



**CASE NOTE:**

**BELL ATLANTIC V. TWOMBLY**

**Max Huffman**

**An eCCP Publication**

**May 2007**

© 2007 Max Huffman. Published with permission by eCCP.

**Bell Atlantic v. Twombly**

By

Max Huffman \*

On May 21, 2007 the Supreme Court reversed the unanimous decision of the Second Circuit in *Bell Atlantic Corp. v. Twombly*.<sup>1</sup> The Court held that allegations of parallel conduct by competitors, without more, were insufficient to state a claim for a conspiracy in violation of the Sherman Act § 1. The result had been predicted by many in the established antitrust bar and in academic circles. As an antitrust case, *Twombly* reaffirms the important principle from the Court's 1954 *Theatre Enterprises*<sup>2</sup> decision—repeated since in cases like *Monsanto*<sup>3</sup> and *Matsushita*<sup>4</sup>—that parallel conduct by competitors, even if based on shared appreciations of their interdependence, is not illegal. *Twombly* is also tantalizingly close—but stops short of being—the Supreme Court's first express recognition of the “plus factors” framework for circumstantial proof of a Sherman Act § 1 conspiracy. *Twombly* has much greater implications as a civil procedure decision. In stating that the “any state of facts” standard from the Court's 1957 *Conley*<sup>5</sup> decision “has earned its retirement,” *Twombly* seemingly announces a new rule for pleading that gives ground for re-evaluation of how generations of lawyers were taught to frame and respond to complaints.

This case note first discusses the *Twombly* litigation leading up to the Court's grant of certiorari in fall 2006. It then turns to the Supreme Court's decision, discussing Justice Souter's opinion for the majority and Justice Stevens's dissent. The note then analyzes the impact of *Twombly* on antitrust law and on pleading practice generally.

**Facts and Posture**

*Twombly* is a purported class action alleging a conspiracy among providers of local telephone and Internet services. Plaintiffs claimed the defendants conspired to do two things: (1) to prevent entry by competitors into their respective markets, and (2) not to enter each other's markets in competition with one another. The result, plaintiffs alleged, was that the defendants maintained monopolies in their geographic markets and consumers were injured. Plaintiffs purport to represent a class of “all individuals and entities who purchased local telephone and/or high speed internet services in the

---

\* Max Huffman is a Visiting Assistant Professor at the University of Cincinnati College of Law, and was the author of the Brief of *Amici Curiae* Legal Scholars in Support of Petitioners, filed in *Bell Atlantic v. Twombly*.

<sup>1</sup> 425 F.3d 99 (2005).

<sup>2</sup> *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954).

<sup>3</sup> *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

<sup>4</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>5</sup> *Conley v. Gibson*, 355 U.S. 41 (1957).

continental United States . . . from at least as early as February 8, 1996 and continuing to present.”

Local telephony, the industry at issue in *Twombly*, is marked by a complex history of regulated monopoly and, since the passage of the Telecommunications Act of 1996 on February 8, 1996, tortured deregulation. The defendants’ respective service markets substantially coincide with the markets in which they had monopolies protected by state law prior to the Telecom Act. The Telecom Act gave local telephone companies the abilities to compete for long-distance business, in exchange for requiring them to share their local exchange networks with competitors. It had the effect of creating two business models for firms seeking to provide local telephony services. One is the “incumbent local exchange carrier”—called an ILEC—which serves the region in which, before deregulation, it had an exclusive franchise under state law. The other is the “competitive local exchange carrier”—called a CLEC—which seeks to serve customers in the markets that have been opened to competition. Despite the Telecom Act’s obvious intention, and hopes expressed by the Consumer Federation of America and various federal legislators, head-to-head competition did not immediately blossom in the market for local exchange telephone services. Like any firm, ILECs have good reason to abhor entry by competitors, and made significant efforts to preclude or limit entry by CLECs. ILECs also have good reason not to become CLECs themselves, competing with another ILEC in its former monopoly service territory. Former Qwest CEO Richard Notebart, a shortened statement of whose was fodder for the *Twombly* plaintiffs’ complaint, made it clear that for an ILEC, competing as a CLEC in other ILECs’ service territories would not be “a sustainable economic model” and would be “unwise” as a “business plan.”

At the trial court level, Judge Gerard Lynch on the Southern District of New York dismissed plaintiffs’ complaint. Because “the Supreme Court ‘has never held that proof of parallel business behavior \* \* \* itself constitutes a Sherman Act offense,’” Judge Lynch noted the court’s responsibility to “distinguish between conduct that represents the natural convergence of competitors’ market behavior, and conduct that appears to have been taken pursuant to an agreement.”<sup>6</sup> Judge Lynch held plaintiffs’ specific allegations in their amended complaint did nothing to advance the complaint beyond merely alleging innocent independent, or perhaps consciously parallel, conduct by competitors.

A unanimous panel of the Second Circuit, with Judge Sack writing, considered the same allegations but “disagree[d] with the standard that the district court applied.” The panel believed factual allegations that were ambiguous as to whether conduct was legitimate or illegal were sufficient to survive a motion to dismiss. “[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.”<sup>7</sup>

---

<sup>6</sup> *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003) (quoting *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954).

<sup>7</sup> *Twombly*, 425 F.3d at 114 (emphasis added).

## The Supreme Court's Decision

On May 21, the Supreme Court reversed in a 7-2 decision. Justice Souter wrote for the majority and Justice Stevens, joined in part by Justice Ginsburg, dissented. Noting the history that underlay the formation of monopoly service territories—beginning with the 1984 divestiture decree in *United States v. American Telephone & Telegraph Co.* and continuing with the 1996 Telecom Act—the Court was not surprised that the four remaining ILECs had not taken significant strides toward head-to-head competition by entering one another's former monopoly service territories. The Court colorfully observed: “The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword.”<sup>8</sup> Apart even from the mutual best interest of maintaining the status quo, each ILEC independently might be disinclined to adopt a new business model by becoming a CLEC. The Court appeared to require the complaint to allege that the profit from becoming a CLEC and competing in a different market, using a different business model, outweighed the opportunity cost of that business decision.<sup>9</sup> And it was even less surprising that the defendants were ill-inclined to encourage competition by CLECs in their respective service territories. “[R]esisting competition is routine market conduct.”<sup>10</sup>

The Sherman Act § 1 claim requires pleading and proof that defendants conspired to restrain trade. Slip op. 1 (interpreting 15 U.S.C. § 1). Thus, allegations that defendants restrained trade *unilaterally* would not suffice. And for more than 50 years, it has been the rule that interdependent conduct—“conscious parallelism”—does not amount to a conspiracy.<sup>11</sup> Under *Theatre Enterprises* and its progeny, the phenomenon of competing gas stations at opposite street corners raising and lowering prices seemingly in unison over a long period of time does not establish a conspiracy. One station's breaking the trend would be, in the Court's words, “living by the sword”; the risk would be starting a price war, at the end of which any station that survived would be bruised. The analog, in the competitive circumstance of the ILEC defendants, is the mutual understanding that competing as a CLEC in another ILEC's territory would encourage not only vigorous competition in that service market (making success as a CLEC less likely), it would encourage the other ILEC to enter as a CLEC in the first-mover's service market. The cost to the surviving ILECs-cum-CLECs would be large, and might well outweigh any expected profit from the head-to-head competition.

The Court drew on decades of experience and economic learning—what the Court called “common economic experience”<sup>12</sup>—in stating those principles of substantive

---

<sup>8</sup> *Bell Atlantic v. Twombly*, No. 05-1126, slip op. at 21 (S.Ct. May 21, 2007).

<sup>9</sup> *Id.* at 22.

<sup>10</sup> *Id.* at 19.

<sup>11</sup> See *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954).

<sup>12</sup> *Twombly*, slip op. at 19. In dissent, Justice Stevens criticized the majority's reliance on “armchair economics.” *Twombly*, Stevens Dissent 18. Justice Stevens himself did so as well. “Many years ago a truly great economist perceptively observed that ‘[p]eople of the same trade seldom meet together . . . but the conversation ends in a conspiracy . . . .’” *Id.* at 22.

antitrust law. It then asked whether plaintiffs' allegations of (1) parallel hostility to entry by CLECs, and (2) parallel refusal to enter into one another's service markets—combined with the fore-shortened Notebart quote (competing as a CLEC “might be a good way to turn a quick dollar but that doesn't make it right”) and an allegation that “upon information and belief . . . [the ILECs] . . . have agreed not to compete with one another”—sufficed to state a claim under § 1 of the Sherman Act. The Court concluded plaintiffs' complaint did not contain “enough factual matter (taken as true) to suggest that an agreement was made.”<sup>13</sup> The factual allegations that were in the complaint “could just as well” show “independent action.”<sup>14</sup> So the complaint failed to “sho[w] that the pleader is entitled to relief.”<sup>15</sup> The line plaintiffs failed to cross with their complaint was that between showing a mere “possibility” or “conceivability” that they would be entitled to relief, and the required showing of “plausibility.”<sup>16</sup>

### Analysis

As an antitrust decision, *Twombly* plows little new earth. Its greatest lasting impacts will be three. First is the Court's powerful reaffirmation of the *Theatre Enterprises* rule, broadly accepted and applauded, but famously decried by commentators including Judge Posner, that consciously parallel conduct by competitors does not amount to a Sherman Act § 1 conspiracy.<sup>17</sup> Second is the extended discussion of the dangers of opportunistic litigation in antitrust cases.<sup>18</sup> Third is the Court's recognition, if not express approval, of the “plus factor” framework that the Courts of Appeals broadly have adopted to implement the Court's earlier rules in *Matsushita* and *Monsanto*, that “proof of a §1 conspiracy must include evidence tending to exclude the possibility of independent action.”<sup>19</sup>

*Twombly* comes close to recognizing the plus factor approach to proving a conspiracy through circumstantial evidence, twice quoting other sources (the Second Circuit decision and respondents' brief) as referencing “plus factors,” and in one footnote defining additional circumstantial facts that might be sufficient to vault allegations of parallel conduct into allegations of a conspiracy. Under the “plus factor” framework, purely neutral parallel conduct—whether independent or interdependent—if proved in combination with facts that render the parallel conduct explicable only if a conspiracy

---

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

<sup>16</sup> Slip op. at 10, 24.

<sup>17</sup> *Twombly*, slip op. at 6-7. Judge Posner has observed that the economic circumstance of consciously parallel conduct is indistinguishable from conspiracy. See Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562, 1575 (1969).

<sup>18</sup> Slip op. at 11-13 & n.6. (In a portion of his dissent that Justice Ginsburg did not join, Justice Stevens took special exception to this discussion. “The transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of pretrial discovery.”)

<sup>19</sup> Slip op. at 7.

exists can suffice to demonstrate a conspiracy through circumstantial evidence.<sup>20</sup> Perhaps because it had never before recognized the approach, although it was encouraged to do so by scholarly *amici*, the Court failed to take the opportunity to clarify what sort of facts, beyond parallel conduct, constitute sufficient “plus factors” to support a Sherman One claim.<sup>21</sup> In a footnote, the Court noted two non-controversial, but not very helpful, descriptions by noted commentators of such plus factors.<sup>22</sup> The one plus factor that the parties had agreed was sufficient (although the Court did not explicitly so hold) was “complex and historically unprecedented changes in pricing structures made at the very same time by multiple competitors, and made for no other discernible reason.”<sup>23</sup> *Id.* Not surprisingly, this agreed-upon plus factor, carefully couched as it is in language that describes conduct unlikely to occur between sophisticated competitors in the future, will be very difficult for antitrust plaintiffs to establish. But the Court at least implicitly affirmed an approach that has been followed in the lower courts for decades. With the deepening body of case law and scholarly commentary defining plus factors, an appropriate vehicle for the Court to consider them in greater depth may present itself in the near future.

As a procedure decision, *Twombly* is much more significant. The Court states a new rule for the Rule 8(a)(2) pleading standard: “stating such a claim requires a complaint with enough factual matter (taken as true) to suggest” the violation of which the plaintiff complains.<sup>24</sup> The evaluation of a complaint requires a court to distinguish between “conceivable” or “possible” entitlement to relief, which is insufficient, and “plausible” entitlement to relief, which is sufficient to proceed to discovery. That standard places dispositive weight on the language in Rule 8(a)(2) that a complaint must “show the pleader is entitled to relief.” The Court offered a new interpretation of *Conley v. Gibson*, 355 U.S. 41 (1957), that is likely to alter the way Rule 8 is taught in law schools across the country. Justice Stevens argued in dissent that it had become black-letter law that so long as the plaintiff’s complaint does not affirmatively demonstrate the plaintiff is *not* entitled to relief, a motion to dismiss must be denied.<sup>25</sup> But that rule, taken at its face, is in effect a non-standard. As Professor Hazard noted, “[I]teral compliance with *Conley v. Gibson* could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment.”<sup>26</sup> For that reason, Justice Souter concluded that the famous “any state of facts” standard from *Conley* “after puzzling the profession for 50 years . . . has earned its retirement.”<sup>27</sup>

---

<sup>20</sup> See Brief of *Amici Curiae* Legal Scholars in Support of Petitioners, *Bell Atlantic Corp. v. Twombly*, No. 05-1126, at 25 (filed August 2006).

<sup>21</sup> See Einer Elhauge, *Twombly—The New Supreme Court Antitrust Conspiracy Case*, May 21, 2007 (“What we really needed guidance on was *which* “plus factors” would, coupled with parallel conduct, suffice to make out an antitrust conspiracy. On that the opinion is of no help.”), available at [http://volokh.com/archives/archive\\_2007\\_05\\_20-2007\\_05\\_26.shtml#1179785703](http://volokh.com/archives/archive_2007_05_20-2007_05_26.shtml#1179785703).

<sup>22</sup> *Twombly*, slip op. at 9 n. 4.

<sup>23</sup> *Id.*

<sup>24</sup> *Twombly*, slip op. at 9.

<sup>25</sup> See *Twombly*, S. Ct. No. 05-1126 (Stevens, J., dissenting), op. at 8-9 & nn. 4-5 (citing cases).

<sup>26</sup> Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998).

<sup>27</sup> Slip op. at 16.

*Twombly* teaches instead that pleading under Rule 8 requires a plaintiff to state a claim adequately, after which it may prove its case with any facts consistent with the allegations in the complaint.<sup>28</sup> In practical effect, that rule is not new: it accurately captures the reality of federal court litigation in the modern era pre-*Twombly*, despite paeans to notice pleading and citations to *Conley*'s broad language.<sup>29</sup> Even Professor Miller—who unsuccessfully sought to participate in oral argument in support of the plaintiffs in *Twombly*—has said that “[i]mplicit in *Conley* is the notion that the rules do contemplate a statement of the circumstances, occurrences, and events in support of the claim being presented.”<sup>30</sup>

The danger, then, is that the Court's new formulation of the *Conley* standard will be treated as license for courts even more readily to dismiss complaints, based on failures to plead facts with specificity. So read, *Twombly* could presage an retrenchment to an era prior to the Court's 1993 *Leatherman*<sup>31</sup> and 2002 *Swierkiewicz*<sup>32</sup> decisions, in which claim-specific heightened pleading standards were manufactured from concerns for abusive litigation—especially in light of the Court's reliance (slip op. at 11-13) on concerns for abusive litigation.<sup>33</sup> But no cause exists to read *Twombly* so broadly. The appropriate but-for world in the light of which the Court's opinion must be read is the world of unduly liberal pleading practices adopted by the Second Circuit in that litigation, which was already having an impact on decisions on dismissal motions in lower courts within that circuit. The Court sought to correct—and succeeded in correcting—a substantial asymmetry favoring antitrust plaintiffs created by a rule that would have permitted claims to proceed based on allegations of purely neutral conduct. Understood that way, *Twombly* “slap[s] down one wayward decision”<sup>34</sup> and demonstrates the need for courts to review factual allegations in complaints through the lens of the governing substantive law.

© 2007 Max Huffman. Published with permission by eCCP.

---

<sup>28</sup> *Twombly*, Slip op. at 16.

<sup>29</sup> See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 463-465 (1986).

<sup>30</sup> 5 WRIGHT & MILLER, FED. PRAC. & PROC. § 1215, at 194 (3d ed. 2004).

<sup>31</sup> *Leatherman v. Tarrant County NICU*, 507 U.S. 163 (1993).

<sup>32</sup> *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002).

<sup>33</sup> See generally Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003).

<sup>34</sup> Elhauge, *supra*.