Legal Backgrounder

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BELL ATLANTIC CORP. v. TWOMBLY: A TECTONIC SHIFT IN PLEADING STANDARDS (OR JUST A TREMOR)?

by

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On May 21, 2007, the Supreme Court handed down its opinion in *Bell Atlantic Corporation v. Twombly*, 127 S. Ct. 1955 (May 21, 2007), rev'g 425 F.3d 99 (2d Cir. 2005). As expected, the Court reversed the decision of the U.S. Court of Appeals for the Second Circuit. This ruling effectively reinstated the district court's decision to dismiss an antitrust complaint filed against Bell Atlantic and the other major telecommunications companies. The *Twombly* Court held that the plaintiff had failed to allege facts sufficient to support its claim of a horizontal conspiracy among the nation's leading telecom providers. *Twombly*, 127 S. Ct. at 1974.

En route to this unremarkable conclusion, the Court took an unexpected detour. It reassessed the half-century old case *Conley v. Gibson*. As virtually every living attorney knows, *Conley* put an oft-quoted gloss on the pleading standard established by the Federal Rules of Civil Procedure: "[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." 355 U.S. 41, 45-46 (1957). With a wave of the pen, the *Twombly* Court ushered "this famous observation [into] retirement." *Twombly*, 127 S. Ct. at 1969.

The Court's decision has been greeted with cheers by the defense bar and jeers by plaintiffs' attorneys. Much of this has nothing to do with *Twombly* itself. Several other cases decided by the Supreme Court during this term seemingly hand important victories to defendants in civil litigation, including *Watters v. Wachovia Bank,* and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* Given the general perception that the Supreme Court has shifted decisively in favor of defendants, both sides have interpreted the abrogation of *Conley* as signaling a fundamental shift in pleading requirements.

While *Twombly* will doubtless be important for antitrust cases, particularly civil conspiracy cases like the case itself, we believe that its broader impact is less certain. The question before the Court—the facts necessary to support the inference of an actionable "contract, combination . . ., or conspiracy in restraint of trade"—may limit its significance. *Id.* at 1961. And a decision issued shortly after *Twombly*, *Erickson v. Pardus*, No. 06-7317, 127 S. Ct. 2197 (June 4, 2007) (per curiam), *rev'g* 198 Fed. Appx. 694 (10th Cir. 2006), suggests that the

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Supreme Court itself views *Twombly* more narrowly than some might wish.

Background. *Twombly* has its roots in the break-up of AT&T and the twenty-plus years of industry upheaval that followed. In 1974, the Department of Justice brought a Sherman Act Section Two case that charged AT&T with monopolizing every facet of the telecommunications industry—from local and long-distance telephone service to telecommunications equipment. In 1984, this suit ended with a consent decree supervised by Judge Harold Green. Although AT&T stayed in the long-distance business, its local telephone business was split among seven Regional Bell Operating Companies ("RBOCs"). The industry remained under the supervision of Judge Green for more than a decade.

Congress replaced Judge Green's consent decree with the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996). Repealing the judicially-enforced separation between the local and long-distance businesses, the Act allowed long-distance companies to offer local telephone services. And upon satisfying the Federal Communications Commission requirement that it had opened its local market to competition, an RBOC could offer long distance services to its customers.

The changes in the telecom industry have not been limited to shifts in the regulatory landscape. The technological face of the industry looks very different than it did when Judge Green issued his consent decree. In 1984, the Internet as we now know it did not exist. It was closed to commercial traffic and operated by an obscure research agency inside the Department of Defense. Moreover, mobile phones were a novelty item. Motorola introduced the first commercially available mobile phone in 1983. The DynaTAC 8000X weighed 28 ounces and was 10 inches high.

Similarly, the corporate landscape bears little resemblance to the one conceived by judicial decree in 1984. Seven RBOCs have become four, and they have bought up the remnants of the once-independent long-distance companies. Amidst the general upheaval, though, one feature of the industry has remained relatively constant: The local telephone business is fairly concentrated in most of the United States. Although the RBOCs have opened their respective territories to competitors, they generally have not competed for local business on one another's home turf.

Enter William Twombly. He and another plaintiff sued Bell Atlantic and the other former RBOCs. They purported to represent every local telephone and Internet subscriber in the United States. *Twombly*, 127 S. Ct. at 1962. Their complaint alleged that the state of competition in the telecommunications industry was best explained by a grand conspiracy between Bell Atlantic and its competitors. The plaintiffs did not allege any facts to support the existence of an agreement in the sense that the complaint did not allege where, when, or even who from the various companies had entered into the claimed agreement. Instead, they alleged, "on information and belief," that the agreement could be inferred from the companies' observed parallel conduct. *Id.* at 1962-63.

The district court dismissed the complaint, holding that the plaintiffs had not offered facts sufficient to support the existence of the alleged conspiracy. *Twombly v. Bell Atlantic Corp*., 313 F. Supp. 2d 174, 189 (2003). The district court observed that the mutual decision not to enter one another's territories could be in the independent interest of each defendant. *Id.* at 188. The court found that the plaintiffs had not alleged any additional facts (*i.e.*, so-called antitrust plus factors) to suggest either that the parallel conduct was the product of an agreement or that it was better explained by a conspiracy than by independent actions. *Id.* at 188-89. Drawing on *Conley's* "no set of facts" rule, the Second Circuit reversed, holding that an antitrust plaintiff was not required to plead "plus factors" in his complaint. *Twombly v. Bell Atlantic Corp*., 425 F.3d 99, 114 (2005).

The Supreme Court's Opinion. The Supreme Court reversed, with Justice Stevens, joined by Justice Ginsburg, dissenting. It is tempting to use the Court's abrogation of *Conley* as a launching pad for speculating about the opinion's potentially sweeping impact. A more measured review of the opinion suggests that the case, although important, may not precipitate a revolution in federal civil litigation.

Twombly addresses a seemingly narrow issue: the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct. The majority's analysis begins with a familiar antitrust principle: "§1 of the Sherman Act 'does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination or conspiracy.'" *Twombly*, 127 S. Ct. at 1964 (quoting *Copperweld Corp. v. Independence*

Tube Corp., 467 U.S. 752, 775 (1984)). Agreement is a necessary element of a Section One violation; a firm does not violate Section One by mimicking the behavior of its competitors. Even so-called "conscious parallelism" undertaken by firms that recognize their interdependent economic interests is not unlawful.

As the *Twombly* majority observes, this principle places a burden on Section One plaintiffs. Previous cases have, as the majority observes, "hedged against false inferences from identical behavior at a number of points in the trial sequence." *Id*. To survive a motion for summary judgment or a motion for directed verdict, for example, an antitrust conspiracy plaintiff must present evidence "tending to exclude the possibility of independent action." *Id*. The *Twombly* majority extends this approach to the pleading stage. *Twombly* holds that stating a Section One claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 1965. Put slightly differently, the *Twombly* Court observes that surviving a Rule 12 motion requires "allegations plausibly suggesting (not merely consistent with) agreement." *Id.* at 1966. Although *Twombly* does not emphasize plausibility in its precise holding, the word appears throughout the opinion. *See, e.g.*, *id.* at 1966 (suggesting that a mere allegation of parallel conduct "stops short of the line between possibility and plausibility of 'entitle[ment] to relief'").

Having reached this conclusion, *Twombly* advances on *Conley*. The majority notes that *Conley* can be read to allow a complaint to "survive a motion to dismiss whenever the pleadings [leave] open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id.* at 1968. According to the Court, this literal reading conflicts with the Federal Rules of Civil Procedure and "would dispense with any showing of a 'reasonably founded hope' that a plaintiff would be able to make a case." *Id.* at 1969. While observing that the oft-quoted *Conley* language, when taken in context, could be read differently (*e.g.*, to stand for the proposition that a plaintiff must allege the facts necessary to support its claim for relief), the Court nevertheless overrules the earlier opinion, offering the following epitaph: "[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Id*.

After disposing of *Conley*, *Twombly* addresses a marginally more difficult precedent, *Swierkiewicz v. Sorema N.A*. 534 U.S. 506 (2002). Decided in 2002, *Swierkiewicz* could be viewed as reducing the burden on a plaintiff at the pleading stage. Under *Swierkiewicz*, a plaintiff alleging employment discrimination need not recite facts to support the elements of his *prima facie* case. *Id.* at 508. The decision to require Twombly to offer facts in support of his Section One claim is, at least superficially, difficult to reconcile with *Swierkiewicz*.

Twombly leaves to an extended footnote its discussion of another difficult issue: Form 9, a sample complaint attached to the Federal Rules of Civil Procedure. *Id.* at 1971, n.10. In his dissent, Justice Stevens contrasts the majority's analysis with Form 9's barebones negligence pleading. After describing the circumstances of a hypothetical automobile collision, it states only that the defendant "negligently" hit the plaintiff, causing injury. As Justice Stevens observes, Form 9 contains essentially no facts. *Id.* at 1971, n.10. The majority distinguishes the Form 9 complaint from Twombly's on the facts: "[a] defendant wishing to prepare an answer to the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin." *Id.* at 1971, n.10.

What Does It Mean? Even if *Twombly* did nothing more than dispose of the complaint against Bell Atlantic and the other former Baby Bells, it would be significant. William Twombly's complaint threatened to plunge the telecom industry into another decades-long antitrust battle.

Twombly seems likely to help future antitrust defendants. The opinion acknowledges the "common lament" that courts have had only "modest" success in checking discovery abuses. *Id.* at 1967. It specifically notes the risk in antitrust cases that asymmetric discovery burdens "will push cost-conscious defendants to settle even anemic cases" before discovery begins. *Id*. The holding of the cases rests in part on the conclusion that only by requiring allegations to "reach the level suggesting conspiracy" could we "hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a §1 claim." *Id.* (alteration in original).

Whether *Twombly* will have a broader impact on civil litigation is less clear. At least one post-*Twombly* decision suggests that *Twombly* does not, for better or worse, signal a complete break with the past. Little more

than two weeks after issuing *Twombly*, the Court released a decision in *Erickson v. Pardus*, No. 06-7317, 127 S. Ct. 2197 (June 4, 2007) (per curiam), *rev'g* 198 Fed. Appx. 694 (10th Cir. 2006), a prisoner civil rights case. The plaintiff filed suit alleging violations of his Eighth and Fourteenth Amendment protections against cruel and unusual punishment after prison officials discontinued his treatment for hepatitis C. *Id*. The district court dismissed the complaint. The Tenth Circuit affirmed, finding that the allegations were too conclusory to establish that stopping the prisoner's treatment caused him any harm. *Erickson v. Pardus*, 198 Fed. Appx. 694, 701 (10th Cir. 2006). In a *per curiam* opinion, the Supreme Court reversed.

According to *Erickson*, the Tenth Circuit's opinion departed "from the liberal pleading standards set forth by Rule 8(a)(2)." *Erickson v. Pardus*, 198 Fed. Appx. 694, 701 (10th Cir. 2006). Although *Erickson* cites *Twombly,* it does so for a proposition somewhat at odds with the general thrust of the opinion—that a plaintiff need not offer "specific facts" to support a claim. *Erickson*, in fact, quotes *Twombly* quoting *Conley* for the proposition that "[s]pecific facts are not necessary; [a] statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id*. *Erickson* also neglects to mention *Twombly*'s plausibility requirement. The word, which appears 15 times in *Twombly*, does not appear once in *Erickson*.

Conclusion. In the wake of *Erickson,* it seems clear that *Twombly* will not spark a revolution in federal civil litigation. To some extent, *Erickson* represents an opportunity lost. As the Tenth Circuit observed, it is far from clear how the denial of treatment hurt the plaintiff in *Erickson*. And the Court could have invoked *Twombly*'s plausibility requirement to dismiss the plaintiff's claim. In fact, the Tenth Circuit's opinion could have been read to have anticipated *Twombly* in this respect. But the Court did not adopt this reading of *Twombly*.

Erickson also raises a question about *Twombly*'s impact outside the narrow context of Section One claims based on parallel conduct. We think the likely answer to this question will be found in cases involving claims more comparable to those at issue in *Twombly*. The plaintiffs in *Twombly* offered a set of facts that could be explained by legal conduct (*i.e.*, independent parallel decisions) or illegal conduct (*i.e.*, an agreement). Their claim could survive only if the explanation involving illegal conduct were more plausible, but they did not allege facts sufficient to support this conclusion. Moreover, the *Twombly* plaintiffs did not anchor the allegedly illegal conduct to any specific time or place. This omission distinguishes the *Twombly* plaintiffs from the plaintiffs in *Swierkiewicz*, *Erickson,* and the hypothetical plaintiff on Form 9.

These problems are not unique to Section One parallel conduct claims or even antitrust claims. Plaintiffs in complex civil litigation frequently offer explanations involving unlawful acts to account for otherwise legal conduct. To take one example, civil conspiracy claims have begun to appear in product liability cases. Plaintiffs allege that manufacturers and their distributors conspired to conceal a product's dangers from consumers, but typically offer no facts to support the existence of such a conspiracy. Instead, they base their claim on the revelation of the defect, prior silence, and the relationship between the distributor and the manufacturer. Although a conspiracy may explain the silence of one or more of the parties, conspiracy is far from the only—or even the most plausible—explanation. *Twombly* suggests that such claims, without more, should not advance beyond the pleadings stage. The way this issue is handled in future product liability cases will provide useful insights regarding *Twombly's* reach.

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