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'Twombly' Pleading Standard: Good Idea, Bad Execution

With its 7 to 2 decision in *Twombly* last term, the U.S. Supreme Court rocked the litigation world by largely supplanting 50 years of notice pleading precedent with an entirely new plausibility standard.[1] The lower courts are still trying to figure out what it all means. Given the inherent irreconcilability of the decision, it will be a very long time, if ever, before they do.

Everyone seems to understand what the Supreme Court was trying to accomplish with *Twombly*. That is, unleashing the lower courts to rid the system of the ever-increasing torrent of frivolous filings. A worthy goal indeed. However, no one seems to understand exactly how far the courts can go in exercising this newfound dismissal power. The Supreme Court offered no clear direction in this regard.

So, instead of merely reining in what was a firmly entrenched but perhaps overextended pleading threshold, *Twombly* has become an open invitation to judges to dispose of cases they just don't like. Surely, this is not what the High Court was setting out to do. And surely, the Court was not trying to single out antitrust conspiracy cases, the very cases Congress says should be encouraged, not discouraged. Unfortunately, *Twombly* sets the stage for exactly this result.

The New Standard

The central challenge in *Twombly* was that the major telecommunications providers conspired to foreclose competition to maintain inflated phone and Internet charges. According to the complaint, they did so in two basic ways. They engaged in concerted efforts to throttle the wgrowth of new entrants. And, they refrained from competing against one another by not seeking business

opportunities in each others' territories.

The problem with the complaint was that it rested entirely on allegations of parallel conduct. There were no independent allegations of any actual agreement among the defendant phone companies. Mindful of the risks of drawing false inferences from identical behavior alone, the Court rejected the complaint outright. Otherwise, it feared, virtually any group of competing businesses could be swept into a viable antitrust complaint.

The Court's logic in all of this was quite sound. A company can never be liable under the antitrust laws for merely engaging in the same conduct as its competitors. This is true even if that parallel conduct leads to higher prices or otherwise harms competition. There has to be something more. There have to be facts that at the very least strongly suggest that the conduct was the product of an agreement, not the result of independent, self-interested conduct. The *Twombly* complaint failed to allege any such facts. The Supreme Court rightly dismissed it. There was nothing new in that decision.

What was entirely new, however, was the circuitous path the Supreme Court took to reach its decision. It did not simply address the question it claimed the case presented, whether a complaint of parallel conduct alone states a valid conspiracy claim under the Sherman Act. The Court answered that question ("No") a long time ago.[2] Instead, the Court tackled the significantly more far-reaching question of whether there is a plausibility bar that must be crossed to maintain a valid complaint, particularly one based on conspiracy. In answering that question ("Yes"), the Court went out of its way to use *Twombly* as a springboard to rewrite the pleading standard.

And just like that the Supreme Court wiped away the notice-pleading regimen that has been universally followed for half a century. No longer is it sufficient for a complaint simply to provide a defendant with notice of the claims against it as Rule 8 of the Federal Rules has heretofore been read. Now, the complaint must also be plausible. Or, as the Supreme Court expounded: it must be meaty enough to state a claim that rises above "the speculative level"; it must provide a "reasonable expectation" that discovery will bare out the claim; it must be "suggestive" of wrongdoing; and, it must have enough "heft" to "show" that the plaintiff is entitled to relief.[3]

A Case of Contradictions

In short, a well-pleaded complaint must now move beyond mere possibility and into the realm of plausibility. Exactly how far beyond this new possibility/plausibility divide it needs to trek is what's left for the lower courts to figure out. Regrettably, they won't find much guidance from *Twombly*. The Supreme Court took pains to paint its new standard as a clarification, not an alteration, of the preexisting standard. As a result, the decision is riddled with conflicting statements and signals which together present an incompatible and ultimately incomplete explanation of what the new standard truly comprises.

At the heart of this failing is any clear conception of plausibility. The Court clearly explained what it is not. A complaint is not plausible if it alleges conduct that is equally consistent with both legal and illegal activity. Thus, the *Twombly* complaint failed because

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the challenged conduct was equally consistent with both independent and concerted action. In the words of the Court, it was "factually neutral" rather than "factually suggestive" on the question of conspiracy.[4]

What the Court did not do, however, is clearly explain what plausibility is. The numerous depictions of plausibility the Court tendered provide, at best, a wooly vision of what the Court now expects. At worst, they offer no insight at all as they seem to clash directly with the bedrock pleading principle that a complaint can not be judged on its likelihood of success. While the Court claimed that it was not imposing such a "probability" requirement, it did very little to distinguish its call for plausibility from exactly that.

The Court also claimed that it was not calling for a heightened pleading of specific facts. But, such specificity is just what the Court found lacking in the complaint. The Court grumbled that the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. Such a who/when/where pleading requirement has never been required in conspiracy cases. And for good reason. This is exactly the type of secret information that remains "largely in the hands of the alleged conspirators."[5] Thus, like the question of plausibility, it remains unclear where the question of specificity now stands.

Adding further to the muddle is the ostensible retreat from *Twombly* the Supreme Court took only two weeks later in the comparatively unnoticed *Erickson v. Pardus*. There, the Supreme Court vacated a lower court's dismissal and rebuked the U.S. Court of Appeals for the Tenth Circuit for departing from "the liberal pleading standards" set forth in Rule 8.[6] Notably, the Court—citing *Twombly!*—stressed that a complaint need only provide fair notice; specific facts are not necessary. There was absolutely no mention of plausibility. From all of this, it is no wonder that so many circuit courts have expressed uncertainty or internal disagreement over the scope and effect of *Twombly*.[7]

A Poor Vehicle for Change

The real problem with *Twombly* lies not in what the Supreme Court was trying to accomplish. The Supreme Court is correct to be concerned about the glut of frivolous filings that have plagued the lower courts. And, it is right to resist exposing companies to the ever-increasing costs of defending these actions without some modicum of assurance that there is at least something behind the complaint. The Court has long insisted on some minimum level of heft before allowing a potentially massive and costly factual controversy to proceed.[8]

But *Twombly* has set forth a threshold pleading requirement that rises high above the general "sniff-test" that the Court has up until now endorsed. And it has done so in a manner that specifically targets antitrust complaints. Not only are these challenges less likely to be the subject of a frivolous lawsuit. They are the very type of actions that Congress has gone out of its way to encourage.

The antitrust bar has certainly seen its share of meritless lawsuits. However, the rising tide of litigation abuse is largely driven by non-antitrust cases. Securities actions and business tort cases have traditionally been the more common feeding ground for this kind of mischief. Antitrust cases are simply too complicated, too risky, and too expensive to engender the gush of frivolous filings found in these other practice areas.

Nor are they the kind of cases that typically lack a meaningful objective. On the contrary, antitrust cases play a very special role in the U.S. legal system. They are considered as important to protecting individual rights as the Magna Carta and the Bill of Rights.[9] As the Supreme Court has repeatedly stressed, every antitrust violation strikes at the very heart of the U.S. economy, the free-enterprise system.[10] That is why the antitrust laws are treated with special solicitude and their active enforcement is highly encouraged.

Congress recognized early on that the government would not have the resources to adequately handle this task alone. So, it enlisted the support of the public to serve as "private attorneys general" to assist in the enforcement.[11] Congress did so through the bounty of treble damages, attorney's fees and costs awarded to successful plaintiffs. Private antitrust plaintiffs have thus become, just as Congress hoped, an indispensable part of U.S. antitrust enforcement.

Twombly runs the risk of seriously undermining this vital private attorney general model by placing out of reach a large swathe of antitrust cases that don't meet the new plausibility standard. This risk is particularly high with conspiracy cases where, as some may see it, the Court has now seemingly imposed a new specificity requirement demanding the who, where, and when of the secret agreement. Since this kind of information is rarely available prediscovery, the Court has essentially invited lower courts to close the door on these kinds of cases.

Even more troubling, in failing to provide clear direction or boundary, *Twombly* may be seen by some judges as a license to shut out virtually any case in which they do not believe or have serious doubt. The Court claimed that it was steering clear of introducing this kind of subjective litmus test. However, it is difficult to see the new plausibility threshold in any other way.

It didn't have to be this way. If the High Court were really just looking to clarify the notice pleading standard to better screen for meritless actions, it could have taken a much clearer path. It could have simply reaffirmed or refined the general "sniff" test that has always been available to judges to throw out barren, nonsensical, or fanciful complaints. It could have established a new pleading standard, even a plausibility standard, but clearly defined its application and scope and harmonized it with notice pleading precedent.

Or, it could have chosen a different kind of case to make its point, one in an area more prone to empty challenges than antitrust cases are. Any of these alternative courses would have been better suited to accomplish the Court's principal goal of weeding out frivolous filings. And they would have done so without upending the pleading process and targeting for heightened scrutiny those cases most deserving of special latitude, not rigor.

Conclusion

It's up to the circuit courts now to decide how far *Twombly* will reach. So far, unsurprisingly, they are finding this to be quite a thorny task. The courts are clearly struggling with how to work through the decision's incongruity and its clash with prior precedent. Perhaps a consensus will emerge and *Twombly* will be put in its proper place and squared with notice pleading precedent. However, given many of the Court's pronouncements in *Twombly*, the lower courts may find this to be an unattainable charge.

1. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007).
2. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-42 (1957).
3. 127 S.Ct. at 1965-66.
4. 127 S.Ct. at 1966 n.5.
5. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).
6. 127 S.Ct. 2197, 2200 (2007).
7. See, e.g., *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007); *McZeal v. Sprint Nextel Corp.*, 2007 WL 2683705 (Fed. Cir. Sept. 14, 2007); *Equal Employment Opportunity Commission v. Concentrated Health Services, Inc.*, 2007 WL 2215764 (7th Cir. Aug. 3, 2007); *Weisbarth v. Geauga Park District*, 2007 WL 2403659 (6th Cir. Aug. 24, 2007); *Watts v. Florida Int'l Univ.*, 2007 WL 2331029 (11th Cir. Aug. 17, 2007).
8. See *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n. 17 (1983).
9. *U.S. v. Topco Assoc.*, 405 U.S. 596, 610 (1972).
10. *Hawaii v. Standard Oil*, 405 U.S. 251, 262 (1972).
11. *Cargill v. Monfort of Colorado*, 479 U.S. 104, 129 (1986).

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