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TWOMBLY: ANOTHER SWING OF THE PLEADING PENDULUM

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Ever since the Supreme Court enacted the Federal Rules of Civil Procedure in 1938, courts have struggled to resolve the inherent tension between the principles embodied in Rules 1 and 8. Rule 1 mandates that the Rules be "construed and administered to secure the just, speedy, and inexpensive determination of every action."[1] On its face, Rule 8(a) requires that a complaint need contain only a "short and plain statement of the claim showing that the pleader is entitled to relief."[2] A literal application of the "notice pleading" standard of Rule 8 would open the door to discovery for virtually every plaintiff as long as the complaint were minimally sufficient to put the defendant on notice of the claim.[3] When combined with the liberal discovery provisions of the Federal Rules,[4] literal adherence to Rule 8 could obviously thwart the "just, speedy, and inexpensive determination of every action" promised by Rule 1.

Historically, federal district and appellate courts have tried to mitigate the costs and burdens that defendants must bear in antitrust and other complex litigation by requiring plaintiffs to allege more facts than might be required by a bare-bones reading of Rule 8. Although the Supreme Court has indicated in the past that it recognizes the courts' role in mitigating those costs and burdens by weeding out baseless cases,[5] in practice the Court has reined in many efforts by the lower courts to perform that gatekeeper role.[6] The recent decision in *Bell Atlantic Corp. v. Twombly*,[7] however, may reflect a realization by the Court that the pleading pendulum had swung too far away from the principles of Rule 1. *Twombly*, therefore, may reset the balance between pure notice pleading, which increases plaintiffs' access to the courts, and some form of more particularized pleading, which advances the goal of speedy and inexpensive judicial determinations.

In *Twombly*, the Court held that allegations of parallel business conduct accompanied by a bare assertion of conspiracy are not sufficient to state a claim under Section 1 of the Sherman Act. The question before the Court was "[w]hether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. Section 1, if it alleges that the defendants engaged in parallel conduct and adds a bald assertion that the defendants were participants in a 'conspiracy,' without any allegations that, if later proved true, would establish the existence of a conspiracy under the applicable legal standard." The Court answered "no," rejecting the liberal pleading standard adopted by the Second Circuit Court of Appeals.

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1 Fed. R. Civ. P. 1.
2 Fed. R. Civ. P. 8(a).
3 *See Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 513-14 (2002).
4 Federal Rule of Civil Procedure 26 entitles a party to "discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party."
5 *See, e.g.*, *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).
6 *See, e.g.*, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Swierkiewicz*, 534 U.S. at 515.
7 127 S. Ct. 1955 (2007).

Had the Court limited its analysis to what inferences may reasonably be drawn from parallel conduct, antitrust practitioners would have found little remarkable about this decision. The Court went on, however, expressly to reject the Second Circuit's literal interpretation of oft-quoted language in *Conley v. Gibson*,[8] in which the Supreme Court, construing Rule 8, stated 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."[9] Although plaintiffs have long relied on this language in seeking to avoid dismissal, the Court held that "after puzzling the profession for 50 years, this famous observation has earned its retirement."[10]

Conley's "no set of facts" language has been cited thousands of times by litigants and judges alike. It is not surprising, therefore, that some observers have objected to the retirement of this standard as a watershed departure that will infuse an unwelcome subjectivity into motions to dismiss. A careful analysis of pleading trends in antitrust cases, however, suggests that some flexibility has coexisted with *Conley* for decades. In the antitrust context, retirement of *Conley's* "no set of facts" language may simply recalibrate court rhetoric to be more in line with reality. Although *Twombly* likely will make it easier for defendants to secure the dismissal of weak antitrust claims, the decision might not have as drastic an effect on antitrust practice as one might initially suspect. In other areas of the law, however, *Twombly* should lead to far more success by defendants in having flimsy complaints dismissed.

Background of *Bell Atlantic Corp. v. Twombly*

As part of the breakup of AT&T, seven regional operating companies (the "Baby Bells") were spun off to provide local telephone service pursuant to a regulatory regime that gave them exclusive franchise arrangements in their designated geographic areas. Congress eliminated these arrangements under the Telecommunications Act of 1996 and required the Baby Bells to sell access to their local exchange networks to new competitors. Plaintiffs alleged that the Baby Bells conspired to keep new competition out of their respective territories, thereby restraining competition in the market for local telephone and high-speed internet access and forcing consumers to pay supra-competitive prices. Plaintiffs supported their claim primarily by pointing to parallel conduct whereby the Baby Bells declined to enter each other's territories despite geographic convenience and statements acknowledging they could do so cost-effectively.

The district court dismissed the complaint. The court concluded that plaintiffs failed to allege "facts that, given the nature of the market, render the defendants' parallel conduct, and the resultant state of the market, suspicious enough to suggest that defendants are acting pursuant to a mutual agreement."[11] The district court held that the plaintiffs did not allege facts sufficient to support a claim for conspiracy under the notice pleading standard of Rule 8.[12]

The Second Circuit vacated this opinion, holding that the plaintiffs' allegations of parallel conduct and a conspiracy to maintain monopoly conditions were sufficient to satisfy the modest standard imposed by Rule 8. Relying on *Conley v. Gibson*, the court stated that "to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate the particular parallelism asserted was the product of collusion rather than coincidence."[13]

The Supreme Court reversed the Second Circuit, holding that allegations of parallel conduct and a bare assertion of a conspiracy do not state a claim under Section 1 of the Sherman Act. Even consciously parallel business conduct, in which firms in a concentrated market recognize their shared economic interdependence with respect to price and output decisions, is not in itself unlawful

8 355 U.S. 41, 45-46 (1957).
9 355 U.S. at 41 (emphasis added).
10 127 S. Ct. at 1969.
11 *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174, 182 (S.D.N.Y. 2003).
12 *Id.* at 181.
13 *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005).

without some evidence of agreement. Thus, to state a claim for conspiracy under Section 1 of the Sherman Act, a plaintiff must allege "enough factual matter (taken as true) to suggest that an agreement was made."[14]

The Court recognized the dangers of permitting cases to go forward based solely on allegations of parallel conduct and required that such allegations "be placed in a context that raises a suggestion of a preceding agreement."[15] The Court noted that it would not suffice to hope that groundless conspiracy claims would be "weeded out" during discovery or at summary judgment, because "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."[16]

The Court did not elaborate on what "further circumstance" or "factual enhancement" would be required to survive a motion to dismiss. The Court simply concluded that in this case, "nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy."[17] Here, the "economic incentive to resist [new competition] was powerful" and the "natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing."[18]

The Pleading Pendulum

Until the Second Circuit's decision in *Twombly*, all (or almost all) lower courts required complaints to contain sufficient factual allegations to support antitrust conspiracy claims, while paying lip service to *Conley*. The Supreme Court, on the other hand, has reined in the lower courts from time to time when it perceived them to have strayed too far from the *Conley* standard. Put another way, the lower courts have favored quick and inexpensive judicial determinations as implied by Rule 1, but the Supreme Court has kept them in check by emphasizing the notice pleading requirements of Rule 8. *Twombly* appears to represent a realization by the Court that it had unduly tilted the balance by its overly literal reading of Rule 8.

Early Notice Pleading

A good place to start our analysis is the Second Circuit's 1957 decision in *Nagler v. Admiral Corp.*,[19] which was written by the principal drafter of the Federal Rules of Civil Procedure, Charles E. Clark. In *Nagler*, as in *Twombly*, the Second Circuit addressed a conspiracy claim based on purely parallel conduct. Unlike the Supreme Court fifty years later, Chief Judge Clark held that although the complaint "lack[ed] a direct allegation that the defendants conspired together," the "trier of facts may draw an inference of agreement or concerted action from the 'conscious parallelism of the defendants' acts."[20] Chief Judge Clark noted that when the Federal Rules were being drafted, many defense lawyers had advocated for more particularized pleading in the antitrust context because "antitrust litigation may be of wide scope and without a central point of attack, so that defense must be diffuse, prolonged, and costly."[21] Indeed, by this time, many district court judges were already "treat[ing] it as accepted law that some special pleading" was "required in antitrust cases."[22] In no uncertain terms, Chief Judge Clark rejected the idea that there could be any special exception to Rule 8 in antitrust cases.[23] Such arguments, he reported, had been advanced and rejected when the Rules were adopted.[24]

Later the same year, the Supreme Court decided *Conley v. Gibson*.[25] The Court embraced Chief Judge Clark's vision of notice pleading and instructed that under Rule 8, a plaintiff is not

14 127 S. Ct. at 1965.
15 *Id.* at 1966.
16 *Id.* at 1967.
17 *Id.* at 1971.
18 *Id.* at 1972.
19 *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957), *overruled in part, Twombly,* 127 S. Ct. at 1968 n.7.
20 *Id.* at 325.
21 *Id.* at 322.
22 *Id.*
23 *Id.* at 322-23 ("[I]t is quite clear that the federal rules contain no special exceptions for antitrust cases.")
24 *See id.*
25 355 U.S. 41 (1957).

required "to set out in detail the facts upon which he bases his claim."[26] In language that would come to haunt courts and defense counsel for the next fifty years, the Court held 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."[27]

Over the following decades, the Supreme Court repeatedly reemphasized the *Conley* standard.[28] The Court made clear that there were no heightened pleading requirements for antitrust complaints.[29] In 1980, for example, the Court unambiguously declared that *Conley's* "no set of facts" "rule applies with no less force to a Sherman Act claim."[30]

Nevertheless, a majority of lower courts quietly veered away from the pure notice pleading requirement laid down by Chief Judge Clark and the *Conley* Court. The lower courts had to contend with expanding dockets and antitrust complaints that often were lacking in substance. Courts responded to these demands in two ways. Some courts chose to interpret *Conley* flexibly, developing principles that anticipated the standard now announced by the *Twombly* Court. Other courts chose effectively to import a heightened pleading standard from Rule 9(b), an approach that was to be expressly rejected by the Supreme Court.

Flexible Interpretation of *Conley*

The Second Circuit shifted away from bare-bones notice pleading in antitrust cases in 1972, when it dismissed a complaint under Section 1 of the Sherman Act for failure to allege sufficient facts. In *Heart Disease Research Foundation v. General Motors Corp.*,[31] although the court acknowledged that the plaintiff alleged four car manufacturers had conspired to suppress the development of motor vehicle pollution control devices, it upheld the dismissal of the complaint.[32] Under a literal reading of *Conley* and the Second Circuit's own precedent, this allegation likely would have provided adequate notice to the defendants of the nature of the claim.[33]

With language that could easily be mistaken for a quote from the Supreme Court's *Twombly* decision thirty-five years later, the Second Circuit held that "a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal."[34]

In 1979, the Fifth Circuit similarly departed from pure notice pleading in *Larry R. George Sales Co. v. Cool Attic Corp*.[35] In contrast to the *Conley*-era *Nagler* decision, the Fifth Circuit held that a plaintiff failed to state a claim under Section 1 of the Sherman Act because the complaint contained only a "general allegation of conspiracy."[36] Foreshadowing the Supreme Court's analysis in *Twombly*, the Fifth Circuit rejected this as "a mere allegation of a legal conclusion [that] is inadequate of itself to state a cause of action."[37] However, the Fifth Circuit also foreshadowed a shift in the direction of a Rule 9(b)-like heightened pleading standard in antitrust cases discussed below: Citing its own pre-*Conley* precedent, the court specified that a "pleader must allege the facts constituting the conspiracy, its object, and accomplishment."[38]

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26 *Conley v. Gibson*, 355 U.S. at 47 ("[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.").
27 *Id.* at 45-46.
28 *See, e.g.*, *Scheuer v. Rhodes*, 416 U.S. 232, 234 (1974) ("[I]t may appear on the face of the pleading that recovery is very remote and unlikely but that is not the test."); *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231 (1959) (reversing dismissal of complaint for being too vague).
29 *See McClain v. Real Estate Bd. of New Orleans*, 444 U.S. 232 (1980); *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976) (reversing dismissal of complaint for failure to state a claim under the Sherman Act); *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962) (instructing that dismissals should be granted sparingly in antitrust cases where the proof is largely in defendants' hands).
30 444 U.S. 232, 246 ("It is axiomatic that a complaint should not be dismissed 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.' This rule applies with no less force to a Sherman Act claim ….").
31 *Heart Disease Research Foundation v. Gen. Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972).
32 463 F.2d at 100.
33 *Cf. Nagler*, 248 F.2d 319.
34 463 F.2d at 100.
35 *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 270, 273 (5th Cir. 1979) ("With all deference to the [*Conley*] rule recounted above, the Court is of the opinion that Plaintiff's Fourth Amended Complaint must be dismissed ….").
36 587 F.2d 266, 273.
37 *Compare id.* at 273, *with Twombly*, 127 S. Ct. at 1970 ("Although in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations.").
38 *Larry R. George Sales Co.*, 587 F.2d at 273 (citing *Nelson Radio and Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 913-14 (5th Cir. 1952)).

Although courts continued to quote *Conley's* "no set of facts" language,[39] as the Supreme Court itself was to note in *Twombly*,[40] most courts came to adopt a flexible standard that was closer to that used by the Second Circuit in *Heart Disease Research Foundation* than to the bare-bones standard of *Conley* itself. As Judge Posner remarked in 1984, "[a]lthough the exceedingly forgiving attitude toward pleading deficiencies that was expressed … in *Conley v. Gibson* … continues to be quoted with approval, it has never been taken literally."[41] Indeed, one commentator has suggested that if *Conley's* "no set of facts" language were taken literally, very few, if any, complaints would have been dismissed in the last half-century.[42]

Heightened Pleading Requirements

Beginning in the 1980s, several courts went further than a mere creative reading of *Conley*, adopting heightened pleading requirements akin to those of Rule 9(b).[43] Although this trend originated in the context of civil rights litigation,[44] it also was felt in antitrust cases, particularly following the Supreme Court's 1983 decision in *Associated General Contractors of California v. California State Council of Carpenters*.[45]

In *Associated General Contractors*, the Supreme Court affirmed the dismissal of an antitrust complaint based on plaintiff's lack of standing.[46] In dicta, the Court noted that the alleged violation was so improbable that to assume there was a violation stretched the rule of *Conley* too far.[47] The Court added that "in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."[48]

Several courts quickly seized upon these dicta to require that plaintiffs in antitrust cases allege facts with some degree of specificity.[49] At least some courts saw the *Associated General Contractors* footnote as constituting a "mandate" for greater specificity in antitrust pleading, but there was substantial confusion as to the degree of specificity required to survive a motion to dismiss.[50] For example, some courts required particularized allegations of fact that described the period, object, accomplishments, or actions specific to an allegation of conspiracy.[51] Others simply concluded with little analysis that allegations concerning antitrust injury,[52] market definition,[53] or monopoly power[54] were not sufficiently specific or particularized to survive dismissal. What was common to these cases, however, was an emphasis on the expense and burden imposed on defendants in antitrust cases as a reason to require plaintiffs to plead with some specificity.[55]

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39 *Id.*
40 *See* 127 S. Ct. at 1969; *see also id.* at 1966.
41 *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) (internal citations omitted).
42 *See* Geoffrey C. Hazard, Jr., From Whom No Secrets Are Hid, 76 Tex. L. Rev. 1665, 1685 (June 1998) ("Literal compliance with *Conley v. Gibson* could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment.").
43 *See, e.g.*, *Valley v. Maule*, 297 F. Supp. 958, 960-61 (D. Conn. 1968) ("It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims."); *compare* Fed. R. Civ. P. 1, *with* Fed. R. Civ. P. 8(a).
44 *See* Christopher M. Fairman, Heightened Pleading, 81 Tex. L. Rev. 551, 551-52 (Dec. 2002).
45 459 U.S. 519 (1983).
46 *Id.*
47 459 U.S. at 528 n.17.
48 *Id.*; *see also* Christopher M. Fairman, The Myth of Notice Pleading, 45 Ariz. L. Rev. 987, 1012 (Winter 2003).
49 *See Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1359 & n.2 (10th Cir. 1989) (affirming dismissal and noting costs of antitrust litigation merit particularity of pleading "in spite of the liberal pleading requirements of the Federal Rules of Civil Procedure"); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106-07 (7th Cir. 1984) (justifying heightened pleading based on costs of antitrust litigation and increasing caseloads with citation to *Associated General*); *Sutliff, Inc.*, 727 F.2d at 654 (same); *Futurevision Cable Sys. of Wiggins, Inc. v. Multivision Cable TV Corp.*, 789 F. Supp. 760, 771-72 (S.D. Miss. 1992) (dismissing complaint for failure to meet mandated *Associated General* standard); *TV Commc'ns Network, Inc. v. ESPN, Inc.*, 767 F. Supp. 1062, 1070 (D. Colo. 1991) (concluding plaintiff failed to plead with sufficient particularity under "mandated" heightened standard from *Associated General*), *aff'd*, 964 F.2d 1022 (10th Cir. 1992); *Garshman v. Universal Res. Holding, Inc.*, 641 F. Supp. 1359, 1367 (D.N.J. 1986) ("[C]ourts have determined that 'the heavy costs of modern federal litigation, especially antitrust litigation, and the mounting caseload pressure on the federal courts,' militate in favor of requiring some reasonable particularity in pleading violations of the federal antitrust laws."), *aff'd*, 824 F.2d 223 (3d Cir. 1987); *but see Baxley-DeLamar Monuments, Inc. v. Am. Cemetery Ass'n*, 843 F.2d 1154-56 (8th Cir. 1988) (reversing dismissal based on Rule 8); *Lombard's Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985) ("Notice pleading is all that is required for a valid antitrust complaint.); *Elec. Data Sys. Corp. v. Computer Assocs. Int'l, Inc.*, 802 F. Supp. 1463, 1466 (N.D. Tex. 1992) (rejecting heightened pleading in antitrust cases); *GTE Data Servs., Inc. v. Elec. Data Sys. Corp.*, 717 F. Supp. 1487, 1489 (M.D. Fla. 1989) (same).
50 *See, e.g.*, *TV Commc'ns Network, Inc.*, 767 F. Supp. at 1070; *see also* Fairman, *supra*, 45 Ariz. L. Rev. at 1017.
51 *See, e.g.*, *Five Smiths, Inc. v. Nat'l Football League Players Ass'n*, 788 F. Supp. 1042, 1048 (D. Minn. 1992) ("[G]eneral allegations of conspiracy, without a statement of 'the facts constituting the conspiracy, its object and accomplishment,' are inadequate to state a cause of action.")(citation omitted); *Garshman v. Univ. Resources Holding, Inc.*, 641 F. Supp. 1359, 1367, 1370 (D.N.J. 1986) (noting mounting caseload militates in favor of particularity and requiring additional facts regarding period, object, and actions specific to conspiracy).
52 *See, e.g.*, *Valley Prods. Co. v. Landmark*, 128 F.3d 398, 404 (6th Cir. 1997) (citing *Associated General* and discussing Sixth Circuit's unique "necessary predicate" antitrust injury test).
53 *See, e.g.*, *Syncsort, Inc. v. Sequential Software, Inc.*, 50 F. Supp. 2d 318, 328 (D.N.J. 1999) (requiring specificity and particularity for monopoly power and market definition).
54 *See id.*
55 *See cases supra* nn.49-51.

In 1993, the Supreme Court rebuffed this expansion of the reach of Rule 9(b). In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*,[56] a Section 1983 civil rights case that had been dismissed below for failure to allege facts with sufficient particularity, the Court reaffirmed *Conley* and announced that Rule 9(b) contained the only permissible exceptions to Rule 8(a)'s notice pleading requirements.[57] In contrast to its later analysis in *Twombly*, the Court stated that absent an amendment to the Federal Rules, federal courts and litigants must rely on summary judgment and control of discovery "to weed out" unmeritorious claims.[58]

In 1993, the Court also reaffirmed the *Conley* "no set of facts" standard in an antitrust context in *Hartford Fire Insurance Co. v. California*.[59] The Court liberally construed allegations in a Section 1 complaint and affirmed the denial of a motion to dismiss. Invoking *Conley*, the Court held that the complaint was sufficient even though the plaintiffs would have to prove additional facts not set forth in the complaint in order to prove an antitrust violation.[60]

Despite the Court's unambiguous analysis in *Leatherman*, some lower courts mistakenly interpreted the holding as applying only to Section 1983 cases.[61i] The Court put this thinking to rest in 2002, when it held unanimously in another civil rights case, *Swierkiewicz v. Sorema*,[62] that an employment discrimination plaintiff need not plead a prima facie case of discrimination to withstand a motion to dismiss.[63] The Court emphasized that Rule 8(a)'s simplified pleading standard applies "to all civil actions," with only the limited exceptions set forth in Rule 9(b).[64]

Leatherman, *Hartford Fire Insurance*, and *Swierkiewicz* curtailed the use of heightened pleading standards in antitrust cases and pushed the pleading pendulum back in the direction of pure notice pleading.[65] Thus, while it became more difficult once again to dismiss flimsy antitrust complaints, many courts (looking back to cases like *Heart Disease Research Foundation*) retained a flexible interpretation of *Conley*.[66] For example, some courts evaluating the sufficiency of conspiracy allegations suggested that plaintiffs should not gain the benefit of imagination to consider what potential, unalleged facts might support an inference of agreement.[67] Indeed, the Supreme Court had never indicated that it believed it reasonable to infer a conspiracy solely from parallel behavior (or any other conduct that is as consistent with competition as with an illegal conspiracy).[68]

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56 507 U.S. 163, 166 (1993).
57 *Id.* at 168.
58 *Compare id.* at 168-69, *with* 127 S. Ct. at 1967.
59 509 U.S. 764 (1993).
60 *Id.* at 811 (noting allegations "may amount to a boycott if the plaintiffs can prove additional facts").
61 *See* Fairman, *supra*, 45 Ariz. L. Rev. at 996.
62 534 U.S. 506 (2002).
63 *Id.* at 515.
64 *Id.* at 514.
65 *See, e.g.*, *Theme Promotions, Inc. v. News. Am. FSI*, 35 Fed. App'x 463, 465 (9th Cir. 2002) ("Antitrust cases do not require heightened form of pleading."); *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) ("No heightened pleading requirements apply in antitrust cases."); *S. Austin Coalition Cmty. Council v. SBC Comme'ns, Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001) (Easterbrook, J.) (rejecting argument that antitrust complaints must be more thorough than normal civil complaints and citing *Leatherman*); *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 876-77 (3d Cir. 1995) (rejecting impatience with notice pleading embodied in Rules based on *Leatherman*); *Rozema v. Marshfield Clinic*, No. 96C592C, 1997 U.S. Dist. LEXIS 8261, at *16-18 (D. Wis. 1997) ("[C]ases that seemingly apply a heightened pleading requirement for antitrust claims cannot be considered authoritative after *Leatherman*."); *Poindexter v. Nat'l Mortgage Co.*, No. 94C5814, 1995 U.S. Dist. LEXIS 5396, at *5-6 (N.D. Ill. Apr. 18, 1995) ("The Seventh Circuit's flirtation with heightened pleading requirements ended with the Supreme Court's reaffirmation of liberal pleading standards in *Leatherman v. Tarrant County* ….") (citing *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778, 782 (7th Cir. 1994) (Posner, J.)).
66 *See Dickson v. Microsoft Corp*, 309 F.3d 193, 220 (4th Cir. 2002) (dissenting opinion noting majority was wrong under *Conley* because "[t]here is simply no conceivable argument from which one could conclude … that the defendants are not on notice of the claims against them and the grounds on which they rest"); *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 140 (2d Cir. 1998) (quoting *Conley* but dismissing complaint for failure to allege antitrust injury despite allegation that "competition [was] eliminated for the repair and servicing of Rolls Royce automobiles for 80% of the market in New York City"); *Kyle v. Morton High Sch.*, 144 F.3d 448, 455 (7th Cir. 1998) (endorsing Judge Posner's statement that *Conley* has never been taken literally); *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1154 (9th Cir. 1989)(discussing "conflicting guideposts" of *Conley's* requirement that "some facts must indeed be pleaded"); *DM Research, Inc. v. College of Am. Pathologists*, 2 F. Supp. 2d 226, 228 (D.R.I. 1998) (quoting *Conley's* no set of fact standard but requiring specificity for each element), *aff'd* 170 F.3d 53 (1st Cir. 1999).
67 *See DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53 (1st Cir. 1999) ("[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation - for example, identifying a written agreement or even a basis for inferring a tacit agreement - but a court is not required to accept such terms as a sufficient basis for a complaint."); *Estate Constr. Co. v. Miller & Smith Holding Co.*, 14 F.3d 213, 221 (4th Cir. 1994) ("[I]t is not [ ] proper to assume that plaintiffs can prove facts that they have not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.") (citing *Associated General*, 459 U.S. at 526); *In re Elevator Antitrust Litig.*, No. 04CV1178, 2006 U.S. Dist. LEXIS 34517, at *30 (S.D.N.Y. May 26, 2006) ("[T]he mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws.") (quoting *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984)); *In re Carbon Black Antitrust Litig.*, No. 0310191, 2005 U.S. Dist. LEXIS 660, at *31 (D. Mass. Jan 18, 2005) ("Simply claiming a conspiracy by pointing to parallel conduct, is not sufficient to plead a Section 1 case.").
68 *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) ("Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism … [is] not in itself unlawful …."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."); *Theatre Enter., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) (denying directed verdict because consciously parallel business conduct, standing alone, is insufficient to prove conspiracy).

Implications of the Supreme Court's Decision

It is ironic, in light of the Second Circuit's now-discredited approach to notice pleading in *Twombly*,[69] that the first court to anticipate the way in which the Supreme Court would eventually reconcile Rule 8 with the practical realities of antitrust litigation was the Second Circuit itself in *Heart Disease Research Foundation*, which required the allegation of at least some facts to support a reasonable inference of an agreement to restrain competition. As we discussed above, however (and as the Supreme Court noted in its *Twombly* opinion), most courts had long since found ways not to be bound too strictly by *Conley's* "no set of facts" language in antitrust cases, and thus the Supreme Court's decision likely will have relatively minor consequences in the context of motions to dismiss antitrust claims. Weak Sherman Act claims that would have been dismissed anyway will still be dismissed. Because the Supreme Court's consignment of *Conley* to the ashbin of history is not limited to antitrust cases, however, *Twombly* is likely to have very significant consequences for motions to dismiss more generally.

The only thing that may be surprising about *Twombly* in the antitrust context is that so many commentators and practitioners profess to have been surprised by it. The Supreme Court's requirement that a complaint must contain allegations "plausibly suggesting (not merely consistent with) [an] agreement"[70] fits easily within established antitrust principles. First, the facts contained in a complaint must be "plausible" in that, taken as a whole, they must make sense from an economic point of view.[71] The Court's citation to *DM Research v. College of American Pathologists* is instructive in this regard.[72] In *DM Research*, the First Circuit affirmed the grant of a motion to dismiss where it was clear from the complaint that the conspiracy as alleged was contrary to the defendants' economic self-interest.[73] Indeed, the requirement that the allegations of a complaint be generally plausible is not limited to antitrust and economic plausibility. Any complaint may be dismissed if it includes allegations of fact that undermine the plaintiff's claim. As Judge Posner has remarked, "a plaintiff can plead himself out of court: If he alleges facts that show he isn't entitled to a judgment, he's out of luck."[74]

Moreover, the Court's requirement that a complaint's allegations be "factually suggestive" of an agreement, rather than "factually neutral,"[75] reflects the principle that conscious parallelism, by itself, will not support a finding of concerted action.[76] Coupled with the established principle that a complaint must contain allegations of fact that, if proven at trial, would entitle the pleader to relief,[77] some courts had already required plaintiffs to allege facts beyond mere parallel conduct in order to survive a motion to dismiss a conspiracy claim.[78]

Although *Twombly* represents a final departure from the *Nagler* era of pure notice pleading,[79] antitrust practitioners are already well equipped to fill in the gaps needed to state a claim.[80]

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69 As explained by Areeda and Hovenkamp:

> [T]he Second Circuit's decision stretches the liberalized pleading standards of the Federal Rules of Civil Procedure very far. Parallel, interdependent prices contain at least a suggestion of conspiracy that renders a complaint plausible even though it does not name the 'plus factors' that will eventually have to be shown if summary judgment is to be avoided. However, parallel decisions by business firms not to enter new markets create no such inference. 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.

I Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application Paragraph 307d (1998-2006, Supp. June 2007).

70 127 S. Ct. at 1966.

71 *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 (noting a factual context can render a plaintiff's claim "implausible," meaning a claim "that simply makes no economic sense").

72 *See* 127 S. Ct. at 1966 & n.5 (citing *DM Research*, 170 F.3d at 56).

73 170 F.3d at 56.

74 *Early v. Bankers Life & Casualty Co.*, 959 F.2d 75, 79 (7th Cir. 1992) (citations omitted).

75 127 S. Ct. at 1966 & n.5.

76 *See* ABA Section of Antitrust Law, Antitrust Law Developments, 10 & n.56 (6th ed. 2007) ("Following [ ] Supreme Court decisions, lower courts consistently have held that conscious parallelism, by itself, will not support a finding of concerted action."). Under the *Monsanto-Matsushita* standard for summary judgment, a plaintiff attempting to prove the agreement element under Section 1 based on circumstantial evidence in a conscious parallelism case must prove additional facts, or "plus factors," that tend to exclude the possibility that the alleged conspirators acted independently. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 588; *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

77 *See* 127 S. Ct. at 1964-65; Fed. R. Civ. P. 8(a).

78 *See, e.g.*, *Paycom Billing Servs. v. MasterCard Int'l, Inc.*, 467 F.3d 282, 293 (2d Cir. 2006) (affirming dismissal of complaint where legal conclusion that defendants "conspired" was not supported by the facts that showed only largely parallel behavior in response to market forces); *In re Elevator Antitrust Litig.*, 2006 U.S. Dist. LEXIS 34517, at *30; *In re Carbon Black Antitrust Litig.*, 2005 U.S. Dist. LEXIS 660, at *31.

79 Although the Court's decision is couched in terms of a failure of *sufficient* notice to the defendants, the Court conceded that defendants had minimal notice of the plaintiffs' claim. *See* 127 S. Ct. at 1970 n.10 ("If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's references to an agreement among the ILECs would have given the notice required by Rule 8.").

80 For an example of a well pleaded Section 1 antitrust claim that was filed prior to *Twombly* that "easily met" the conspiracy element under *Twombly*, *see Omnicare Inc. v. UnitedHealth Group, Inc.*, No. 06 C 6235, 2007 WL 2875227, at *4-6 (N.D. Ill. Sept. 28, 2007) ("The court does not believe that *Bell Atlantic* alters the analysis on this issue."). In the interest of full disclosure, please note that authors Harvey Kurzweil and Susannah P. Torpey are counsel for plaintiff in this matter.

In addition to the Court's suggestion that factual allegations akin to direct evidence of a conspiracy (such as the time, place, and identity of the conspirators) will provide adequate notice of a Section 1 claim,[81] most courts have already identified "plus factors" that may allow a plaintiff to prove conspiracy absent direct evidence. It is likely that many courts will find allegations of one or more plus factors at the pleading stage to be sufficient to "nudge [a] claim across the line from conceivable to plausible."[82] Such plus factors may include allegations of: a motive to conspire; conduct that is contrary to a defendant's unilateral self-interest; artificial standardization of products; pricing or production that is out of step with market conditions; artificial output or quality restrictions; extraordinarily high benefits; pretextual explanations; patterns of antitrust violations; and even still (coupled with other plus factors), an opportunity to conspire.[83]

Following *Twombly*, it seems likely that the antitrust complaints most at risk of dismissal will be those filed upon breaking news of government investigations.[84] Lawyers who want to win the race to the courthouse to claim the position of lead counsel in follow-on class action lawsuits will now either have to wait for sufficient information to emerge from the investigation or conduct an "inquiry reasonable under the circumstances" themselves.[85] Of course, the impact of *Twombly* may be limited to some extent by Federal Rule of Civil Procedure 15(a), which permits one amendment as of right prior to responsive pleadings and otherwise embodies a liberal policy favoring amendment.[86]

Twombly may also be significant in close cases, because courts could rely on it to tip the balance one way or another depending on the likely discovery burdens to be placed on defendants.[87]Although the Supreme Court warned judges to be "cautious before dismissing an antitrust complaint in advance of discovery," some judges may now be more likely to grant motions to dismiss weak allegations that would expose defendants to extensive discovery demands.[88] Indeed, some courts already were including this balance in their calculation.[89]

Only time will tell if courts will resist the urge to classify factual allegations as implausible conclusions in efforts to ease the burden of their dockets. Should the balance swing too far away from open access to the courts, it is likely the Court will again emphasize that Rule 8 mandates a liberal approach to notice pleading and that there are limits to the logic of *Twombly*. In the meantime, it seems that much time and effort will be expended by both judges and litigants in attempting to distinguish factual allegations from conclusory ones.[90] As Wright and Miller have explained with reference to more particularized forms of pleading: "Unfortunately, as was amply demonstrated by years of frustrating experience, it was difficult, if not impossible, to draw meaningful and consistent distinctions between or among 'evidence,' 'facts,' and 'conclusions.'"[91]

The greatest impact of *Twombly* likely will be felt outside of the antitrust context. Without the contextual meaning of "plausible" and "factually suggestive" that is found within antitrust jurisprudence, it may be particularly tempting for courts to quote dicta from *Twombly* as a basis for dismissal in other contexts.[92] Several courts, for example, have already skipped over the

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81 127 S. Ct. at 1970 n.10.

82 *Id.*

83 *See* Antitrust Law Developments, *supra*, at 10-17 & nn.57-68; Areeda & Hovenkamp, *supra*, Paragraphs 1411-18, 1434. In *Twombly*, the Court indicated that an opportunity to conspire based on trade association activity alone is not a reasonable basis from which to infer an agreement. *See* 127 S. Ct. at 1971 n.12 (rejecting a suggestion in dissenting opinion that the plaintiffs' allegation of an unlawful conspiracy was plausible because the Baby Bells participated together in trade associations).

84 *Cf. In re Crude Oil Commodity Litig.*, No. 06 Civ. 6677, 2007 U.S. Dist. LEXIS 47902, at 12, 27 (S.D.N.Y. June 28, 2007)("The hearsay nature of these recitals [from complaints and settlements from government investigations and newspaper articles] underscores why they are an insufficient substitute for factual allegations, for 'plaintiffs cannot be permitted to free ride off the press or complaints of other parties filing similar lawsuits ….'"). Although this case was dismissed under Rule 9(b), the court's reliance upon *Twombly* for the standard of dismissal under Rule 12(b)(6) suggests the court would have likewise dismissed the claim under Rule 8. *See id.* at *12.

85 *See* Fed. R. Civ. P. 11(b).

86 *See* Fed. R. Civ. P. 15(a).

87 For examples of cases highlighting discovery burdens following *Twombly*, *see In re Elevator Litig.*, No. 06-3128, 2007 U.S. App. LEXIS 21086, at *7 n.4 (2d Cir. Sept. 4, 2007); *McCagg v. Marquis Jet Partners, Inc.*, No. 05 CV 10607, 2007 U.S. Dist. LEXIS 54516, at *10 (S.D.N.Y. July 27, 2007).

88 *Cf. Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962).

89 *See cases supra* nn.49-51; *see, e.g., DM Research, Inc.*, 170 F.3d at 55 (1st Cir. 1999) ("[T]he factual allegations must be specific enough to justify 'dragging a defendant past the pleading threshold.'") (citation omitted).

90 *See* Wright & Miller, *supra*, Section 1218.

91 *Id.*

92 *Compare Hyland v. Homeservices of America, Inc.*, No. 3:05CV612, 2007 U.S. Dist. LEXIS 65731, at *9-10 (W.D. Ky. Aug. 17, 2007) (*Twombly* "plausibility standard" met under Section 1 where plaintiffs alleged "more than parallel conduct" with "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement"), *and Behrend v. Comcast Corp.*, No. 03-6604, 2007 U.S. Dist. LEXIS 55952, at *21-22 (E.D. Pa. July 31, 2007) ("Clear allegations of actual agreements between Comcast and its competitors" were "sufficient to show a plausible contract, combination or conspiracy."); *with Vitola v. City of New York*, No. 07-CV-3678, 2007 U.S. Dist. LEXIS 71067, at *10-11 (E.D.N.Y. Sept. 25, 2007) (dismissing pro se Section 1983 claim because the claim in *Twombly* "was certainly at least as plausible as [plaintiff's] allegation" despite concluding the claim at issue was "certainly not entirely implausible").

(uncontroversial) language in *Twombly* that factual allegations must be taken as true for purposes of a motion to dismiss, to emphasize only that a claim must be plausible in that "[f]actual allegations must be enough to raise a right to relief above the speculative level."[93] In another case, the Second Circuit remarked that although the Court in *Twombly* is not requiring "a *universal* standard of heightened fact pleading," its "plausibility standard [ ] obliges a pleader *to amplify a claim* with some factual allegations in those contexts where such amplification is needed to render the claim plausible."[94] On a motion for a more definite statement, yet another court has stretched *Twombly's* logic even farther, concluding that while "the allegations contained in [the] second amended complaint *are sufficient for [the] court to infer that Plaintiff is entitled to relief*, [they] do not constitute a 'showing' of entitlement beyond mere speculation."[95] Without any reference to *Leatherman*, the court concluded in that Section 1983 civil rights case that a "more particularized complaint" was warranted even though it "place[d] a heightened burden on [the] [pro se] [p]laintiff."[96] Here, it appears that the pleading pendulum again is in motion, swinging farther than might be permissible within the *Leatherman - Swierkiewicz* framework. Although the Supreme Court (writing only two weeks after *Twombly* itself) may have already sought to temper such expansive readings of the *Twombly* rule,[97] it is inevitable that the absence of explicit guidance will again lead to disagreement among the courts.

POSTSCRIPT

This article was prepared in advance of the Ninth Annual Sedona Conference on Antitrust Law & Litigation in October 2007, not long after *Twombly* had been decided and thus at a time when the longer-term implications of the Supreme Court's decision could only be predicted. Since then, there has been a torrent of decisions by the lower courts citing *Twombly*. Some clear trends seem to be emerging and those trends are consistent with predictions in this article. As the author of a recent empirical study concluded: "[W]hile some commentators have suggested that *Twombly* will only apply in the antitrust context, this study shows that courts have applied the decision in every substantive area of law governed by Rule 8. Antitrust cases comprised only 3.7% (40 out of 1075) of all cases citing *Twombly* in this study: the remainder is representative of every substantive area of law."[98] Interestingly, the study further concluded that although "the new linguistic veneer that the Court has placed on Rule 8(a) and 12(b)(6)" had only limited impact on motions to dismiss generally (including antitrust), "the one area in which this study *does* show a significant departure from previous dismissal practice is the civil rights field," in which the dismissal rate "has spiked."[99]

93 *See, e.g.*, *Walker v. S.W.I.F.T. SCRL*, No. 06C3447, 2007 U.S. Dist. LEXIS, at *6-7 (N.D. Ill. June 12, 2007).
94 *Iqbal v. Hasty*, No. 055768, 2007 U.S. App. LEXIS 13911, at *35 (2d Cir. June 14, 2007) (emphasis added); *Goldstein v. Pataki*, No. 06CV5827, 2007 U.S. Dist. LEXIS 41216, at *103 (E.D.N.Y. June 6, 2007) (concluding plaintiffs failed to meet "plausibility standard" where "facts alleged by Plaintiffs … are as consistent with lawful behavior as with unlawful behavior").
95 *Fisher v. Caruso*, No. 03-71804, 2007 U.S. Dist. LEXIS 45366, at *10-11 (E.D. Mich. June 22, 2007) (emphasis added).
96 *Id.* at *12.
97 In *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), decided two weeks after *Twombly*, the Court considered whether sparse allegations that an inmate pro se plaintiff was endangered by prison officials were sufficient to state a claim under the Eighth Amendment. The Court began its analysis by citing *Twombly* for the traditional principles that "specific facts are not necessary" and that a "short and plain statement" of a claim "need only give the defendant fair notice of what the claim is and the grounds upon which it rests." 127 S. Ct. at 1086. The Court vacated the dismissal of the complaint and held that the complaint cannot be dismissed on the ground that the factual allegations were too conclusory. *Id.*
98 Kendall W. Hannon, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 Notre Dame L. Rev. __ (forthcoming 2008), *available* at http://ssrn.com/abstract=1091246.
99 *Id.* (emphasis in original).