standing alone, cannot give rise to an antitrust claim. Further, inferring a conspiracy on the basis of parallel inaction is even more problematic because "the number of territories a business does not enter or products it does not offer is virtually infinite."[100]

The United States suggested the following standard of review on motions to dismiss:

> [T]he complaint [must] give rise to a reasonably grounded expectation that discovery will reveal relevant evidence to support [a] Sherman Act claim, and . . . provide the requisite fair notice to [defendants] of the basis for that claim.[101]

The United States expressly stated that its proposed standard of review does not go so far as to require a Section 1 complaint to allege facts "that would be sufficient to defeat summary judgment under the standard articulated in *Matushita Electric*."[102] The United States acknowledged three times that *Twombly* presents a "close question," but ultimately concluded that the Amended Complaint fails to satisfy the requirements of Rule 8.[103]

The Government's *amicus* brief illustrates the fundamental difficulty in assessing the sufficiency of the allegations in *Twombly*. The Government conceded that the case is a close one; proffered a standard of review that does not expressly require pleading of plus factors and vaguely invited courts to evaluate the "reasonableness" of a plaintiff's allegations in the context of the plainly non-competitive market at issue, all of which goes beyond traditional Rule 12 analysis such as that set forth in *Conley v. Gibson*.

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96 *Id.* at *10.
97 Brief for the United States as Amicus Curiae Supporting Petitioners, *Bell Atlantic Corp., v. Twombly*, 127 S. Ct. 1955, 550 U.S. ___ (No. 05-1126), 2006 WL 2482696 (Aug. 25, 2006), at *1.
98 *Id.* at *9 (stating that the legal standard adopted by the Second Circuit "is wrong and has the potential to chill substantial economic activity that is both efficient and innocuous from the standpoint of the antitrust laws").
99 *Id.* at *20.
100 *Id.* at *21.
101 *Id.* at *26.
102 *Id.* at *22-*23 (citing *Matsushita*, 475 U.S. at 588).
103 *Id.* at *8, *10, *26.

V. THE SUPREME COURT'S OPINION

The Supreme Court stated the issue and holding in its *Twombly* decision as follows: "[t]he question in this putative class action is whether a Section 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed."[104] Despite this basic characterization, the Supreme Court's seven-member majority opinion also overrules a long-standing and oft-cited case interpreting Rules 8 and 12 of the Federal Rules of Civil Procedure, arguably rewrites the notice pleading standard embodied in those rules, and deplores the costs of discovery in complex cases.

A. "Plausibility" Pushes Aside *Conley v. Gibson*

The Supreme Court began its analysis with the familiar statement that the crucial question in Section 1 cases is whether the alleged anticompetitive conduct "stems from independent decision or from an agreement, tacit or express."[105] The court then reiterated that parallel conduct, standing alone, cannot establish a successful Section 1 claim because it is "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."[106] In so holding, the court relied on Professor Turner's 1962 article. Thus, and without substantive analysis of the consequences of its holding for competitively dysfunctional markets such as local telephone service, the court reaffirmed the rule of *Theatre Enterprises*.

The Supreme Court then launched into a discussion of the pleading requirements of Rule 8 and their relationship to the motion to dismiss standard set forth in Rule 12(b)(6).[108] Although Rule 8 does not explicitly require the pleading of "facts," the court noted that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions. . . . Factual allegations must be enough to raise a right to relief above the speculative level."[109] Indeed, the court questioned whether it would be possible for a plaintiff to satisfy Rule 8's pleading requirements of providing "'fair notice' of the nature of the claim" and "the 'grounds' on which the claims rests" without some factual allegations.[110]

The Supreme Court applied these "general standards" and developed a "plausibility" test: in order to state a claim under Section 1, a plaintiff must plead "enough factual matter to suggest that an agreement was made."[111] The court insisted that requiring a plaintiff to plead plausible factual grounds to infer the existence of an illegal agreement "does not impose a probability requirement at the pleading stage." Rather, the court maintained that its plausibility standard "simply calls for enough fact [sic] to raise a reasonable expectation that discovery will reveal evidence of [an] illegal agreement."[112] The court explained that requiring allegations plausibly suggesting – and not simply consistent with – the existence of an agreement "reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'show that the pleader is entitled to relief.'"[113] Bare allegations of parallel conduct "get[ ] 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.'"[114]

The Supreme Court's "plausibility" test appears grounded in a very strong aversion to allowing potentially "false positive" antitrust claims to proceed to the discovery stage. In explaining the justifications for its plausibility standard, the court relied upon Seventh Circuit Judges Richard

104 *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1961, 550 U.S. ___ (May 21, 2007).
105 *Id.* at 1964 (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954)) (internal quotations and alteration omitted).
106 *Id.*
107 *Id.*
108 *Id.* at 1964-65.
109 *Id.* (internal alterations omitted).
110 *Id.* at 1965, n.3.
111 *Id.* at 1965 (internal parenthentical omitted).
112 *Id.*
113 *Id.* at 1966 (quoting Fed. R. Civ. P. 8(a)(2)) (alteration omitted).
114 *Id.* (alteration omitted).

Posner and Frank Easterbrook, who have assailed the costly and burdensome nature of class action and antitrust discovery and the potential for *in terrorem* settlements putatively connected with such discovery (even though the court provides no empirical evidence of such settlements).[115] Indeed, as the court noted, "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery but quite another to forget that proceeding to antitrust discovery can be expensive."[116] Quoting *Associated General Contractors*, the court reiterated that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."[117] The court noted that the potential expense of discovery in *Twombly* could be staggering because the putative plaintiff class includes at least 90 percent of local phone or internet subscribers in the continental United States, the defendants have thousands of employees "generating reams and gigabytes of business records", and the alleged antitrust violations span a seven-year period.[118]

The Supreme Court then found that district courts are ill-suited to weed out claims that are "just shy of a plausible entitlement to relief" because of the practical problems district courts face in managing discovery and the common belief that "the success of judicial supervision in checking discovery abuse has been on the modest side."[119] Although unmeritorious claims may be disposed of on summary judgment, the court observed that the timing of a summary judgment motion would not avoid the expense and burdens of discovery.[120] Thus, the court concluded that requiring allegations that provide plausible grounds for inferring the existence of a conspiracy is the only probable way to avoid the potentially colossal expense of discovery in cases with no reasonable expectation that discovery will reveal evidence of an illegal agreement.[121]

Next, and surprisingly, the Supreme Court revisited *Conley v. Gibson*, the 1957 case containing the oft-cited language 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."[122] The court rejected *Conley's* "no set of facts" language because it could be read in isolation to allow a "wholly conclusory statement of claim" to survive a motion to dismiss unless the pleadings show the factual impossibility of the claim on their face.[123] Then, the court canvassed judicial and academic authority to underpin its rejection of *Conley* and concluded that "*Conley's* 'no set of facts' language has been questioned, criticized, and explained away long enough."[124] Thus, the court expressly overruled *Conley* to the extent its "no set of facts" language guided pleading practice: "after puzzling the profession for 50 years, this famous observation has earned its retirement."[125]

B. Twombly Failed to State a Plausible Claim under Section 1

Turning to the case before it, the Supreme Court agreed with the district court that plaintiff Twombly's allegations failed to state a plausible claim of conspiracy.[126] Although the Supreme Court recognized that some of the paragraphs of the Amended Complaint speak of or refer to an agreement, it dismissed these allegations as mere legal conclusions.[127]

The Supreme Court then concluded that none of the specific claims pleaded by the plaintiffs state a cause of action because these claims do not allege a plausible suggestion of a conspiracy.[128] Instead, the court asserted, each instance of anticompetitive activity alleged by the plaintiffs was wholly consistent with legitimate unilateral economic activity. For example, plaintiffs

115 *Id.* at 1966-67 (citing *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill 2003) (Posner, J., sitting by designation), and Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635 (1989)).
116 *Id.* at 1966-67 (internal citation omitted).
117 *Id.* at 1967 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983), and citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.* at 1968 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).
123 *Id.*
124 *Id.* at 1969.
125 *Id.*
126 *Id.* at 1970.
127 *Id.*
128 *Id.* at 1970-71.

claimed that the defendants suppressed competitive entry into the defendants' incumbent markets and that the defendants coordinated these efforts. The court opined that plaintiffs failed to plead any facts that would show that these actions by defendants, even if true, were anything other than "the natural, unilateral reaction of each [defendant] intent on keeping its regional dominance."[129] Indeed, the court quipped that "if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a Section1 violation against almost any group of competing businesses would be a sure thing."[130]

Plaintiffs also alleged conspiracy based on the failure of the defendants to begin competing in their neighbors' territory in the wake of the deregulation spawned by the 1996 Telecommunications Act.[131] The court made short work of this claim as well, noting that a natural explanation for the alleged noncompetition could be that each of the defendants was sitting tight and enjoying the vestigial effects of the regulated world of communications while expecting that their competitors would act the same way.[132] In addition, the court noted that "firms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets,"[133] and plaintiffs failed to allege that the nonexistent inter-territorial competition would have been more lucrative than any other opportunities the defendants actually pursued.[134]

The Supreme Court concluded by asserting that its plausibility test is neither a heightened pleading standard, nor an expansion of the scope of Rule 9, which requires certain claims to be pleaded with greater particularity.[135] Thus, the court was able to square this decision with its most recent decision in the Rule 12 context, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), which reversed a dismissal of an employment law complaint as having required too much specificity of the plaintiff. Instead, the court states in *Twombly* that it requires no "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."[136] The court's concern was not that the allegations of the Amended Complaint were not pleaded with sufficient particularity, but rather that the Amended Complaint "failed *in toto* to render plaintiffs' entitlement to relief plausible."[137] Thus, the court concluded, "because the plaintiffs have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."[138]

Notwithstanding these explanations, the Supreme Court's new "plausibility" standard suffers from inherent indeterminancy, as the history of *Twombly* shows. The Second Circuit had ***upheld*** the sufficiency of the Amended Complaint because conspiracy was a "plausible" conclusion that could be drawn from the facts alleged.[139] The Supreme Court held that the Amended Complaint's allegations of conspiracy are ***not*** "plausible," and dismissed the case on that basis.[140] "Plausibility" is thus from its birth a legal standard that is highly subjective, much more so than *Conley v. Gibson's* "no set of facts" standard, which most courts have applied consistently to deny most motions to dismiss.

C. The Dissent

Justices Stevens and Ginsburg dissented, assailing the "plausibility" standard articulated by the majority. The dissent begins by contending that the issue framed by the majority, *i.e.*, whether allegations of parallel conduct state a claim for relief under Section 1, can be answered in the negative based on the 50-year-old *Theatre Enterprises* case.[141] The dissent notes that the parallel conduct alleged in the Amended Complaint, which the defendants assert is consistent with the absence of an illegal

129 *Id.* at 1971.
130 *Id.*
131 *Id.* at 1972.
132 *Id.*
133 *Id.* at 1973 (quoting P. Areeda & H. Hovenkamp, Antitrust Law Paragraph 307d, at 155 (Supp. 2006).
134 *Id.*
135 *Id.* at 1973-1974.
136 *Id.* at 1974. When Congress has specified a heightened pleading standard for particular claims, the current Supreme Court has been willing to apply it strictly. *E.g., Tellabs, Inc. v. Makor Issues and Rights, Ltd.*, 127 S. Ct. 2499 (2007) (applying heightened pleading standard under Private Securities Litigation Reform Act of 1995, 109 Stat. 737).
137 *Id.* at 1973, n.14.
138 *Id.* at 1974.
139 *Twombly*, 425 F.3d at 114.
140 *Bell Atlantic v. Twombly*, 127 S. Ct. at 1974.
141 *Id.* (Stevens, J. dissenting) (*citing Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954)).

agreement, is also consistent with the presence of an illegal agreement. Thus, the dissent maintains that "the Federal Rules of Civil Procedure, our longstanding precedent, and sound practice . . . at least require some sort of response from petitioners before dismissing the case."[142]

The dissent identified two "practical concerns" that presumably explain the court's "dramatic departure from settled procedural law": the expense of antitrust litigation and the risk that a jury may use evidence of parallel conduct to determine the existence of an agreement, when, in fact, the parties were acting alone but made similar business decisions.[143] The dissent opines that these concerns do not justify dismissal, but rather call for "careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries."[144]

The dissent reviewed the evolution from code pleading to the notice pleading standard presently embodied in the Federal Rules of Civil Procedure. After noting the historical difficulties caused by requiring the pleading of "facts," the dissent concluded that "Rule 8 was directly responsive to this difficulty" and "[i]ts drafters intentionally avoided any reference to 'facts' or 'evidence' or 'conclusions.'"[145]

The dissent defended *Conley v. Gibson*, and interpreted that decision's "no set of facts" standard to allow dismissal "only when proceeding to discovery or beyond would be futile."[146] The dissent took issue with the majority's criticism of *Conley* and its statement that the "no set of facts" phrase has been "questioned, criticized, and explained away long enough" and "has puzzled the profession for 50 years." The dissent noted that *Conley* has been cited by the Supreme Court in a dozen majority opinions and that 26 states and the District of Columbia use the "no set of facts" test to evaluate motions to dismiss.[147]

After reviewing a litany of cases discussing the liberality of federal pleading standards, the dissent concludes that despite its statements to the contrary, the majority created a heightened pleading standard that is "irreconcilable with Rule 8 and with our governing precedents."[148] Indeed, according to the dissent, "[e]verything today's majority says would . . . make sense if it were ruling on a Rule 56 motion for summary judgment . . . [b]ut it should go without saying . . . that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage."[149] The dissent cites the availability of treble damages and attorneys' fees as evidence of congressional intent to encourage private enforcement of the antitrust laws, and admonishes, "[i]t is therefore more, not less, important in antitrust cases to resist the urge to engage in armchair economics at the pleading stage."[150]

The dissent then reviewed the allegations of the Amended Complaint and concluded that dismissal was not warranted under existing pleading rules. Finally, Justice Stevens (Justice Ginsburg declined to join this Part) asked the pivotal question:

> Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer. But that the Court has announced a significant new rule that does not even purport to respond to any congressional command is glaringly obvious.[151]

142 *Id.* at 1975.
143 *Id.*
144 *Id.*
145 *Id.* at 1976.
146 *Id.* at 1977-1980 (quoting *Conley v. Gibson*, 355 U.S. at 45 46).
147 *Id.* at 1978.
148 *Id.* at 1983.
149 *Id.*
150 *Id.*
151 *Id.* at 1988-1989.

VI. THE FUTURE

Twombly is the latest in a line of recent Supreme Court cases that have not been kind to antitrust plaintiffs.[152] Indeed, the antitrust opinions from the past two terms show that this court will impose strict burdens of pleading and proof on plaintiffs in antitrust cases.[153] The court is heightening the burdens on plaintiffs by trending away from *per se* rules and toward analyses of the economic impacts of allegedly anticompetitive conduct. The court's reversal of the Second Circuit in *Twombly* is consistent with its reduced emphasis on blanket prohibitions of certain categories of conduct in favor of a more detailed inquiry into the nature and effect of the questioned conduct.

While *Twombly* is helpful to the extent it instructs plaintiffs on what not to plead, *i.e.*, parallel conduct with no facts to support an inference of an agreement, *Twombly* fails to provide meaningful guidance on what sorts of facts a plaintiff should plead to survive dismissal. The "plus factors" identified by Judge Posner at the summary judgment stage in *High Fructose Corn Syrup* may provide guidance to a plaintiff seeking to plead a conspiracy under Section 1.[154] In *High Fructose Corn Syrup*, Judge Posner noted several facts that the plaintiffs demonstrated to show the existence of "an explicit agreement, not merely a tacit one."[155] Market structure allegations – few competitors, opportunities to communicate, ease of identification of cheating by other industry members – were certainly part of what made a finding of conspiracy factually permissible. However, there were also numerous express oral and written statements implying the existence of an illegal agreement, including direct statements from defendants' management that the defendants had "an understanding . . . not to undercut each other's prices," and "our competitors are our friends."[156] Most significantly, two former executives of the primary defendant (who were in prison for fixing the price of a different product), took the Fifth Amendment and refused to answer questions relating to whether they had fixed prices of high fructose corn syrup, permitting an adverse inference from their silence. The Seventh Circuit held that these facts represented "sufficient admissible evidence in support of the hypothesis of a price-fixing conspiracy to prevent the grant of summary judgment to the defendants."[157]

As a practical matter, however, verbatim statements from defendants' executives implying the existence of an agreement are neither commonly known – at least at the pleading stage – nor required to state a conspiracy claim under Section 1.[158] Perhaps the most significant plus factors "are those that tend to show that the conduct would be in the parties' self-interest if all agreed to act in the same way but would be contrary to their self-interest if they acted alone."[159] Allegations of this sort were missing from the Amended Complaint in *Twombly*, and, as noted by the district court and the Supreme Court, all of the plaintiffs' conspiracy allegations were consistent with each defendant's individual economic interest.[160]

The outcome of *Twombly* is broadly consistent with the views advanced by Professor Turner in his seminal article, in which he states:

> The point is that conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts. Thus,

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152 *E.g., Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (rejecting monopolization claim under Sherman Act Section 2, 15 U.S.C. Section 2, against Verizon based on Verizon's purported failure to comply with the Telecommunications Act of 1996). Because the named plaintiffs in *Twombly* (and their lawyers, who represented the *Trinko* plaintiffs) were attempting to sidestep *Trinko*, one explanation for the Supreme Court's disposal of the *Twombly* Amended Complaint would be the court's desire to finish the job it had begun in *Trinko*. *See* Petition for a Writ of Certiorari, *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 550 U.S. ___ (No. 05-1126), 2006 WL 558418 (March 6, 2006), at *4.

153 *See Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006) (price discrimination); *Texaco, Inc. v. Dagher* 126 S. Ct. 1276 (2006) (joint ventures); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1462 (2006) (tying); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S. Ct. 1069 (2007) (predatory bidding); *Leegin Creative Leather Prods., Inc., v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (resale price maintenance).

154 *In Re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002) (Posner, J.).

155 *Id.* at 661.

156 *Id.* at 662-63.

157 *Id.* at 666.

158 *See, e.g., In re: Pressure Sensitive Labelstock Antitrust Litig.*, 356 F. Supp. 2d 484, 492 (M.D. Penn. 2005).

159 American Bar Ass'n Section of Antitrust Law, Antitrust Law Developments 12 (6th ed. 2007).

160 *But see In re: Pressure Sensitive Labelstock Antitrust Litig.*, 356 F. Supp. 2d at 492 (declining to dismiss conspiracy complaint in which the behavior that was allegedly inconsistent with each defendant's individual economic interest consisted of: 1) the existence of excess capacity in the labelstock industry; 2) an alleged lack of price competition; and 3) a statement by one defendant's CEO that price competition from a new entrant had "ruined the market," citing *Lum* and *Bogosian*). Faegre & Benson LLP represented two of the *Labelstock* defendants in a related federal merger enforcement action.

> conscious parallelism is not even evidence of agreement unless there are some other facts indicating that the decisions of the alleged conspirators were interdependent, that the decisions were consistent with the individual self-interest of those concerned only if they all decided the same way.[161]

Twombly's result is also consistent with Judge Posner's recognition that there are practical limits to expanding the reach of Section 1 to encompass litigating complaints that allege no more than conscious parallelism:

> In closing, might I suggest that if there is a good case to be made against the proposed employment of section 1 of the Sherman Act, it will be built on the practical difficulties of proving tacit collusion. That, rather than the doctrinal or remedial questions, is the heart of the problem and should be the focus of the debate.[162]

Thus, in *Twombly*, the Supreme Court premises its conclusion heavily upon fear of the overdeterrence that could result from allowing complaints pleading little more than similar actions by similarly situated competitors to survive motion to dismiss, when (in light of the court's refusal to reconsider *Theatre Enterprises*) such cases are substantively doomed.

The district court, the Second Circuit, and the Supreme Court each highlighted the problematic and burdensome discovery inherent in antitrust litigation. As noted, the Second Circuit went so far as to expressly invite the Supreme Court to "re-calibrate" the balance between the "colossal expense" of antitrust discovery and the ripple effect of the settlement of meritless claims by defendants to avoid this expense.[163]

In *Twombly*, the Supreme Court was surprisingly accepting of the Second Circuit's invitation to relieve the discovery burdens on antitrust defendants, as evinced by the court's holding and its devotion of several pages in its opinion to the burdensome nature of discovery and the case management challenges common to antitrust litigation. Standing alone *Twombly* need not mark a paradigm shift in discovery practice because it could be limited to a fairly narrow set of cases – Section 1 conspiracy claims which purport to premise an illegal agreement solely on parallel conduct among competitors. However, such limited application seems unlikely. After *Twombly* has had a few years to percolate downward through the federal court system, it may be identified as beginning an era of new limits on discovery in large civil cases, just as *Matsushita* ushered in a new era of judicial favor for summary judgments.

Twombly's greatest impact will occur as lower courts apply the plausibility standard under Rule 12 of the Federal Rules of Civil Procedure to dismiss cases beyond the realm of conspiracy claims founded on parallel conduct. If, as the majority insists, *Twombly* is not setting a heightened pleading standard unique to antitrust claims, then logically the case's reasoning applies to civil litigation in general. By reaching out to disparage *Conley v. Gibson*, the Supreme Court must be seen as allowing significantly freer rein to lower courts to dismiss complaints at the outset than has existed in recent memory.

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161 Turner, *supra* note 1, at 658.
162 Posner, *supra* note 1, at 1592.
163 Discovery is nonetheless an integral part of litigation, and courts are generally reluctant to provide relief to parties complaining of discovery burdens outside of the protections afforded by the Federal Rules of Civil Procedure. The recent amendments to the Federal Rules governing electronic discovery arguably increase the scope and expense of discovery for corporate defendants. Even though these amendments excuse the non-production of materials because of "undue burden or cost," courts have generally refused to afford corporate defendants blanket relief from the burdens of discovery. Factually, when the *Twombly* defendants assert that they have collectively spent "billions on regulatory compliance efforts, and having their market-opening efforts exhaustively scrutinized by the Department of Justice and by federal and state regulatory authorities," the burden of one more civil lawsuit does not appear so great. *See* Petition for a Writ of Certiorari, *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 550 U.S. ___ (No. 05-1126), 2006 WL 558418 (March 6, 2006), at *4.