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I. INTRODUCTION

Pretty strong words have been bandied in the few years since *Bell Atlantic Corp. v. Twombly*.[2] Two leading procedure scholars recently wrote that *Twombly,* and the subsequent *Ashcroft v. Iqbal,*[3] have "destabilized the entire system of civil litigation,"[4] creating a "revolutionary" new "civil procedure hitherto foreign to our fundamental procedural principles. . . ."[5] Sitting federal judges, too, have been rather uncommonly open in their criticism, in academic writing[6] and in published opinions,[7] and there have been dozens of legislative and academic proposals for reform or repeal.[8]

A fair bit of the criticism has been essentially political, in stating fears that *Twombly-Iqbal* will unduly chill private litigation. Even before *Twombly* there had been fears that the new Roberts majority had "closed the courts,"[9] and at least in antitrust there is little doubt that *Twombly-Iqbal* has impacted the number of new private filings.[10] But the view is also growing that *Twombly-Iqbal* is just not a workable system of pleading. It is hard to see how the standard is more than the chancellor's foot; though *Twombly* has been cited more than 100,000 times in cases,

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[2] 550 U.S. 544 (2007).

[3] 129 S. Ct. 1937 (2009).

[4] Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010).

[5] *Id.* at 834.

[6] *See, e.g.*, Hon. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41SUFFOLK U. L. REV. 851 (2008) (views of judge of the Southern District of New York).

[7] *See, e.g.*, Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327 (11th Cir. 2010) (Ryskamp, J., dissenting).

8 See Edward A. Hartnett, *Responding to Twombly and Iqbal: Where Do We Go From Here?*, 95 IOWA L. REV. BULL. 24 (2010), *available at* www.uiowa.edu/~ilr/bulletin/ILRB_95_Hartnett.pdf (discussing several legislative and academic reform proposals).

[9] Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1 (quoting Yale law professor Judith Resnik, who described 2006 as "the year they closed the courts").

[10] While there may be some debate as to what precisely was the cause, and how much of the effect *Twombly-Iqbal* can explain, there is no dispute that the filing of new antitrust claims has been decimated since *Twombly* was decided in 2007. In just three years, the number of new filings fell by 59%. *See* ADMIN. OFF. OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS tbl. C-2A (2010) (showing that number of new antitrust filings fell from 1318 in 2008 to 812 in 2009 to 544 in 2010). For many years prior to *Twombly*, new antitrust filings had been gradually increasing, and for some years had been around or above 1000 per year. *See* ADMIN. OFF. OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS tbl. C-2A (2007) (giving new filing numbers for 2003-2007); ADMIN. OFF. OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS tbl. C-2A (2002) (new filing numbers for 1998-2002); *See* ADMIN. OFF. OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS tbl. C-2A (1997) (new filing numbers for 1993-1997).

treatises, and briefs,[11] no consensus whatsoever has emerged other than that the test remains "unclear."[12]

And so, tellingly, two panels of the Seventh Circuit came to opposite conclusions in massive antitrust cases during the past year, even though they applied nominally the same *Twombly-Iqbal* standard to very similar fact allegations on the same procedural posture. The cases were *In re Text Messaging Antitrust Litigation*,[13] which affirmed a denial of dismissal in December 2010, and *Minn-Chem, Inc. v. Agrium Inc. ("Potash")*,[14] which reversed a denial of dismissal in September 2011.

These two cases show not only how unrestrained the *Twombly-Iqbal* standard really is, a point about which I will have more to say, but how great the stakes are for our larger society. Both cases involved allegations of many billions of dollars of consumer injury, but whether the alleged conduct could be subjected to the rule of law was made to depend on a legal standard that amounts more or less to poetry. In effect, whether the substantive law will be applied in any major lawsuit now boils down to the subjective and essentially unrestrained personal impulses of the two appellate judges it takes to make a panel majority.

As Adolph Berle once put it, the courts in these cases now apply only words, and not rules.[15]

II. *TWOMBLY* AND *IQBAL* AS BACKGROUND

Because there now exists a small library of commentary on *Twombly-Iqbal*, I will not restate the facts or reasoning of the cases. Instead, I will summarize the standard as it currently appears to exist. It is now reasonably clear that *Twombly-Iqbal* contemplates a two-step analysis of any federal motion to dismiss for failure to state a claim. The court first reviews the complaint to determine whether any of the allegations are "conclusory" and, if any of them are, the court ignores them completely in weighing the motion to dismiss.[16] Second, the court asks whether, on the remaining allegations, the conduct they allege as showing liability seems "plausible."[17] The gravity of the change worked by *Twombly-Iqbal* lies largely in the fact that, essentially as a matter of logical necessity, this judicial weighing of plausibility must take place before the plaintiff has

[11] *See* Scott Martin, *Recent Developments in Dispositive Motions: To Be or Not,* Twombly*?,* NAT'L L. REV., March 20, 2011, *available at* http://www.natlawreview.com/article/recent-developments-dispositive-motions-to-be-or-not-twombly (so stating, based on Westlaw queries).

[12] *In re* Text Messaging Antitr. Litig., 630 F.3d 622, 624 (7th Cir. 2010).

[13] 630 F.3d 622 (7th Cir. 2010).

[14] ___ F.3d ___, 2011 WL 4424789 (7th Cir. 2011).

[15] Adolph A. Berle, Jr., *The Theory of Enterprise Entity,* 47 COLUM. L. REV. 343, 346 (1947).

[16] *See Iqbal,* 129 S. Ct. at 1949 (complaints must include "more than an unadorned, the-defendant-unlawfully-harmed-me accusation;" it cannot consist of "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement" (citations omitted)).

[17] *Iqbal,* 129 S. Ct. at 1950 ("only a complaint that states a plausible claim for relief survives a motion to dismiss.") *See generally id*. at 1949-50 ("Two working principles underlie our decision in *Twombly*. . . . First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss." (citations omitted); Clermont & Yeazell, *supra* note 4, at 835-34 (formulating *Twombly-Iqbal* as a two-part test).

had access to any discovery.[18] It will be performed only on the parties' assertions, such evidence as plaintiff can find in publicly available sources, and the trial judge's own hunches.

In any case, both central concepts—"conclusoriness" and "implausibility"—are fraught with confusion, but by far the worse is "implausibility," the issue at the heart of *Text Messaging* and *Potash*. On its face the word "plausible" has no inherent boundaries or limiting content, and such guidance as *Twombly* and *Iqbal* give to flesh it out amounts to no more than a series of mystic incantations.[19] Most strikingly, and laying the situation bare for what it really is, *Iqbal* attempted to encapsulate the Court's several, essentially poetic, characterizations of "plausibility" in the following sure-to-be-much-quoted summary:

> Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.[20]

In other words, access to the courts now depends on the apparently unfettered subjective judgment of individual judges, which ordinarily must be based on no or almost no evidence at all. As one recent dissenter put it:

> When plausibility is based on a judge's common sense and experience, different judges will have different opinions as to what is plausible, resulting in a totally subjective standard for determining the sufficiency of a complaint.[21]

III. *TEXT MESSAGING*

One can only guess why the *Text Messaging* panel agreed to take the case. It was the very rare appellate review of a *denial* of a pre-trial motion to dismiss, in a case involving no question of immunity from suit and, adding to its unlikelihood, the court granted that review only to affirm the denial unanimously.[22] I would like to believe that, at least from the point of view of the opinion's author, Judge Posner, as well as that of Judge Wood, there was something a little bit heroic about it. It was the effort of judges who believe in antitrust to bring restraint to a starkly

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[18] Discovery cannot be had at any time prior to the adoption, either by agreement of the parties or order of the court, of a discovery plan under F.R.Civ.P. 26. As a practical matter that will not occur prior to the defendant's answer, which itself will not issue any sooner than a denial of its Rule 12(b)(6) motion.

[19] *Iqbal*, 129 S. Ct. at 1951 (plaintiff must "nudge[] [his] claims . . . across the line from conceivable to plausible" (citations omitted)); *Twombly*, 550 U.S. at 556 (plausibility "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal [relevant] . . . evidence."); *id.* at 565 (plausibility is to be measured "in light of common economic experience."); *id.* at 569 n.14 (denying that Court adopted any new, "heightened pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9," which requires particularized pleading of fraud or mistake"; the "concern is not that the allegations in the complaint were insufficiently 'particular[ized],' rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.").

[20] *Iqbal*, 129 S. Ct. at 1950.

[21] Jacobs v. Tempur-Pedic Int'l, Inc., 626 F.3d 1327 (11th Cir. 2010) (Ryskamp, J., dissenting). God bless senior district judges.

[22] As a practical matter, denial of pre-trial dispositive motions cannot be reviewed on appeal from final judgment. *See* Varghese v. Honeywell Int'l, Inc., 424 F.3d 411, 426 (4th Cir. 2005) (refusing to review denial of summary judgment); Clermont & Yeazell, *supra* note 4, at 844 n.84. So they can be reviewed on an interlocutory basis, which requires that only where both the trial and appellate court certify the question for interlocutory review, 28 U.S.C. § 1292. That sort of review is disfavored, and is ordinarily granted only where the movant claims to enjoy some immunity from suit. *See* Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). So one might have thought that a court granting interlocutory review of a denial of dismissal would only have done so to reverse, presumably because it found the pendency of the suit particularly egregious.

revised new regime of chaotic, anti-plaintiff judicial activism, which has the potential to kill off private antitrust enforcement entirely.[23]

The facts alleged were more than superficially reminiscent of those in *Twombly*. Plaintiffs alleged a price-fixing conspiracy among the major providers of text messaging, a concededly massive oligopoly, on the basis of circumstantial evidence that began with parallelism. It was enough in the end that "[t]he . . . complaint alleges a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion."[24] If anything is remarkable about the analysis, it is only the degree of fidelity with which it follows the traditional, pre-*Twombly* antitrust law of plus-factor pleading. The court affirmed denial of dismissal on plaintiffs' allegations of: (1) parallel prices, (2) heavy concentration in the market, (3) defendants' membership in a trade organizations through which they exchanged price information and worked to "substitute 'co-opetition' for competition," (4) price increases in the face of falling costs, and (5) a simultaneous change in heterogeneous price structures to a uniform price structure followed by a large price increase.[25] With those allegations in place, the court found it unimportant that there was no "smoking gun," because "[d]irect evidence of a conspiracy is not a sine qua non . . . ."[26]

And yet there was some genuine angst among the defense bar following *Text Messaging*, and the suggestion was even made that the case had effectively overruled *Twombly*.[27] And, indeed, the case may well be one effort to reign in the new pleading standard; if so, it takes its place among others.[28] Even the most radical critics of *Twombly-Iqbal* suspect that its impact will be tempered by the lower courts, who will refuse to apply the test literally "simply because the result would be too revolutionary."[29]

And there may be something for defense attorneys to fear in the opinion's last two paragraphs. First, to his credit, Judge Posner offered a brief but fairly minute analysis of the Supreme Court's many Delphic characterizations of "plausibility," writing thusly:

> The Court said in *Iqbal* that the "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." . . . This is a little unclear because plausibility, probability, and

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[23] Judge Posner had suggested limits to *Twombly-Iqbal* earlier. *See* Smith v. Duffey, 576 F.3d 336, 340 (7th Cir. 2009) (Posner, J., dictum) (suggesting that *Twombly* and *Iqbal* were special cases, perhaps limited to their facts). He also has to his credit a number of important antitrust opinions supportive of antitrust enforcement that one might have thought a judge as reputedly conservative as he would not support. *See, e.g.*, Hosp. Corp. of Am. v. FTC, 807 F.2d 1381 (7th Cir. 1986). Judge Wood was formerly a high-ranking antitrust enforcement official in the Justice Department and she, too, has been frequently quite supportive of antitrust enforcement.

[24] 630 F.3d at 627.

[25] 630 F.3d at 627-28.

[26] *Id.* at 628-29.

[27] *See* http://www.americanbar.org/tools/digitalassetabstract.SIGNIN.html/content/dam/aba/multimedia/antitrust_law/20110907_at11907_mo.mp3 (audio file of teleconference program entitled "*OMG! Has* Twombly *Been Over-Turned? The 7th Circuit's* Text Messaging *Decision*").

[28] Notably, Justice Souter, who rather dramatically wrote *Twombly* but then dissented in *Iqbal*, wrote an opinion after his retirement while sitting by designation on the First Circuit, which took a fairly narrow view of the freedom to dismiss for "implausibility." *Sepulveda-Villarini v. Dept. of Ed. of Puerto Rico*, 628 F.3d 25 (1st Cir. 2010). Other appellate opinions have refused to dismiss cases under *Twombly-Iqbal*, and have offered what may be limiting glosses. *See, e.g.*, West Penn Allegheny Health Sys. v. UPMC, 627 F.3d 85 (3d Cir. 2010).

[29] *See, e.g.*,Clermont & Yeazell, *supra* note 4, at 838-40.

> possibility overlap. Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as "preponderance of the evidence" connote.[30]

So maybe there is some significance in an eminent judge's view that plausibility might mean only "non-negligible" probability, though frankly how it could be doubted that a mere complaint need not meet a preponderance standard is beyond me. A mere four years ago, a plaintiff was free to plead little more than bare, legal conclusions.

And so, in the end, if *Text Messaging* is really surprising or significant, it could only be because some among us thought that *Twombly* and *Iqbal* had reversed *all* of the law of antitrust pleading.

IV. POTASH

Perhaps surprisingly, *Potash* is yet another case reviewing denial of a dismissal, on an interlocutory basis, though the matter raised no issues of immunity from suit. That the Seventh Circuit has entertained two such appeals in less than a year probably shows just how seriously the courts take this issue of the remaining uncertainty of *Twombly-Iqbal*.

On its surface *Potash* may seem quite different than *Text Messaging*. Plaintiffs in two consolidated class actions alleged an international price-fixing conspiracy among producers of the fertilizer component potash. Because all defendants were foreign, and the challenged conduct occurred overseas, the major issue was whether U.S. antitrust law could apply. Though defendants also challenged the sufficiency of the conspiracy allegations, the court ordered dismissal only on the extraterritorial reach issue.[31]

However, as the court construed the law of the Foreign Trade Antitrust Improvements Act, extraterritorial reach depended on whether the challenged conduct was "directed at an import market," apparently implying that there literally be some positive intent component, such that the conduct must "target [U.S.] import goods or services."[32] Thus it became critical for the court that the complaint:

> does not . . . allege any specific facts to support a plausible inference that the offshore defendants agreed to an American price or production quota for potash. . . . The complaint's specific factual allegations describe anticompetitive conduct aimed at the potash markets in Brazil, China, and India—not the U.S. import market. True, the complaint generally alleges that the "defendants conspired to coordinate potash prices and price increases so as to fix, raise, maintain, and stabilize the price at which potash was sold in the United States at artificially inflated and anticompetitive levels." But this wholly conclusory statement is akin

[30] 630 F.3d at 629. The court also expressed some sympathy for the fact that plaintiffs had not yet had any discovery. *Id.*

[31] 2011 WL 4424789, at *5.

[32] *Id.* at *9 (citations omitted).

> to a recitation of the elements of the Sherman Act claim, which is insufficient under *Twombly* and *Iqbal*. [33]

Accordingly, the court construed FTAIA effectively to require proof of an agreement to raise U.S. prices, and so the question was more or less precisely the same as in _Text Messaging_. The court found plaintiffs' allegations on that issue insufficient to raise a plausible inference of agreement. And yet, consider what the complaint alleged as its initial basis for proving conspiracy on circumstantial grounds: a plus-factors case that if anything was more substantial than the one in *Text Messaging*, and one that not only shows a perfectly plausible conspiracy to raise U.S. prices, but that was contemporaneous with what the court itself acknowledged was a "staggering" U.S. price increase—"roughly 600%."[1] Specifically, the plus factors included: (1) massive, world-wide concentration, (2) a literal, explicit price-fixing agreement as to much global production, organized by a Canadian state-sanctioned cartel, (3) allegations of explicit price agreements in non-U.S. markets, and (4) oligopoly conditions conducive to price-fixing."

V. CONCLUSION

So the question at the end of the day is, why was one traditional, well established plus-factors pleading "plausible" and a very similar one "implausible"? Could anyone really identify a specific distinguishing factor between the two cases that could really amount to a principled difference that serves any policy of antitrust or civil procedure?

Is this seriously how we want our laws to be applied?"

[33] *Id.*