

## **Living With *Twombly***

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On May 21, 2007, the U.S. Supreme Court handed down *Bell Atlantic Corp. v. Twombly* (550 U.S. 544 (2007)). Just short of two years have passed since *Twombly* was decided, time enough to assess its impact on pleading and motion practice in the federal courts. We can now answer the question of whether *Twombly* was an antitrust pleading case or a federal civil pleading case.

The issue before the Supreme Court in *Twombly* was: How much detail must a plaintiff allege in order to state a claim for conspiracy under Section 1 of the Sherman Act? May a plaintiff rest with allegations of parallel conduct by several defendants, or is a plaintiff required to allege something more in order to state a claim for conspiracy? In *Twombly*, the plaintiffs, based on a history of parallel conduct, had alleged a conspiracy among telecommunications companies not to compete against one another and to block entry of new local service providers.

The District Court dismissed the complaint, finding that merely alleging parallel conduct was insufficient to state a claim for conspiracy. The Second Circuit reversed. It held that allegations of parallel conduct standing alone were sufficient to state a claim and provided adequate notice of the nature of the conspiracy alleged as well as the basis for the claim.

In a 7 to 2 decision, the Supreme Court reversed. Justice Souter's opinion for the majority held that "stating a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." Specifically, "an allegation of parallel

business conduct . . . without further factual enhancement . . . stops short of the line between possibility and plausibility.” In reviewing the complaint before it, the Court found “nothing” that provided a “plausible suggestion of conspiracy” where each of the defendants had a strong economic incentive to resist competition from new entrants and where a “natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.” In the Court’s view, “asking for plausible grounds to infer an agreement” does not require factual allegations which make recovery probable, but does require “enough fact to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.”

In revisiting the pleading standard, the Court expressly disapproved the language and standard set out in *Conley v. Gibson*, 355 U.S. 41 (1957). Under *Gibson*, dismissal under Rule 12 was appropriate only when it appears beyond doubt that the plaintiff could not prove any set of facts entitling it to relief. In *Twombly*, the Supreme Court characterized the “no set of facts” test as “best forgotten as an incomplete, negative gloss on an accepted pleading standard.”

Initial reactions to *Twombly* were quite varied. The predominant reaction was that *Twombly* would mark a significant reduction in antitrust litigation, and that it was a decision limited to the antitrust context. Less common, but still not at all uncommon, were suggestions that the holding would not be limited to antitrust actions, but would and should be applied to all federal civil cases.

The suggestion that *Twombly* was to be limited to antitrust cases was not just myopic narrow-mindedness. We should remember that *Erickson v. Pardus*, 551 U.S. 89

(2007), came down shortly after *Twombly*. In *Pardus*, the Supreme Court expressly affirmed that notice pleading had not been altered by *Twombly*. That combination of decisions suggested that *Twombly* might be confined to the antitrust context. If so, it would not be the only special standard applicable to antitrust cases. In the context of a Rule 56 motion, for example, conspiracy claims in antitrust are analyzed under a different and more demanding standard than applied elsewhere in civil law. *Pardus* therefore might have been read as a signal that the Supreme Court did not intend a revolution in pleading. The question really came to this: What was the import of the discussion of *Conley v. Gibson* in *Twombly*? The Supreme Court certainly sought change in Rule 12 pleading standards, but just what kind of change?

The answer appears to be that the *Twombly* “plausible allegations” standard is the standard for analysis under Rule 12 of *all* civil complaints. Absent factual allegations sufficient to make the claims plausible, a complaint is to be dismissed.

#### What Has Happened in the Tenth Circuit?

The Tenth Circuit has directly addressed *Twombly* in a number of cases, but almost all of those cases are *not* antitrust cases. That breadth of context is important. The first thing to note is that the Tenth Circuit has not treated *Twombly* as solely about antitrust cases nor has the Tenth Circuit limited *Twombly*’s application to complex civil cases; instead, it considers *Twombly* as applicable to all Rule 12 motions under Federal law.

Consider, for example, a couple of recent Circuit Court decisions. *Bryson v. Gonzales*, 534 F. 3d 1282 (10<sup>th</sup> Cir. 2008), is a Section 1983 case based on allegations of false arrest and imprisonment. (*Bryson* is one offshoot of an effort to remedy a

remarkable pattern of prosecutorial misconduct and state efforts to block release of a wrongfully convicted man. *See Bryson*, 534 F.3d at 1283-84.) In *Bryson*, the Tenth Circuit held that *Twombly* applies to all complaints, *i.e.*, that a complaint must allege facts creating a plausible basis for the claims asserted. The Court's commitment to a broad application of *Twombly* is unmistakable. *Bryson* is a Section 1983 case having nothing to do with antitrust law. The Court expressly applies *Twombly*, and goes on to explain its understanding of *Twombly*. A complaint that alleges all of the elements of a claim necessarily is sufficient. But a complaint which omits some essential elements may still succeed so long as the missing elements are plausibly inferred from what is alleged. Allegations of otherwise innocent conduct are not likely to be plausible allegations of a claim. "Plaintiffs thus omit important factual material at their peril." *Id.* at 1286.

In *Patton v. West*, No. 07-4154, 2008 U.S. App. LEXIS 8956 (10<sup>th</sup> Cir. April 25, 2008), the complaint alleged a conspiracy by Provo, various of its employees and a guardian ad litem to deprive the parents of custody of their children. The Tenth Circuit applied the plausibility standard of *Twombly* to the case. *Pace v. Swerdlow*, 519 F.3d 1067 (10<sup>th</sup> Cir. 2008), was a case arising under diversity jurisdiction which involved claims against an expert in a medical malpractice case. The district court had dismissed the complaint under Rule 12(b)(6). The Circuit Court reversed, finding that the allegations were sufficient to state a claim because they were factually sufficient to make the claim plausible. But, relevant here, the dissent by Judge Gorsuch cites *Twombly* as applying broadly to all federal cases and as changing the pleading standard. *Id.* at 1076. That portion of the dissent is picked up and cited with approval in *Bryson*.

These are not isolated or unusual cases. A quick survey of other cases in the Circuit yields the same conclusion: The “plausible theory” standard of *Twombly* is the pleading standard in this Circuit for all civil cases in the federal courts. In *Robbins v. Oklahoma*, 519 F.3d 1242 (2008), the Tenth Circuit affirmed dismissal of a complaint because the plaintiff had not pled facts sufficient to make the claims plausible. In *Robbins*, the parents of a child who died in a subsidized day care program asserted that the fatal injuries to their infant gave rise to a claim under Section 1983. The Court of Appeals went directly to *Twombly* and read that decision as announcing a new (or clarified) standard. *Id.* at 1247. The degree of specificity needed to get past the *Twombly* “plausibility line” applied here as well. Just where that line was to be drawn would vary, but plausibility was the standard: “specificity necessary to establish plausibility and fair notice . . . depends on context.” *Id.* at 1248. More recently, the Tenth Circuit applied *Twombly* to dismiss a medicare False Claims Act case in *U.S. ex rel. Conner v. Salina Regional Health Center, Inc.*, 543 F.3d 1211 (2008), and in *Carson v. Cudd Pressure Control, Inc.*, No.07-6199 2008 U.S. App. LEXIS 24033 (10<sup>th</sup> Cir. 2008) applied *Twombly* is reversing dismissal of an ADA claim.

Let me end this section by reading an extended quotation from *Bryson*, leaving out citations and internal quotation marks:

To state a claim, a plaintiff’s complaint must show that the pleader is entitled to relief. This means that the plaintiff must allege enough factual matter, taken as true, to make his claim to relief plausible on its face. . . . If a complaint explicitly alleges every fact necessary to win at trial, it has necessarily satisfied this requirement. If it omits some necessary facts, however, it may still suffice so long as the court can plausibly infer the

necessary unarticulated assumptions. But if the complaint is sufficiently devoid of fact necessary to establish liability, that it encompasses a wide swath of conduct, much of it innocent, a court must conclude that plaintiffs have not nudged their claims across the line from conceivable to plausible. Plaintiffs thus omit important factual material at their peril. . . . Thus, despite the liberality of modern rules of pleading, a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.

At 1286.

What the Other Circuits are Doing:

As suggested above, the other Circuits are interpreting *Twombly* in terms largely consistent with what the Tenth Circuit has done. They too have found that *Twombly* changed the pleading standard in antitrust cases of all kinds (not just conspiracy), *and* reaches to all kinds of complaints coming before the federal courts.

The Ninth Circuit has held that there is a new pleading standard for antitrust cases. In *Kendall v. VISA USA, Inc.*, 518 F.3d 1042 (2008), the Ninth Circuit held that a plaintiff must plead evidentiary facts sufficient to prove all three elements of a Section 1 claim: a contract or conspiracy, which is intended to harm trade, and which actually harms competition. In footnote 5, the Ninth Circuit said: “At least for purposes of adequate pleading in antitrust cases, the Court specifically abrogated the usual ‘notice pleading’ rule....”

There does not seem to be much dispute that all antitrust complaints face the plausibility standard now. Consider also *NicSandisa, Inc. v. 3M Co.*, 507 F.3d 442 (6<sup>th</sup> Cir. 2007), a 2007 antitrust case in the Sixth Circuit applying *Twombly* pleading

standards, or, from the Third Circuit, *Phillips v. County of Allegheny*, 515 F.3d 224 (2008), a Section 1983 case holding that *Twombly* applied to all federal civil cases. The Second Circuit reached the same conclusion in *Port Dock and Stone Corp. v. Oldcastle Northeastern, Inc.*, 507 F.3d 117 (2<sup>nd</sup> Cir. 2007).

### The Plausibility Standard

While *Twombly* has raised the pleading standard for federal civil cases, the meaning of the new “plausibility” standard is not very clear. The courts have offered relatively little guidance. What the courts have said is that a “plausible” set of allegations depends on (and presumably varies with) the nature of the claim. That answer directs us to look for patterns of alleged facts which pass or fail muster in the various kinds of cases, and suggests that the district courts may have broad discretion in ruling on Rule 12(b)(6) motions. But it may also be that, like antitrust injury, it is just not feasible to offer bright line rules.

### Import for Utah State cases:

Because *Twombly* was an antitrust case, it is natural to think that the most likely route for that case and its new pleading standard to enter into state opinions is via a state antitrust case. But there is a dearth of antitrust cases in the state courts. There have not been any decisions on antitrust claims from the Utah Court of Appeals or the Utah Supreme Court since *Twombly*. To be honest, I did not locate any antitrust cases in the last 10 years. If *Twombly* has an influence on Utah law, it will be a long wait if confined to the antitrust context. With the federal courts taking *Twombly* as applicable in all Rule 12(b)(6) motions, it is more likely that *Twombly* will enter Utah law, if it does, through some other kind of case. Rule 8 and Rule 12 of the Utah Rules of Civil Procedure

essentially mimic the corresponding Federal Rules. The Utah case law to date follows the *Conley* approach to Rule 12(b)(6) – the defendant loses unless there are no facts which could support the complaint. The language of the Utah appellate decisions is quite close, if not identical, to the standard recitations of federal courts under *Conley*.

The question, then, is whether the Utah Courts will follow on the path of *Twombly*. They do not have to. The line of cases interpreting Rule 12(b)(6) of the Utah Rules of Civil Procedure is independent of the federal Rule 12(b)(6) cases. The Utah line of cases, which aligns with *Conley*, can stand independently of the Federal decisions. That relevant Rules are virtually identical does not really give any guidance to what the Utah Supreme Court will do when it is faced with the issue. I do not just mean that there is a logically defensible separation of the authority between Utah and Federal cases. That is a formal argument about the sovereigns. There is also Utah precedent, and of recent vintage, indicating divergent interpretations of very similar, if not identical, civil rules.

The Federal Rule 56 and Utah Rule 56 are also virtually identical. Everyone knows that the governing case for Rule 56 motions under the Federal Rules of Civil Procedure is *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). But *Celotex* is not law in Utah. *Orvis v. Johnson*, 2008 UT 2, ¶ 15-16, 177 P.3d 600. In *Orvis*, the Utah Supreme Court expressly noted that Utah summary judgment standards differ from the federal standards. The Utah Supreme Court held that a moving party who does not bear the burden of proof at trial must still advance (presumably admissible) evidence negating an essential element of a claim in order to properly obtain summary judgment. This is contrary to the standard under *Celotex*. Whatever the wisdom of that holding – about which I have serious doubts – it makes clear that the Utah Supreme Court may adopt and

defend its own interpretation of Rules of Civil Procedure no matter how closely the text of the specific rule may appear to be to the corresponding Federal Rule. I think there are some interesting ties between the Utah Supreme Court's unsettled jurisprudence of constitutional interpretation (*cf. American Bush v. City of South Salt Lake*, 2006 UT 40, 140 P.3d 1235 and *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921 (Utah 1993) (calling for an originalism) *with State v. Tiedemann* 2007 UT 49, 162 P.2d 1106 (completely ignoring the prior cases)) and interpretation of the rules of civil procedure. What works for Rule 56 – interpretation grounded in the Utah committee and history – could work for Rule 12(b)(6) as well. Or not.

A driving force leading to the *Twombly* decision seems to have been pre-trial litigation costs.<sup>1</sup> The same consideration applies to state cases. The brouhaha over revising Utah's Rule of Evidence 702 showed a good deal of sensitivity about pre-trial litigation costs, in particular for plaintiffs in that instance. The same sorts of trends are pushing litigation costs in state cases as in federal cases. Electronic discovery, for example, is just as much a burden in state cases as in federal cases.

In any event, I note that a fairly recent decision from the Utah Court of Appeals makes no mention, one way or the other, of the “plausibility” standard or of *Twombly*. While not using the language of *Conley v. Gibson* directly, the language the Court of Appeals did use is pretty close to the *Conley* standard: “if it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of its claim.” *Williams v. Stag Car Club*, 2008 UT App 306, ¶ 21, 193 P.2d 640.

### Conclusion

In federal court, plaintiffs should plead facts sufficient to make the claims plausible in all cases, not just antitrust conspiracy cases. Plausible is less than probable, but certainly more than bare notice of the claim. A higher standard, and plausibility certainly is a higher standard, means more frequent grants of motions to dismiss. The more interesting issue that remains is what the state courts will do, and when.

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<sup>1</sup> See *Twombly* 127 S. Ct. at 1966; see also *Bryson*, at 1287.