Bell Atlantic Corp. v. Twombly: A Review of the "Plausibility" Pleading Standard

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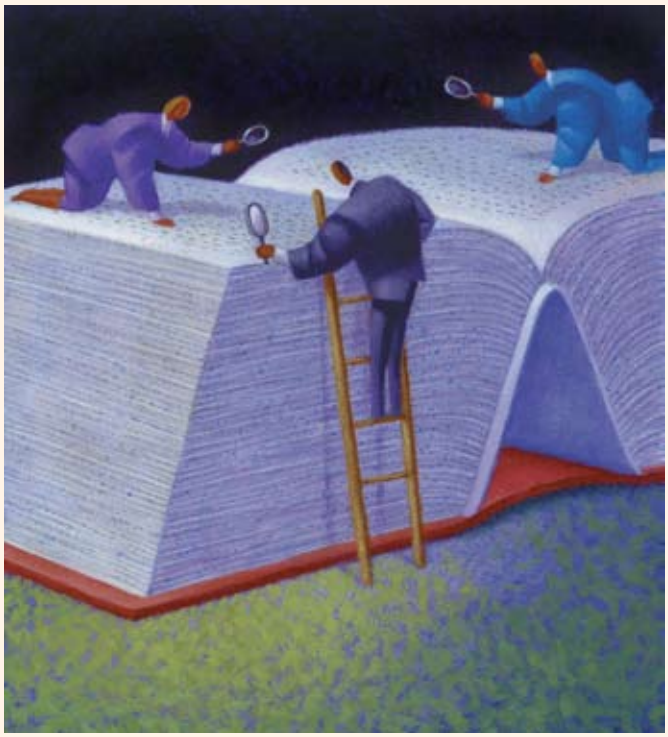
For 50 years, courts relied on the U.S. Supreme Court's opinion in *Conley v. Gibson*, 355 U.S. 41 (1957), in allowing for dismissal of an action for failure to state a claim only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" in order to "give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. However, in May 2007, the Supreme Court rejected this standard in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), setting out a new "plausibility" standard for evaluating the sufficiency of complaints when faced with a Rule 12(b)(6) motion to dismiss. Upon reviewing the *Twombly* opinion, questions arise as to whether the plausibility standard applies to all civil complaints or whether it is restricted solely to the antitrust claims that were at issue in *Twombly*. In addition, *Twombly* raised concerns that this new standard would be interpreted in a manner that would set a particularly high pleading standard that had not been contemplated by Rule 8(a).

Several circuit courts of appeal have recently examined the *Twombly* decision and its effect on pleading standards. To assist practitioners in understanding what *Twombly* requires, this article will review the *Twombly* opinion, looking closely at the Supreme Court's reasoning behind the new plausibility standard, and will then consider the manner in which several circuit courts have interpreted and applied this new standard.

The *Twombly* Opinion

According to the Federal Rules of Civil Procedure, before filing a complaint in any civil action, the plaintiff must determine what facts and allegations must be pleaded in order to support the claims to be asserted sufficiently. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Keeping in mind this "short and plain" requirement, the plaintiff must make sure that the allegations of the complaint are sufficient to withstand a defendant's motion to dismiss the case because of failure to state a claim for which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

In *Twombly*, the plaintiffs, representing a putative class consisting of all subscribers of local telephone and high-



speed Internet services, filed a complaint against a group of incumbent local exchange carriers (ILECs), alleging that the ILECs controlled more than 90 percent of the market for local telephone service in the 48 contiguous states. *Twombly*, 127 S. Ct. at 1962 n.1. The plaintiffs sought treble damages and declaratory and injunctive relief for claimed violations of § 1 of the Sherman Act, 15 U.S.C., which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."

The central allegations of the complaint were set out as follows:

> In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition … within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and

> belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.

Id. at 1962–1963. The U.S. District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted. In its dismissal, the district court stated that mere allegations of "parallel business conduct," taken alone, are not sufficient to state a claim under § 1 of the Sherman Act. Rather, the plaintiffs must allege additional facts that "[t]end to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." In addition, the district court found the plaintiffs' complaint "failed to rais[e] an inference that [the ILECs'] actions were a result of a conspiracy," because the plaintiffs did not allege facts that would suggest that the ILECs were doing anything more than protecting their own economic interests by refraining from competing in other territories.

The U.S. Court of Appeals for the Second Circuit reversed the district court's dismissal, finding that the district court had tested the sufficiency of the complaint under the wrong standard. The Second Circuit held that the plaintiffs were not required to plead "plus factors" to support an antitrust claim based on parallel conduct. Furthermore, the Second Circuit recognized that "to rule that allegations of parallel anti-competitive 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." The U.S. Supreme Court granted certiorari to "address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct." The Supreme Court began its review by setting out the elements the plaintiffs were required to prove in order to support their claims under § 1 of the Sherman Act. The Court then set out the following general standards for pleading:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." While a complaint attacked by Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Id. at 1964–1965. Next, the Court applied these standards to the plaintiffs' § 1 claim, holding that "stating such a claim requires a complaint with enough factual matter (taken as true) to suggest than an agreement was made." The Court stated that "asking for *plausible* grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* (emphasis added). The Court then recognized that "[t]he need at the pleading stage for allegations *plausibly* suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 1966 (emphasis added). Thus, the Court interpreted the pleading rules as requiring facts suggestive enough to "render a § 1 conspiracy plausible" and held that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice."

Arguing against the application of the plausibility standard, the plaintiffs suggested to the Court that the standard was in direct conflict with the Court's construction of Rule 8 in *Conley*, in which Justice Hugo Black's opinion written for the Court recognized the "accepted rule 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 claims which would entitle him to relief." *Id.* at 1968 (citing *Conley*, 355 U.S. at 45–46). In response to this argument, the Court noted that the Second Circuit, in reversing the district court's dismissal, read *Conley* in such a way that "any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings." The Court further iterated that "[o]n such a focused and literal reading of *Conley*'s 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts to support recovery,'" and that "this approach to pleading would dispose with any showing of a 'reasonably founded hope' that a plaintiff would make a case."

After recognizing that *Conley*'s "no set of facts" language has been "questioned, criticized, and explained away long enough," the Court stated the following:

> To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations of the complaint." *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.

Id. at 1968–1969. Thus, the Court made it clear that the analysis based on "no set of facts" that has been applied since *Conley* should no longer be used to analyze the sufficiency of a complaint, and the opinion went on to find that the plaintiffs in *Twombly* had failed to allege plausible facts that would support their claims. In reversing the Second Circuit's judgment, the Supreme Court stated "here … we do not require heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."

The *Twombly* opinion put a greater burden on plaintiffs bringing antitrust claims to ensure that facts are included in the complaint that make the alleged conduct "plausible" in their case rather than merely conceivable under some undiscovered set of facts. However, the Court did not make clear what effect its "retirement" of *Conley* would have on federal cases that do not involve allegations of antitrust conspiracies. Several circuit courts of appeal have recently issued opinions examining *Conley* and its effect on pleading requirements in general. A review of these opinions will give important insight into the implications the *Twombly* opinion may have to cases outside of the antitrust arena.

Phillips v. County of Allegheny: The Third Circuit's Interpretation of the *Twombly* Standard

In *Phillips v. County of Allegheny*, 515 F.3d 224 (3rd Cir. 2008), the U.S. Court of Appeals for the Third Circuit examined the effect of the *Twombly* opinion in the context of a civil rights and wrongful death action. The plaintiff, Jeanne Phillips, acting in her capacity as executor of the estate of Mark Phillips, made allegations that the county and its 911 dispatchers' office violated Mark Phillips' civil rights under 42 U.S.C. § 1983 and further alleged that said violations led to Mark Phillips' wrongful death. In response to the complaint, the defendants moved for dismissal under Rule 12(b)(6), and the district court granted the motion.

On appeal, the Third Circuit recognized that it would have to determine what effect *Twombly* had on pleading standards before it could review the district court's dismissal of the complaint. At the outset, the Third Circuit stated the following:

> What makes *Twombly*'s impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new "plausibility" paradigm for evaluating the sufficiency of complaints. At the same time, however, the Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression; even in rejecting *Conley*'s "no set of fact" language, the Court does not appear to have believed that it was really changing the Rule 8 or Rule 12(b)(6) framework. Therefore, our review of how *Twombly* altered review of Rule 12(b)(6) cases must being by recognizing the § 1 antitrust context in which it was decided. Outside § 1 antitrust context, however, the critical question is whether and to what extent the Supreme Court altered the general Rule 12(b)(6) standard.

Phillips, 515 F.3d at 230. The Third Circuit then noted that *Twombly* expressly left intact the requirement of Rule 8 that only a "short and plain" statement of the claim needs to be set forth in the complaint, and that this standard does not require factual allegations. Furthermore, the court made no change to the general rule that on a Rule 12(b)(6) motion to dismiss, the facts alleged must be taken as true and a trial court should not dismiss a complaint when it appears unlikely that the plaintiff can prove the alleged facts or will prevail on the merits.

After setting out what it felt the *Twombly* decision had not changed, the Third Circuit looked at two concepts raised for the first time in *Twombly*. First, *Twombly* used language never before used in stating that "a plaintiff's [Rule 8] obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 231 (quoting *Twombly*, 127 S.Ct. at 1964-65). According to *Twombly*, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 232 (quoting *Twombly* at 1965fn.3). Second, and more important, the Third Circuit noted that *Twombly* rejected the "no set of facts" language used in the *Conley* ruling, and then recognized that these two aspects of the *Twombly* opinion "are intended to apply to the Rule 12(b)(6) standard in general," not solely to cases involving section 1 antitrust claims. *Id.* at 232 (emphasis added) (citing *Iqbal v. Hasty*, 490 F.3d 143, 157 n.7 (2nd Cir. 2007) (stating that "it would be cavalier to believe that the Court's rejection of the 'no set of facts' language from *Conley* … applies only to section 1 antitrust claims")). The Third Circuit also made sure to point out that *Twombly* was not to be read as "demanding a heightened pleading of specifics nor imposing a probability requirement."

The Third Circuit felt that "the more difficult question raised by *Twombly* is whether the Supreme Court imposed a new 'plausibility' requirement at the pleading stage that materially alters the notice pleading regime." While the *Twombly* Court repeatedly referred to "plausibility" in the context of notice pleading, it also repeatedly indicated that it was not adopting a heightened standard of pleading. Admittedly confused by the intended scope of the *Twombly* opinion, and noting that the opinion "will likely be a source of controversy for years to come," the Third Circuit "declined to read *Twombly* narrowly," and interpreted *Twombly* as imposing a plausibility requirement in all civil actions, not simply those actions alleging section 1 violations. The court then indicated that this plausibility requirement is met where "factual allegations … raise a right to relief above the speculative level."

Upon reaching the conclusion that *Twombly*'s plausibility standard applies to all cases, the Third Circuit provided the following summary of the *Twombly* pleading standard: "stating … a claim requires a complaint with enough factual matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." The Third Circuit's opinion in

Phillips helped to clear up some of the confusion caused by seemingly inconsistent language used in the *Twombly* decision, and the court articulated a reasonably clear summation of the plausibility pleading standard imposed by *Twombly*.

The Tenth Circuit's Look at the *Twombly* Opinion

Not long after the *Phillips* opinion was issued, the U.S. Court of Appeals for the Tenth Circuit took a look at *Twombly* and its effect on pleading standards. In *Robbins v. Oklahoma*, 519 F.3d 1242 (10th Cir. 2008), the parents of an infant who had suffered fatal injuries while in the care of a day care center recommended by the Oklahoma Department of Human Services brought claims under 42 U.S.C. § 1983 against the department, its employees who had been involved, and the day care center and its owner-operator. Several of the defendants moved to dismiss the claims under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The district court granted the Department of Human Services' motion based on sovereign immunity but partially denied the motion of the individual defendants. The individual defendants appealed, asking the Tenth Circuit to consider whether the plaintiffs had stated a claim for relief.

Like the Third Circuit, the Tenth Circuit noted that "[t]he most difficult question in interpreting *Twombly* is what the court means by 'plausibility.'" Recognizing *Twombly*'s instruction that "[a] well pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable and 'that a recovery is very remote and unlikely,'" the Tenth Circuit reasoned that the term "'plausible' cannot mean 'likely to be true.' … Rather, 'plausibility' in this context must refer to the scope of the allegations in a complaint; if they are so general that they encompass a wised swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" Summarizing its interpretation of the plausibility requirement, the Tenth Circuit stated that "[t]he allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief."

Significantly, the Tenth Circuit, adopting a principle set out in *Phillips*, recognized that "the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations, depends on context." Thus, what constitutes "fair notice" for the purpose of Rule 8 "depends on the type of the case." *Id.* at 1248 (citing *Phillips*, 515 F.3d at 231–232). As the court noted, a simple case of negligence involving an automobile would not require the specific allegations that were required in *Twombly* when the plaintiffs attempted to state antitrust claims. Thus, in determining whether the plaintiff has "crossed the line from conceivable to plausible," the court must keep in mind the complexity of the claims asserted and the context in which the claims arose.

In the "context" of the § 1983 claims that the court was asked to review, the Tenth Circuit cautioned that "complaints in § 1983 cases against individual government actors pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants." The Tenth Circuit further stated that "[t]he *Twombly* standard may have greater bite in such contexts, appropriately reflecting the special interest in resolving the affirmative defense of qualified immunity 'at the earliest possible stage of a litigation.' … Without allegations sufficient to make clear the 'grounds' on which the plaintiff is entitled to relief, it would be impossible for the court to perform its function of determining, at an early stage in the litigation, whether the asserted claim is clearly established."

After noting the "bite" *Twombly* has with respect to § 1983 claims, the Tenth Circuit found that the plaintiffs in *Robbins* had failed to allege facts sufficient to support their claims, stating that "[a]s it stands, the complaint encompasses a broad range of imaginable circumstances, only some of which, if any, would entitle the plaintiffs to relief, and therefore, 'stops short of the line between possibility and plausibility of entitle to relief.'" The Tenth Circuit reversed the district court's judgment and remanded the case with instructions to dismiss the complaint without prejudice for failure to state a claim upon which relief can be granted.

Conclusion

The true effect of the *Twombly* opinion on pleading requirements will probably not be determined for many years to come, once all of the circuit courts have had a chance to look at and interpret the plausibility standard. However, the *Phillips* and *Robbins* cases do tell us that courts are not willing to limit the plausibility standard to the antitrust claims at issue in *Twombly*. Thus, rather than merely alleging general facts that could possibly support the claim stated in their complaint, plaintiffs must now allege facts sufficient to "nudge their claims across the line from conceivable to plausible." The Supreme Court may not have intended a drastic change in pleading standards when it rendered its *Twombly* opinion, but the Court's opinion was vague enough to allow lower courts to interpret the plausibility standard in a way that may very well lead to a "heightened" pleading standard in the context of complex claims. The Supreme Court certainly gave defense lawyers ammunition to obtain dismissal of complaints that would not have been dismissed under *Conley* "no set of facts" framework, and circuit courts are likely to have ample opportunities to review the application of the plausibility standard by trial courts that have dismissed complaints under Rule 12(b)(6). **TFL**

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