Can You Hear Me Now?
Bell Atlantic v. Twombly and the Pleading Standards for Antitrust Conspiracy Claims

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The Supreme Court is preparing this term for another foray into antitrust law. One of the cases it will decide, *Bell Atlantic v. Twombly*,[1] promises to clarify a surprisingly murky area of the law: the standards for pleading an antitrust conspiracy claim based on parallel conduct. In its first term, the Roberts Court decided three antitrust cases, all lopsided victories for defendants.[2] However, it is far from clear how the Court will come out in *Twombly*.

The approaches taken by the *Twombly* district court and the Second Circuit define near-opposite ends of the spectrum. The district court dismissed the plaintiffs' class action complaint, which alleged that the Baby Bells had conspired to thwart upstart local telephone competitors in the Bells' home territories and agreed not to enter each other's territories and compete for local telephone customers. In dismissing, the district court ruled that a plaintiff must allege specific "plus factors," proof of which would ultimately be required for a plaintiff to survive summary judgment against it on parallel conduct claims. The district court also evaluated the plausibility of inferences that could be drawn from the factual allegations in the plaintiffs' complaint and took account of the heavy costs of defending potentially unmeritorious antitrust cases.

By contrast, the Second Circuit's decision reversing the district court applied a relaxed pleading standard based on a literal reading of Rule 8 of the Federal Rules of Civil Procedure, and with canonical roots in *Conley v. Gibson*[3] and modern notice pleading jurisprudence. The Second Circuit rejected any notion that an antitrust conspiracy complaint must allege plus factors or otherwise match up to the summary judgment standards of *Matsushita*.[4] Instead, it defined a pleading threshold that would seem to protect just about any parallel conduct complaint from dismissal: "[T]o 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 that the particular parallelism asserted was the product of collusion rather than coincidence."[5] While the Second Circuit acknowledged the burdens of defending against antitrust claims, it observed that "the remedy to that problem is not to be found in abandoning the rules of notice pleading and raising the bar on plaintiffs in the absence of a legislative mandate to do so."[6]

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[1] Twombly v. Bell Atl. Corp. (*Twombly I*), 313 F. Supp. 2d 174 (S.D.N.Y. 2003), *rev'd*, Twombly v. Bell Atl. Corp. (*Twombly II*), 425 F.3d 99 (2d Cir. 2005), *cert. granted*, Bell Atl. Corp. v. Twombly, 126 S. Ct. 2965 (U.S. June 26, 2006) (No. 05-1126).

[2] Texaco Inc. v. Dagher, 126 S. Ct. 1276 (2006) (8–0 decision); Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860 (2006) (7–2 decision); Illinois Tool Works, Inc. v. Independent Ink, Inc., 126 S. Ct. 1281 (2006) (8–0 decision).

[3] 355 U.S. 41 (1957).

[4] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[5] Twombly v. Bell Atl. Corp. (*Twombly II*), 425 F.3d 99, 114 (2d Cir. 2005) (emphasis added).

[6] *Id.* at 116.

This article explores the nature of the plaintiffs' conspiracy claims, the analytical tensions between the two lower court opinions on those claims, and offers some thoughts about how the Supreme Court might view the case.

The Case

The Regulatory Setting. For decades, AT&T, along with its regional Bell Operating Companies (also known as Baby Bells or "BOCs"), owned 80 percent of all local telephone lines and service in the United States. In 1974, the U.S. Department of Justice sued AT&T under the Sherman Act, alleging that it used its monopoly in the market for local exchange facilities to suppress competition in related markets, including the markets for telephone equipment and long distance services. In 1982, the parties settled under a consent decree, according to which AT&T agreed to divest itself of its ownership of the BOCs. AT&T became an inter-exchange (long-distance) carrier and the BOCs were given monopoly power over local exchange services in their respective regions. The BOCs, however, were prohibited from offering long-distance services. The BOCs were heavily regulated by federal and state authorities, but otherwise existed as legal monopolies, often with exclusive franchise licenses from the states in which they were located.

The Telecommunications Act of 1996[7] was meant to replace regulation with competition in the local exchange market. Under the Act, the BOCs were classified as "incumbent local exchange carriers" or "ILECs" in the regions where they were located. The Act permitted the ILECs to enter the long-distance market but required that they facilitate competitors'—also known as "competing local exchange carriers" or "CLECs"—entry into the local exchange market "on just, reasonable and nondiscriminatory" terms.[8] In particular, the Act mandated that an ILEC (1) sell local telephone exchange services to CLEC at wholesale rates; (2) lease elements of its network to the CLECs on an unbundled basis; and (3) permit the CLEC to connect its network to the ILEC's infrastructure.

A wave of litigation followed the enactment of the '96 Act. Many private plaintiffs sued under Section 2 of the Sherman Act,[9] claiming that ILECs were refusing to share their networks with CLECs as required by the '96 Act. That is how the *Twombly* case began.

The Plaintiffs' Claims. In 2002, the Second Circuit decided *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*,[10] which upheld Sherman Act Section 2 monopolization claims premised on an ILEC's alleged failure to comply with its '96 Act obligations to share local exchange networks with CLECs. Soon thereafter, William Twombly filed a complaint against the BOCs in the Southern District of New York alleging exactly that, on behalf of an alleged class of all users of telephone and Internet service in the United States. In particular, the complaint claimed that the defendants had refused to provide potential CLECs with network connections and access to the same level of services that the ILECs provided to their own customers; billed the CLECs' customers to undermine the

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[7] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[8] 47 U.S.C. § 251(c)(3) ("The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.").

[9] 15 U.S.C. § 2.

[10] 309 F.3d 71 (2d Cir. 2002), *rev'd sub nom.* Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

CLECs' relationships with them; delayed the provision of network elements; refused CLECs the use of certain facilities; and misused their monopoly power to negotiate unfair agreements.

In the meantime, the Supreme Court granted a petition for certiorari to review the Second Circuit's *Trinko* decision, and in 2004, reversed it. The Supreme Court held that plaintiffs claiming monopolization by ILECs had to meet traditional antitrust requirements for those claims, rather than basing them on alleged violations of the '96 Act.[11] Soon after the Supreme Court's *Trinko* decision, the plaintiffs in *Twombly* amended their claims. They left in the allegations about suppressing entry and competition in local exchange markets but abandoned their Section 2 monopolization claims. In their place, the plaintiffs substituted conspiracy claims under Section 1 of the Sherman Act.[12]

To bring their new complaint within the ambit of Section 1, the plaintiffs claimed that the defendants' exclusionary conduct occurred pursuant to an agreement among all defendants to thwart the competitive threat posed by the CLECs. As evidence of the conspiracy, the plaintiffs alleged that all the defendants mistreated the CLECs in the same ways. The plaintiffs also claimed that the defendants engaged in additional parallel conduct by not competing as CLECs in each other's respective territories, "which would be anomalous in the absence of an agreement among the [defendants] not to compete with one another."[13] In particular, the defendants' service areas were noncontiguous and sometimes surrounded a rival's territory. The plaintiffs alleged that by not attempting to expand coverage in the areas where the defendants appeared to enjoy a geographic advantage, they were acting against their economic self-interest. As further evidence of conspiratorial conduct, the plaintiffs cited statements by Qwest's CEO, Richard Notebaert, that competing in the territory of a rival ILEC "might be a way to make a quick buck, but it didn't make it right."[14]

The defendants' alleged motive for this conspiracy was to maintain exclusive control over their respective territories and to prevent potential CLECs from succeeding. According to the plaintiffs, if CLECs made inroads into any ILEC's territory, it would expose all ILECs' vulnerability to competition. The alleged conspiracy harmed competition by depriving consumers of the opportunity to purchase local telephone or high-speed Internet services from CLECs rather than ILECs. The lack of competition allegedly resulted in consumers, such as the plaintiffs, paying supracompetitive rates for local services.

The District Court's Decision Dismissing the Claims. The defendants collectively moved to dismiss the complaint, arguing that the plaintiffs' allegations of a conspiracy based upon parallel conduct were insufficient to state a claim under Section 1. They argued that parallel conduct is not itself unlawful absent additional evidence that either directly shows, or creates an inference, that the parallel conduct was not independent. The defendants maintained that the absence of factual allegations of so-called "plus factors" in the complaint rendered the plaintiffs' claims fatally defective.

U.S. District Court Judge Gerald E. Lynch agreed that plaintiffs must allege plus factors to withstand a motion to dismiss. Evidence of parallel business behavior, standing alone, is insufficient to establish a conspiracy; indeed, parallel behavior may be entirely consistent with lawful, inde-

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[11] *Trinko*, 540 U.S. at 406–07.

[12] 15 U.S.C. § 1.

[13] Twombly v. Bell Atl. Corp. (*Twombly I*), 313 F. Supp. 2d 174, 178 (S.D.N.Y. 2003).

[14] *Id.* at 178, 184.

pendent decision making. Thus, the law requires plaintiffs, at least at the summary judgment stage, to offer evidence of "at least one 'plus factor' that tends to exclude independent self-interested conduct as an explanation for defendants' parallel behavior . . . [such as] evidence that the parallel behavior would have been against individual defendants' economic interests absent an agreement, or that defendants possessed a strong common motive to conspire."[15] While acknowledging that the plus factor test was developed in the context of summary judgment, the district court held that it also should apply when testing the sufficiency of a complaint:

> This requirement is necessary to ensure that plaintiffs actually state a claim on which relief can be granted, by separating complaints that allege simple parallel action that does not suggest a conspiracy and is therefore not actionable under § 1, from complaints that allege parallel action that could be the result of a conspiracy, and that plaintiffs are therefore entitled to explore in discovery.[16]

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In reviewing the plaintiffs' claims under this test, Judge Lynch began by noting that "[t]he crucial inquiry … is what inferences naturally arise from the facts that plaintiffs have pled, taking all facts in the Amended Complaint as true."[17] The inquiry the court envisioned was anything but cursory:

> In the context of parallel conduct claims, the basic requirement that plaintiffs must fulfill is 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 mutual agreement rather than their own individual self-interest. This determination necessarily entails beginning with 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. While these questions resemble the factual issues that would have to be decided in the context of a summary judgment motion, on a motion to dismiss the Court may properly draw these background assumptions only from the facts pleaded in the complaint and the relevant statute, and may rely only on such background facts about the market and its history that are appropriate for judicial notice.[18]

Applying this detailed framework to defendants' motion to dismiss, the district court found that the plaintiffs failed to state a claim of conspiracy under Section 1.

Judge Lynch first observed that the allegations that the defendants had attempted to keep the CLECs from entering the local services market were not sufficient evidence of an illegal conspiracy because "it is in each ILEC's individual economic interest to attempt to keep CLECS out of its market. . . . Thus, defendants' parallel action does not naturally give rise to an inference of an agreement, since the behavior of each ILEC in resisting incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory."[19] Further, the court found unpersuasive the collective motives the plaintiffs suggested for the defendants' conduct, again finding that those motives were consistent with the defendants' individual economic interests.

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[15] *Id.* at 179 (citations omitted).

[16] *Id.* at 180.

[17] *Id.* at 182.

[18] *Id.*

[19] *Id.* at 183.

The district court also rejected the plaintiffs' second theory of conspiratorial behavior—that an agreement to restrain trade could be inferred from the failure of ILECs to enter their rivals' markets as CLECs. According to the plaintiffs, because it would be in the ILECs' economic interests to gain market share from their rivals by acting as CLECs, the collective failure to do so evidenced a conspiracy. While Judge Lynch found this a "closer question," he ultimately concluded that the plaintiffs' theory failed to acknowledge that "being a CLEC in another ILEC's territory is an entirely different business than being an ILEC."[20] ILECs that attempt "to become CLECs in another ILEC's territory [would] have little competitive advantage over other CLECs" because their success would depend upon cooperation from the ILEC whose territory they were invading.[21] For the same reason, "the ILEC-as-CLEC cannot leverage geographical proximity into independence, and therefore is not materially different from a CLEC without a nearby territory of its own."[22]

Taking this view of the market, the district court went on to find that "[p]laintiffs' own factual allegations, which must be accepted as true for purposes of this motion, establish that ILECs have successfully impeded CLECs' using [the '96 Act] to create viable business opportunities. Thus, plaintiffs themselves refute their theory that becoming a CLEC is an obviously profitable opportunity for an ILEC."[23] Because it was not against the defendants' economic interest to refrain from competing as CLECs, the court concluded that the plaintiffs had failed to allege facts that would create an inference that the defendants' parallel conduct was the result of a conspiracy.[24] Accordingly, the court granted the defendants' motion to dismiss.

The Second Circuit's Reversal. The plaintiffs appealed to the Second Circuit, which reversed. The Second Circuit's test was as liberal as the district court's was strict: pleading facts "indicating parallel conduct by the defendants *can* suffice to state a plausible conspiracy. . . . [T]o 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 that the particular parallelism asserted was the product of collusion rather than coincidence."[25] The Second Circuit acknowledged that "*after* discovery, a plaintiff confronting a summary judgment motion is required to adduce admissible evidence of 'plus factors' if it seeks to have the trier of fact infer an unlawful conspiracy in restraint of trade from consciously parallel conduct."[26] However, "there is no reason . . . to require plaintiffs to include allegations of 'plus factors' in their complaint since they may not be required to establish 'plus factors' at trial—if, for example, they can prove conspiracy directly."[27] Applying Rule 12(b)(6), the Second Circuit found that the plaintiffs' complaint pled facts sufficient to state a claim under Section 1. Accordingly, it vacated judgment and remanded.

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[20] *Id.* at 185.

[21] *Id.* at 186.

[22] *Id.* at 186–87.

[23] *Id.* at 187.

[24] *Id.* at 188.

[25] Twombly v. Bell Atl. Corp. (*Twombly II*), 425 F.3d 99, 114 (2d Cir. 2005) (emphasis added).

[26] *Id.*

[27] *Id.*

On Certiorari. The defendants filed a petition for writ of certiorari to the U.S. Supreme Court. On June 26, 2006, the Court granted the petition and added the matter to the docket for its current term.[28] The specific question presented in the petition is:

> Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, if it alleges that the defendant 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.[29]

The Issues

At its narrowest, the question in *Twombly* is whether an antitrust plaintiff must plead a factual basis for "plus factors" to allege conspiracy based upon parallel conduct. However, as framed by the Second Circuit and the defendants, *Twombly* also brings a more fundamental debate to the Court's doorstep: Is the nature of the modern antitrust case sufficiently different from other civil litigation that heightened scrutiny at the pleading stage is warranted? And to the extent the Court decides that a more rigorous review of antitrust complaints is warranted, what is the appropriate test and what is the legal basis for it?

What Is Enough to Plead an Antitrust Conspiracy? The question in *Twombly* centers on the relationship between substantive antitrust law and the liberal notice pleading requirements embodied in Rule 8 of the Federal Rules of Civil Procedure. While both the district court and the Second Circuit recognized a "tension" between the two, the two courts started from much different reference points. Those starting points essentially predetermined the outcome of their analyses.

Substantive Requirement of Plus Factors. The district court began its review by focusing on substantive antitrust law relating to parallel conduct, much of which has been developed in the context of summary judgment. Judge Lynch noted that while parallel conduct by competitors—or what is often referred to as "conscious parallelism"—is probative of a potential agreement, it is not itself conclusive. "[P]arallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions."[30] Or, as the Supreme Court held in *Matsushita*:

> [C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.[31]

Under *Monsanto* and *Matsushita*, most courts have required at the summary judgment stage antitrust plaintiffs to establish some "plus factor" that, with parallel conduct, permits the inference

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[28] Bell Atl.Corp. v. Twombly, 126 S. Ct. 2965 (U.S. June 26, 2006) (No. 05-1126) (granting certiorari).

[29] Brief for Petitioners at i, Bell Atl. Corp. v. Twombly, No. 05-1126 (U.S. Aug. 25, 2006), *available at* http://www.appellate.net/briefs/MeritsBriefforPetitioners_BA_Twombly.pdf.

[30] Twombly v. Bell Atl. Corp. (*Twombly I*), 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003).

[31] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984)) (citations omitted).

of a conspiracy.[32] As the Second Circuit noted, these plus factors may include a common motive to conspire; that the conduct was against the apparent economic self-interest of the alleged co-conspirators; or that there was a high level of inter-firm communications.[33]

To the district court, requiring a plaintiff to plead a factual predicate for plus factors was mandated by both substantive antitrust law and pleading requirements under the federal rules. The court noted that "[w]hile there is no special pleading standard for conspiracy, simply alleging that two or more defendants participated in a 'conspiracy,' without more, is insufficient to withstand a motion to dismiss."[34] In a parallel conduct case, not alleging plus factors was akin to a conclusory, "bare bones" claim of conspiracy.[35]

The district court acknowledged that these requirements are "somewhat in tension" with Federal Rule 8.[36] But it resolved the conflict by noting that because parallel conduct is not itself unlawful absent inferences that may be drawn from the plus factors, requiring a plaintiff to allege plus factors in its complaint does not compel pleading beyond what is necessary to state a claim. Further, the plus factor pleading requirement was consistent with Rule 8's purpose to place the defendant on notice of the basis of the alleged conspiracy. Accordingly, from the district court's perspective, because plus factors were necessary to prove conspiracy based upon parallel conduct, procedurally a plaintiff was required to plead those facts in the complaint.

Liberal Notice Pleading Under Rule 8. The Second Circuit started its review at the other end of the spectrum, focusing on the liberal notice pleading requirements under federal procedural law. Citing to the seminal case of *Conley v. Gibson*, the Second Circuit explained that Rule 8 was meant simply to require plaintiffs to "give defendant fair notice of what the … claim is and the grounds upon which it rests."[37] *Conley* commands that the federal pleading rules are meant to facilitate decisions on the merits and not to "screen out complaints based upon a lack of artful lawyering before any facts have been discovered."[38] According to the Second Circuit, "[a]ntitrust claims are, for pleading purposes, no different"—especially having not been singled out in the rules for more demanding pleading requirements.[39]

The court of appeals acknowledged that a "bare bones" statement of conspiracy was not sufficient to state a claim under Section 1 "without supporting facts."[40] Accordingly, there must be a factual predicate that includes a conspiracy "among the realm of plausible possibilities."[41] "But short of the extreme of 'bare bones' and utter 'implausibility,' a complaint in an antitrust case need only contain the 'short and plain statement of the claim showing that the pleader is entitled to relief' that Rule 8(a) requires."[42]

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[32] *See* 6 Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1434, at 241 (2d ed. 2003).

[33] Twombly v. Bell Atl. Corp. (*Twombly II*), 425 F.3d 99, 114 (2d Cir. 2005) (citations omitted).

[34] *Twombly I*, 313 F. Supp. 2d at 180.

[35] *Id.*

[36] *Id.*

[37] *Twombly II*, 425 F.3d at 107 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

[38] *Id.* (citing Conley, 355 U.S. at 48).

[39] *Id.* at 107–08 (referencing Rule 9(b)'s enhanced pleading requirements for averments of fraud).

[40] *Id.* at 109.

[41] *Id.* at 111.

[42] *Id.*

Applying these rules to the context of a Section 1 claim, the Second Circuit concluded that "an antitrust claimant must allege *only* the existence of a conspiracy and a sufficient supporting factual predicate on which that allegation is based."[43] Parallel conduct is one factual predicate from which conspiracy could plausibly be inferred, and therefore puts the defendant on sufficient notice to answer and prepare for trial. In contrast, the plus factors necessary for a conscious parallelism case are hurdles to be overcome at summary judgment *after* discovery is taken (and assuming no direct evidence of conspiracy is found).

Whither the Supreme Court? How the Supreme Court resolves the issue will likely turn on whether it begins from the perspective of the liberal pleading requirements of *Conley v. Gibson* and Rule 8 or the substantive antitrust law governing conscious parallelism established in *Monsanto* and *Matsushita*. For the defendants-petitioners and the numerous amici curiae[44] who have filed briefs in support, the matter is simply one of requiring factual allegations in a complaint to meet the standards of substantive law—in this case, that consciously parallel conduct without more does not violate Section 1 of the Sherman Act. Alleging anything less amounts to a conclusory statement that is insufficient even under the liberal pleading rules embodied in Rule 8. Thus, from the perspective of the defendants-petitioners and certain amici, the plus factor test is consistent with Rule 8, given the limits of the substantive law.

The counterargument, as embodied in the Second Circuit's opinion, is that Rule 8 deliberately sets a low threshold, requiring only that a complaint place a defendant on bare notice of the basis for the claims. Parallel conduct is a basis for a conspiracy claim. In this view, the specific facts by which an inference of conspiracy can be drawn from the parallel conduct—e.g., plus factors—are properly the subject of discovery, and the sufficiency of the evidence should be tested at summary judgment, not on a motion to dismiss.

The Supreme Court's most recent pronouncements on Rule 8 likely will play a significant part in the Court's analysis. In *Swierkiewicz v. Sorema*,[45] the Court reaffirmed the liberality of notice pleading under Rule 8. In reversing the Second Circuit, a unanimous Court held that a plaintiff alleging discrimination under Title VII was not required to plead facts that would support a prima facie claim under the burden-shifting standard specified in *McDonnell Douglas Corp. v. Green*.[46] The Court found that because the *McDonnell Douglas* framework does not necessarily apply to all discrimination cases—for example, it is also possible to prove discrimination through direct evidence—it was sufficient for a plaintiff to allege discrimination based upon a prohibited ground without the additional facts required under *McDonnell Douglas*.[47] The Court went on explain that the "simplified notice pleading standard [under Rule 8] relies on liberal discovery rules and summary judgment motions to define facts and issues and to dispose of unmeritorious claims."[48]

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[43] *Id.* at 114 (emphasis added).

[44] Eight amici curiae filed briefs in favor of certiorari, and to date at least seven amici have filed merits briefs supporting the defendants-petitioners, including the U.S. Government. The American Bar Association has filed a brief in support of neither the defendants-petitioners nor the plaintiffs-respondents, but which argues that the Second Circuit's test is wrong. *See* Brief of the American Bar Association as Amicus Curiae in Support of Neither Petitioners Nor Respondents, Bell Atlantic Corp. v. Twombly, No. 05-1126 (U.S. Aug. 25, 2006), *available at* http://www.abanet.org/amicus/briefs/bell_atlantic_v_twombly.pdf.

[45] 534 U.S. 506 (2002).

[46] 411 U.S. 792, 802 (1973).

[47] *Swierkiewicz*, 534 U.S. at 511–12.

[48] *Id.* at 512.

Three years later, the Court again encountered pleading standards issues, this time in the securities litigation context. In *Dura Pharmaceuticals, Inc. v. Broudo*,[49] a unanimous Court ruled that the district court properly dismissed a securities case for failure to state a claim under Rule 12(b)(6). The Court held that securities plaintiffs must plead facts identifying losses they suffered and a causal connection to the defendant's conduct.[50] The Court noted while Rule 8 generally does not burden plaintiffs with detailed fact pleading requirements, it was not burdensome to require some factual predicate to place a defendant on notice of a plaintiff's alleged loss, or set forth the causal connection between the defendant's actions and the alleged loss.[51]

The outcome here may turn on whether the Court views plus factors as akin to the facts necessary to create an inference of discrimination under *McDonnell Douglas* or something more fundamental like the requirements of pleading economic loss and causation in a securities claim. Further, in undertaking this analysis, the Court will likely need to address the relative burdens placed upon the parties at the pleading stage.

The outcome here may turn on whether the Court views plus factors as akin to the facts necessary to create an inference of discrimination under McDonnell Douglas *or something more fundamental like the requirements of pleading economic loss and causation in a securities claim.*

The district court in *Twombly* found that its requirement that a plaintiff allege plus factors "is simply not analogous to the requirement that Title VII plaintiffs allege the *McDonnell Douglas* prima facie case" because, in part, while the basis of a Title VII claim is usually "fairly self-evident," "a plaintiff's factual and economic theory of a conspiracy is not evident from a conclusory allegation of conspiracy, and there is simply no way to defend against such a claim without having some idea of how and why the defendants are alleged to have conspired."[52] This reasoning is in line with the Court's holding in *Dura Pharmaceuticals*, and rests on the idea that the burden should not fall upon defendants to guess plaintiffs' possible theories of conspiracy based only on an allegation of conscious parallelism. Using the language of *Dura Pharmaceuticals*, the defendants-petitioners and certain amici argue that requiring plus factors to be pled in a complaint is not a "burdensome" obligation to place upon antitrust plaintiffs.

By contrast, and while not as directly addressing the applicability of *Swierkiewicz* as did Judge Lynch, the Second Circuit clearly found that the burdens on a plaintiff to plead a sufficient claim under Section 1 were intentionally minimal. For the appellate court,"[a]t 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 whether the conspiracy can be established at trial."[53] From this perspective, so long as there is enough in the complaint to permit a defendant to answer, dismissal under Rule 12(b)(6) is improper. Implicit in this analysis is that defendants bear some obligation to divine the plaintiffs' potential theories of recovery at the pleading stage without plaintiffs necessarily having to specify those theories in a complaint. In light of *Swierkiewicz* and *Dura Pharmaceuticals*, it will undoubtedly be significant to see where the Supreme Court places burdens at the pleading stage with respect to a complaint alleging conspiracy under Section 1.

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[49] 544 U.S. 336 (2005).

[50] *Id.* at 346–47.

[51] *Id.* Although the Court noted that there are additional pleading requirements under Rule 9 and the Private Securities Litigation Reform Act, the Court assumed arguendo that there were no special pleading requirements with respect to proximate cause or economic loss other than Rule 8. *Id.* at 346.

[52] Twombly v. Bell Atl. Corp. (*Twombly I*), 313 F. Supp. 2d 174, 181 (S.D.N.Y. 2003).

[53] Twombly v. Bell Atl. Corp. (*Twombly II*), 425 F.3d 99, 116 (2d Cir. 2005) (citations and internal quotations omitted).

Should Antitrust Cases Be Judged Differently? Adding color to this procedural argument is that, for defendants and many amici, antitrust cases are fundamentally different than other kinds of civil litigation. For example, the U.S. Government, in siding with the defendants, has taken the position that Rule 8 must be applied in the "context of the particular case,"[54] and that with respect to claims of "complex and wide-ranging antitrust conspiracies," this means facts "sufficiently concrete" to provide "meaningful notice."[55] This stands in contrast to the "minimal factual allegations [that] may suffice to apprise a defendant of the plaintiff's claim in a simple case."[56] The defendants-petitioners and other amici have echoed the sentiment that antitrust cases are different (i.e., more complex, expensive, and socially significant), which begs the question whether any differences merit special treatment on a motion to dismiss.

The Second Circuit made clear its view that for pleading purposes, antitrust cases are not different than other civil litigation.[57] Yet the appellate court conceded that in the context of antitrust litigation the liberal pleading standards sometimes will mean:

> [C]olossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to 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.[58]

However, the Second Circuit opined that if the balance between Rule 8 and antitrust law was to be "re-calibrated," it was for the Supreme Court or Congress to do.[59]

The defendants-petitioners and numerous amici curiae are urging the Supreme Court to do just that. In particular, the defendants and the amici have cited what they see as the staggering costs of antitrust litigation. These costs include not merely the burdens of defending an antitrust lawsuit, but the social costs of firms forgoing legitimate business conduct out of fear of litigation. Moreover, the discovery disputes and heavy motion practice associated with antitrust cases also take a heavy toll on the judicial system. According to these proponents, antitrust cases are so burdensome for the litigants and the economy that heightened scrutiny[60] at the pleading stage is necessary to weed out non-meritorious claims.

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[54] Brief of the United States as Amicus Curiae in Support of Petitioners at 12 (Aug. 25, 2006), Bell Atlantic Corp. v. Twombly, No. 05-1126, *available at* http://www.usdoj.gov/atr/cases/f218000/218048.htm.

[55] *Id.* at 19.

[56] *Id.* at 7.

[57] *Twombly II*, 425 F.3d at 108.

[58] *Id.* at 117.

[59] *Id.*

[60] The Second Circuit explained that a "heightened pleading standard" has not been applied to antitrust cases, despite the pleas of "successive generations of lawyers representing clients defending against civil antitrust claims." *Twombly II*, 425 F.3d at 107–108. The defendants-petitioners and amici do not argue or concede before the Supreme Court that the plus factor test is a "heightened pleading standard." They do, however, at the very least advocate that antitrust cases require closer or more rigorous scrutiny under Federal Rules 8 and 12(b)(6), given their unique burdens. In contrast, the plaintiffs-respondents are likely to contend that the plus factor test is a heightened pleading standard for antitrust cases—something the Second Circuit squarely rejected in *Twombly* and which would bring the matter closer to the Supreme Court's holding in *Swierkiewicz*. *See* Swierkiewicz v. Sorema, 534 U.S. 506, 513 (2002) ("declin[ing] to extend" the heightened pleading requirements of Rule 9 to contexts other than fraud or mistake). We use the term "heightened scrutiny" to describe the position advocated by the defendants-petitioners without expressing any opinion as to whether such scrutiny is, in fact, a heightened pleading standard.

However, the "antitrust is different" point could conceivably also be invoked to support more liberal scrutiny of antitrust complaints. As opposed to ordinary civil litigation, which focuses on and may affect only the parties to the dispute, the basic tenet of antitrust law is the protection of competition and, by extension, the welfare of consumers. In this context, antitrust conspiracy cases may implicate a broader public interest than many other types of civil litigation, and some may argue that heightened scrutiny at the pleading stage could weed out too many claims of potential merit before evidence of a conspiracy could be fully exposed.

Finally, added to this mix is the fact that Congress has yet to intervene as it did in the securities litigation context, which perhaps will help the plaintiffs-respondents' arguments that the Supreme Court should not, or even cannot, apply heightened scrutiny to antitrust cases at the pleading stage without congressional action.

The challenge of fashioning an appropriate test has eluded consensus even among those advocating heightened scrutiny.

A Workable Test? Assuming the Supreme Court finds that merely pleading parallel conduct without more is insufficient, the ultimate question is what is the appropriate test. The district court's approach was rooted in substantive law developed for summary judgment and then tweaked for the context of a motion to dismiss. Given its moorings in the summary judgment context, the district court's test has the benefit of a well-established body of substantive antitrust law to aid litigants and courts in determining what will be sufficient at the pleading stage. Further, there is an inherent logic in requiring a complaint to meet the threshold requirement of the substantive law with respect to a conspiracy claim based upon parallel conduct.

However, the district court's test is not without potential concerns. First, does a summary judgment-based standard really fit? The detailed evidence presented at summary judgment to aid courts in analyzing plus factors is very different than typical allegations in a complaint. And, importantly, as the district court acknowledged, deciding whether plus factors are sufficient to support a claim of conspiracy based upon parallel conduct will require an understanding of the market, and particularly the behavior to be expected from market participants. In a typical case, such a market analysis would be very hard to do at the pleading stage. Indeed, *Twombly* was arguably unique because the Telecommunications Act of 1996 and the Antitrust Division's case against AT&T offered such a substantial body of information from which the district court was able to draw in its analysis. Other newly filed cases might be much less susceptible to an analysis of the market's dynamics and the issue of whether parallel conduct would be in the economic interest of certain competitors.

The challenge of fashioning an appropriate test has eluded consensus even among those advocating heightened scrutiny. The defendants-petitioners and certain amici have essentially championed Judge Lynch's standard, which requires pleading a factual predicate for plus factors. Other amici, however, have offered what appear to be perhaps slightly looser standards. For example, the government, while not advocating that plus factors necessarily must be pled, has offered instead that a "Section 1 complaint must allege, at a minimum, facts providing concrete notice of the claimed wrongdoing and some objectively reasonable basis for inferring that an unlawful agreement may explain the parallel conduct."[61] Similarly, the American Bar Association has advocated that an antitrust plaintiff must plead facts that at least "provide a reasonable basis to believe there is an agreement."[62] Still others have simply advocated that the Supreme Court

[61] Brief of United States, *supra* note 54, at 23.

[62] Brief of the American Bar Association, *supra* note 44, at 3.

require more than what the Second Circuit required, leaving the "more" to be determined by the Court.[63] And some amici are seeking a broader interpretation of Rule 8 that would grant latitude to district courts to dismiss cases beyond the antitrust context.[64]

Conclusion

The impact of *Twombly* will likely be significant. If the Court requires additional factual allegations to support a conspiracy claim under Section 1, fewer antitrust cases may be filed, or at least fewer may survive motions to dismiss. Even those that are permitted to proceed could see the scope of discovery limited to comport with the theory of conspiracy set forth in the complaint. Some amici even hope that the Court will issue a broader pronouncement on Rule 8 that may affect cases outside antitrust. Alternatively, an opinion that strongly reaffirms the liberal pleading requirements under Rule 8 in this context may pave the way for less well-tailored complaints in the future—perhaps entailing wasteful and expensive litigation and settlements.

In short, whatever the Supreme Court decides in *Twombly*, the case is likely to have significant and far-reaching effects on the world of civil antitrust litigation. Certainly the Court will have much to consider in establishing an appropriate standard that comports both with the basic tenets of Rule 8 and the well-established substantive requirements of Section 1. ●

[63] *See, e.g.*, Brief of Amici Curiae Economists in Support of Petitioner at 6, Bell Atlantic Corp. v. Twombly, No. 05-1126 (U.S. Apr. 6, 2006), *available at* http://www.techlawjournal.com/courts/2006/bellatlantic_twombly/cert_amicus_baumol.pdf (favoring the "plus factor" standard but taking no position as how strong the interference of parallel conduct must be supported by allegations in the complaint).

[64] *See, e.g.*, Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners at 13–19, Bell Atlantic Corp. v. Twombly, No. 05-1126 (U.S. Apr. 6, 2006), *available at* http://www.wlf.org/upload/TWOMBBRF.pdf.