The Sedona Conference Journal

Volume 13 2012

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Recommended Citation: Margaret M. Zwisler & Amanda P. Reeves, *The Search for Clarity in Federal Pleading Standards: Are We Close to Limiting the Intended (and Unintended) Consequences of Twombly and Iqbal?*, 13 SEDONA CONF. J. 135 (2012).

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THE SEARCH FOR CLARITY IN FEDERAL PLEADING STANDARDS: ARE WE CLOSE TO LIMITING THE INTENDED (AND UNINTENDED) CONSEQUENCES OF *TWOMBLY* AND *IQBAL*?

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I. INTRODUCTION

The majority opinions in *Twombly* and *Iqbal*[2] have become a resource that resembles *Bartlett's Familiar Quotations* in briefs supporting motions to dismiss in antitrust cases. Justice Souter, writing for the majority in *Twombly*, said that, to survive dismissal, an antitrust complaint alleging a conspiracy must contain "enough factual matter (taken as true) to suggest that an agreement was made"; a plaintiff must allege "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement"; and the plaintiff must at the pleading stage present "allegations plausibly suggesting (not merely consistent with) agreement."[3] The actual holding of the case is eminently quotable: "[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."[4] Many of us defense lawyers can write these quotes without having to refer to the opinion.

Justice Kennedy, writing for the majority in *Iqbal*, also authored quotes that defendants commonly reference. He wrote that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions" and that "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."[5] On the plaintiffs' side, about the only quotable sentence in either opinion is Justice Souter's conclusion in *Twombly* that the decision's holding "do[es] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."[6]

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2 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

3 *Twombly*, 550 U.S. at 556-57.

4 *Id.* at 570.

5 *Iqbal*, 129 S.Ct. at 1949-50.

6 *Twombly*, 550 U.S. at 570.

The two opinions' repetitious articulation of the "plausibility" standard appears to be an attempt to ensure that there is no ambiguity in the message to district courts as to how to apply the "not-new" rule. District courts are to assess the sufficiency of a complaint by applying their own subjective judgment to determine whether a complaint's factual allegations are "plausible." This is actually an astonishing directive from a conservative Court. The Senate Judiciary Committee pilloried both Elena Kagan and Sonia Sotomayor during their confirmation hearings for suggesting that a judge's own experience should inform his or her decisions.[7] But, given that the Supreme Court is the final arbiter of the federal rules of civil procedure, judges have the freedom – or, obligation – to assess the sufficiency of pleadings through their own lenses.

In the five years since *Twombly*, trial judges have had ample opportunity to apply their own "common sense and experience" in assessing a complaint's plausibility. As numerous judges have observed, it certainly may be questioned whether the use of this standard either promotes judicial efficiency or results in consistent decisions.[8] This point was made most succinctly by a trial judge, sitting by designation on the appeal of the grant of a *Twombly* motion in an antitrust case.[9] There, the plaintiff alleged that Tempur-Pedic had conspired with its distributors to fix resale prices. He alleged that the agreement was a per se violation of the Sherman Act. After he filed his complaint, the Supreme Court decided *Twombly*, and also *Leegin*.[10] Defendants successfully moved to dismiss the complaint, arguing that the plaintiff did not allege a plausible relevant market (now a required element of the offense since *Leegin* had held that a court must assess a resale price maintenance claim under the rule of reason). They also argued that he failed to allege a plausible conspiracy since uniform prices among the distributors could suggest either conspiracy or independence. The district court dismissed without leave to amend. On appeal, two appellate judges affirmed the dismissal, holding that the plaintiff's relevant market allegations and conspiracy claims were implausible.

Judge Kenneth J. Ryskamp, a district court judge from the Southern District of Florida, wrote a strong dissent. He argued that the majority went too far in its application of *Twombly*'s plausibility standard, especially in concluding, on the basis of its own "judicial experience and common sense", that the plaintiffs' claims were not plausible. "My judicial experience and common sense", he wrote, "leads me to conclude that it is entirely plausible that [the defendant] and its distributors colluded to set prices. Indeed, it is totally implausible that [the defendant] and its distributors set prices independently of each other."[11] Judge Ryskamp used the difference between his view of plausibility and the majority's to illustrate what he saw as the problem with the *Twombly/Iqbal* standard. He argued that "[w]hen plausibility is based on a judge's common sense and experience,

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7 *See* Orrin G. Hatch, The Case Against Confirmation, National Review Online, July 12, 2010 (arguing that now-Justice Kagan's writings, including her statement that "the judge's own experience and values become the most important element in the decision" of most Supreme Court cases today disqualified her from becoming a Supreme Court justice); A Judge's View of Judging Is On The Record, New York Times, May 14, 2009 (quoting now-Justice Sotomayor's "Wise Latina" speech).

8 Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 852 (2008) ("Because Twombly is so widely cited, it is particularly unfortunate that no one quite understands what the case holds."). Judge McMahon is a judge on the U.S. District Court for the Southern District of New York. *See also Robbins v. Oklahoma ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008) ("We are not the first to acknowledge that [Twombly's] new formulation is less than pellucid."); *Shionogi Pharma, Inc. v. Mylan, Inc.*, No 10-1077, 2011 U.S. Dist. LEXIS 58774 at *3 (D. Del. May 26, 2011) ("The undersigned, formerly a member of the Advisory Committee on Civil Rules, knows that many practitioners and judges share in the confusion resulting from Iqbal's seemingly strong requirement of factual pleadings in the absence of any specific overruling of prior cases allowing traditional notice pleading.").

9 *Jacobs v. Tempur-Pedic International, Inc.* 626 F.3d 1327 (11th Cir. 2010).

10 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

11 *Jacobs*, 626 F.3d at 1346 (Ryskamp, J. dissenting).

different judges will have different opinions as to what is plausible, resulting in a totally subjective standard for determining the sufficiency of a complaint."[12]

Recent experience in antitrust cases that contain similar factual allegations supports Judge's Ryskamp's point. The disarray that has resulted from this new standard, let alone the burden imposed on the judges from it, may well be one of the unintended consequences of *Twombly* and *Iqbal*. Below, we illustrate the issue with two examples. We then offer some observations regarding what these decisions suggest about where the federal appellate courts are heading in their application of *Twombly* to antitrust cases. We end with some concluding thoughts.

II. DOCTRINAL DISARRAY ON DISPLAY: THE SET-TOP BOX CASES AND THE FUEL SURCHARGE OPINIONS

A. The Set-Top Box Cases

In 2008 and 2009, nine cable television companies, including Comcast, Time Warner Cable, Cox and 6 others, were each hit with separate class actions, all alleging that each company tied the sale of a product called "premium cable services" to the lease of a set top box. Each set of plaintiffs alleged that, while customers of each cable company can access basic digital cable programs through TIVO devices, or through cable card-enabled TVs, they can only access two-way services such as Pay Per View, On Demand, and interactive program guides, by leasing a set top box from the local cable TV company. Consumers can also access TV programming through multiple options, such as direct broadcast satellite companies like Direct TV, and in some markets, through the fiber optic offerings of telco providers like Verizon (FIOS) and U-Verse (AT&T). However, because municipalities and market areas typically contract with only one cable company, plaintiffs filed separately against each cable provider. As a result, nine district courts in eight separate districts have been managing the cases (there are two cases pending in the Southern District of New York, one against Time Warner Cable, and one against Mediacom).[13]

In each case, the defendant moved to dismiss on the grounds that plaintiffs failed to plead facts sufficient to state a plausible claim for relief under the *Twombly* standard. In analyzing the pleadings, all of the district courts recognized that, to state a tying claim, plaintiffs must allege the following elements: (1) two separate products; (2) sufficient market power to coerce customers to buy the tied product, including market power in the relevant product and geographic markets; (3) actual coercion; and (4) anticompetitive effects in the market for the tied product. All of the courts cited *Twombly* for the standard under which they would judge the sufficiency of the plaintiffs' complaints. Yet, the district courts in these cases came to sometimes wildly different conclusions about the sufficiency of plaintiffs' claims.

Unbelievably, there are thirteen separate opinions considering motions to dismiss in these cases.[14] In the case against Time Warner Cable in the Southern District of New

12 *Id*. at 1346-47, citing Arthur R. Miller, From Conley to Iqbal: A Double Play of the Federal Rules of Civil Procedure, 60 DUKE L.J. 1, 30 (2010) ("[I]nconsistent rulings on virtually identical complaints may well be based on individual judges having quite different subjective views of what allegations are plausible") and Rajiv Mohan, A Retreat from Decision by Rule in *Ashcroft v. Iqbal*, 33 HARV. J.L. & PUB. POL'Y 1191, 1197 (2010) (basing the plausibility determination on judicial experience and common sense "suggests that plausibility is not meant to be guided by clear principles, but instead by the wisdom of judges").

13 A chart listing each case and its related opinions is attached as Appendix A.

14 *See* App. A, *supra*.

York before Judge Castel, the court twice granted a motion to dismiss and the case is now on appeal at the Second Circuit. However, the Mediacom case, before Judge Kimba Wood in the same district, survived a motion to dismiss a virtually identical complaint and is now in discovery. In the Cablevision cases in the District of New Jersey, the court granted three separate motions to dismiss, all with leave to replead. In response to Cablevision's fourth motion to dismiss, the court granted it in part and denied it in part. The first judge assigned to the Insight case in the Northern District of Kentucky granted the motion to dismiss, with leave to replead, but the second judge assigned to the case denied it. Finally, judges in the four other cases where defendants moved to dismiss on *Twombly* grounds all denied the motions and those cases are proceeding through discovery at various paces.[15]

A few examples from these various opinions illustrate how the different judges treated the same issue but came to such different conclusions. The judge in the Time Warner Cable case held that plaintiffs' allegations that Time Warner Cable coerced them to lease a set top box were implausible because subscribers can access premium cable services through the use of TiVo, or a cable card enabled TV. The court also held that plaintiffs' allegation that Time Warner Cable did not sufficiently publicize the fact that customers could access most of the tying product through cable cards did not constitute implicit coercion.[16] The judge considering Cox's motion to dismiss held the opposite. It found that Cox did coerce the lease of a set top box because customers could not access *all* aspects of premium cable services without a leased set top box and that the allegations that Cox minimized the viability of cable cards by not promoting their use did state a plausible claim of implicit coercion.[17]

Similarly, Judge Wood in the Mediacom case held that plaintiffs adequately alleged a geographic market composed of the collective of the defendant's service areas in 23 states.[18] Judge Castel, in the Time Warner Cable case in the same district, held that plaintiffs' allegation that the geographic market was "the collective" of the markets in which Time Warner Cable does business was insufficiently alleged, but found that the complaint did plausibly allege 53 separate local markets (he dismissed the complaint because plaintiffs failed to plead that Time Warner Cable had market power in each local geographic market).[19]

Of course, it is impossible to conclude from these opinions what aspect of each judge's "judicial experience and common sense" led them to the conclusions that they reached, or whether the judges that granted motions to dismiss these cases with leave to replead used the liberal amendment rule to assist plaintiffs in staying in court. We would suggest that, under the simpler notice pleading under Rule 8 prior to *Twombly*, the results might be more uniform, and the cases certainly would not have spawned so many separate opinions.

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15 Comcast has not filed a *Twombly* motion in its case, instead filing a motion to compel arbitration. Motion To Compel Arbitration, In re Comcast Corp. Set-Top Cable Television Box Antitrust Litigation, Civ. No. 09-MD-02034 (E.D. Pa. July 22, 2011, ECF No. 127). Mediation proceedings remain ongoing.

16 In re *Time Warner Cable Set-Top Cable Television Box Antitrust Litig.*, No. 08-7616, 2010 WL 882989, *6 (S.D.N.Y. Mar. 5, 2010) ("Time Warner I").

17 In re *Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig.*, No. 09-2048, 2010 WL 5136047, *3 (W.D. Okla. Jan. 19, 2010).

18 *Knight v. Mediacom Communications Corp.*, No. 10-01730, slip op. at 9 (S.D.N.Y. Mar. 30, 2011, ECF No. 19).

19 In re *Time Warner Cable Set-Top Cable Television Box Antitrust Litig.*, No. 08-7616, 2011 WL 1432036 (S.D.N.Y. Apr. 8, 2011).

B. The Fuel Surcharge Opinions

Another example is presented in *In re Rail Freight Fuel Surcharge Litigation* and *In re LTL Shipping Services* cases.[21] These cases also considered similar claims by plaintiffs based on similar factual allegations, but received different treatment by the district court judges who considered the motions to dismiss. Both cases involved the allegation that freight carriers (rail in one case and less-than-truckload ("LTL") truck carriers in the other) had conspired to fix the amount of fuel surcharges that they imposed as a result of the run-up on oil prices in the summer of 2003.[22] In both cases, a federal agency, the Surface Transportation Board, had concluded that the defendants had imposed fuel surcharges in excess of the actual increase in fuel costs.[23] In both cases, plaintiffs alleged that defendants had imposed higher surcharges than were necessary to cover fuel costs and had thus made large profits from the surcharges.[24] Plaintiffs also alleged that defendants in both cases reached and implemented these agreements, in part, during trade association meetings.[25] Nonetheless, like the set top box cases, the district courts in these cases reached opposite results.

In the *Rail Freight* litigation, the court held that plaintiffs had pleaded sufficient factual allegations to suggest a plausible inference of conspiracy.[26] The court found that the allegation that defendants faced a common problem, escalating fuel costs not captured in their existing contracts, demonstrated the likelihood of a conspiracy.[27] The court found also that plaintiffs' allegation that defendants established identical complex and new fuel surcharge programs within a nine month period supported the conspiratorial inference.[28] The court also pointed to allegations that the defendants met at trade association meetings on specific dates in the fall of 2003 and "created and implemented coordinated fuel surcharge programs" as suggestive of a conspiracy.[29]

The *LTL Shipping Services* court held that the plaintiffs had not pled a plausible conspiracy based on virtually identical real world allegations. It held that the industry structure, rather than being conducive to conspiracy, as the *Rail Freight* judge had found, instead gave each defendant the same independent incentive to reduce fuel costs.[30] The court also noted that allegations showing a dramatic increased volatility in fuel prices around the time that the alleged conspiracy began suggested that the defendants had independent motives to alter their respective fuel surcharge fee structures.[31] The court also found that plaintiffs' allegations of simultaneous imposition of surcharges were not persuasive because plaintiffs failed to plead the simultaneous price increase within a "defined and narrow date or date window."[32] In contrast to the *Rail Freight* court, the *LTL Shipping Services* court found that the complaint's allegations that all of the defendants were members of the same trade association and that the trade association had multiple meetings on specific dates between 2003 and 2007 did not plausibly suggest that defendants had agreed to do anything.[33]

20 In re *Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27 (D.D.C. Nov. 7, 2008).
21 In re *LTL Shipping Servs. Antitrust Litig.*, No. 08- 01895, slip op. (N.D. Ga. Jan. 29, 2009, ECF No. 256).
22 *Id.* at 4; *Rail Freight*, 587 F. Supp. 2d at 36.
23 *Rail Freight*, 587 F. Supp. 2d at 36, n. 5; Am. Compl., *LTL Shipping Servs.*, No. 08- 01895, at ¶ 57 (N.D. Ga. May 23, 2008, ECF No. 237).
24 *LTL Shipping Servs.*, slip op. at 11; *Rail Freight*, 587 F. Supp. 2d at 31.
25 *LTL Shipping Servs.*, slip op. at 10-11 (plaintiffs alleged that defendants communicated by posting fuel surcharge rates on public web sites); *Rail Freight*, 587 F. Supp. 2d at 30 (plaintiffs alleged meetings at restaurants and other facilities); 33-34 (plaintiffs alleged that defendants reached agreement at trade association meetings in 2003).
26 *Rail Freight*, 587 F. Supp. 2d at 29.
27 *Id.* at 34.
28 *Id.* at 25-26.
29 *Id.* at 34 (quoting complaint).
30 *LTL Shipping Servs.*, slip op. at 40, 45.
31 *Id.* at 43-44.
32 *Id.* at 37, n. 9.
33 *Id.* at 38.

Again, it is impossible to assess how each judge's "common sense and experience" affected their different conclusions. But it is an odd result that two cases *alleging virtually the exact same facts* – parallel imposition of fuel surcharges, a finding by a federal agency that the imposition was an unreasonable practice, opportunity to conspire at trade association meetings – had such different results.

III. PUSHBACK ON *TWOMBLY* FROM COURTS OF APPEAL

The inconsistencies in the *Set-Top Box* and *Fuel Surcharge* opinions are not an accident. *Twombly* left considerable ambiguity in its wake and both district and appellate courts have been able to seize on that ambiguity to reach their desired result in antitrust cases. As context, it is important to recall that, at least initially, the conventional wisdom was that *Twombly* (and subsequently *Iqbal*) had dramatically changed Rule 8's application. With rare exception, the initial federal appellate cases in *Twombly* and *Iqbal*'s wake held that the plaintiffs' allegations were insufficient to state a claim. As a result, the plaintiffs in those cases were denied the discovery they needed to prove liability and, just as significantly, to extort the pricey settlements that inevitably often followed regardless of liability. There can be no mistake that taking this "settlement leverage" off the table was, at least in part, the *Twombly* court's objective. As the *Twombly* Court observed, "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with 'no reasonably founded hope that the [discovery] process will reveal relevant evidence.'"[34]

Indeed, writing in dissent, Justice Stevens took particular exception to the "transparent policy consideration" of "protecting defendants – who in this case are some of the wealthiest corporations in our economy – from the burdens of pretrial discovery."[35] In his view, the majority's opinion was completely inconsistent with the entire scheme of the Federal Rules of Civil Procedure as conceived by the drafters and as the Supreme Court had uniformly interpreted in multiple cases including *Conley v. Gibson*[36], the cases upon which *Conley* relied, and the cases that have followed *Conley*. But Justice Stevens also took particular exception to the majority's elimination of the plaintiffs' claim, before defendants had denied that they had participated in a conspiracy, and before plaintiffs had had any opportunity for discovery. He acknowledged that "if [he] had been the trial judge in this case, [he] would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint." Instead, he would have permitted plaintiffs to propound what he termed "limited discovery," that would include the opportunity to take the deposition of a principal witness quoted in the complaint, and "at least one responsible executive representing each of the other defendants" before deciding to dismiss the complaint. Justice Stevens squarely rejected the majority's view that "the success of judicial supervision in checking discovery abuses has been on the modest side," insisting that a trial court can weed out weak claims through careful case management.[37]

The tide, however, may be turning in Justice Stevens' direction. Although *Twombly* and *Iqbal*'s ambiguities may never lend themselves to a completely coherent precedent, recent opinions from the Second, Third and Seventh Circuits suggest that the federal appeals courts are trying to rescue district judges (and, maybe, plaintiffs) from

34 *Twombly*, 550 U.S. at 559, (quoting *Dura*, 544 U.S., at 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (quoting *Blue Chip Stamps*, *supra*, at 741, 95 S. Ct. 1917, 44 L. Ed. 2d 539; alteration in *Dura*)).
35 *Id.* at 596 (Stevens, J., dissenting).
36 *Conley v. Gibson*, 355 U.S. 41 (1957).
37 *Twombly*, 550 U.S. at 596 (considering majority's discussion at *Twombly*, 550 U.S. at 572) (Stevens, J., dissenting).

Twombly and *Iqbal's* intended consequences – i.e., to save defendants from the expense of discovery. A review of the most recent opinions from these three appellate courts suggests that some courts of appeal agree with Justice Stevens in dissent.

A. Anderson News and *Sony BMG*: From The Court Reversed in *Twombly*

In a pair of opinions, the Second Circuit has led the way in rolling back *Twombly*. In the first case, *Song BMG*, plaintiffs, individual purchasers of internet music, alleged that defendants, major record labels, agreed, in violation of Section 1 of the Sherman Act, to fix the prices and terms of the web-based sale of electronic music.[38] As in *Twombly*, plaintiffs did not allege any direct evidence of conspiracy and based their claims on circumstantial evidence such as parallel conduct.[39] The district court granted defendants' motion to dismiss, concluding that the allegations were consistent with independent conduct and therefore were insufficient to plead a plausible conspiracy.[40] The Second Circuit reversed.[41]

The Second Circuit gave lip service to the *Bartlett's Familiar Quotations Twombly* excerpts. It said that, to survive a motion to dismiss, a complaint "does not need detailed factual allegations" but "requires more than labels and conclusions and a formulaic recitation of the elements of a cause of action will not do."[42] It quoted *Twombly* in holding that "'[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all allegations in the complaint are true (even if doubtful).'"[43]

However, when it applied this standard to the complaint, it held that plaintiffs' allegations did plausibly raise an inference of conspiracy. The court rested its conclusion on plaintiffs' allegations that (1) defendants participated in one or two joint ventures that imposed identical "unpopular terms" and pricing strategies, (2) their prices did not decrease as much as would be expected by the substantial costs savings realized by the electronic format, (3) they took actions that would be against their economic self interest in the absence of a conspiracy, (4) they implemented uniform policies and price changes, and (5) federal and state authorities launched investigations into defendants' conduct.[44] The Second Circuit also rejected defendants' argument that *Twombly* required plaintiffs to plead facts alleging a specific time and place of meetings to allege a plausible conspiracy. The court interpreted *Twombly* to only require these details in cases where the claim is not based on sufficient allegations of the parallel conduct.[45]

These factors (even the investigations referenced) do not prove a conspiracy, but are at least as susceptible of stating a plausible one as were the allegations in *Twombly*, as this same circuit court had actually held in the *Twombly* case itself. One wonders if the *Sony BMG* opinion is merely *Twombly* redux.

Further complicating matters is the Second Circuit's more recent decision in *Anderson News*.[46] There, the plaintiff (Anderson News) was a wholesaler of single-copy magazines to retail outlets, including newsstands, bookstores, and mass merchandisers that resold to consumers. The plaintiff alleged that the national magazine publishers, distribution

38 *Starr v. Sony BMG Music Entertainm't,* 592 F.3d 314, 317 (2d Cir. 2010).
39 *Id*. at 322.
40 In re *Digital Music Antitrust Litig*., 592 F. Supp. 435, 441-42 (S.D.N.Y.) (J. Loretta A. Preska).
41 *Starr,* 592 F.3d at 317.
42 *Id*. at 321 (quoting *Twombly*, 550 U.S. at 555).
43 *Id.*
44 *Id*. at 323-324.
45 *Id*. at 325.
46 *Anderson News v. Am. Media, Inc.,* 2012 U.S. App. LEXIS 6715 (2d Cir. Apr. 3, 2012).

service companies, and wholesalers that competed with plaintiff entered into group boycott in violation of Section 1 of the Sherman Act to exclude plaintiff and another wholesaler (Source Interlink Distribution) from the market for single-copy magazine distribution.

Yet again, as in *Twombly*, the plaintiff did not allege any direct evidence of conspiracy and based their claims on circumstantial evidence such as parallel conduct.[47] Moreover, as to "plus factors," the complaint was severely lacking. Principally, Anderson News alleged that the defendant distributors decided to boycott Anderson News and another wholesaler after the two wholesalers imposed a 7-cent-per-magazine surcharge on the defendants. The defendants' conduct, of course, would be consistent with the defendants' unilateral economic self-interest insofar as the defendants likely did not want to do business with Anderson News if it would cost them more to do so. Following *Twombly*'s lead, the district court granted defendants' motion to dismiss, concluding that the allegations were consistent with independent conduct and therefore were insufficient to plead a plausible conspiracy.[48] The court also denied the plaintiff's motion for leave to file an amended complaint and observed that "[t]he addition of numerous conclusory allegations does not cure the deficiencies of the Complaint."[49] The Second Circuit reversed.[50]

The Second Circuit panel struggled to articulate what the *Twombly* Court intended when it held that, to state a cognizable Section 1 conspiracy claim, a plaintiff relying on circumstantial evidence must allege more than consciously parallel conduct.[51] The district court read *Twombly* to mean, consistent with Section 1 summary judgment standards (and *Twombly*'s citations thereto), that a Section 1 plaintiff must plead plus factors. The Second Circuit, however, was more equivocal. On the one hand, the panel acknowledged that a "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[52] In antitrust parlance, then, this would have to mean that a plaintiff must plead plus factors since such allegations would be necessary to create a "reasonable inference" of liability. On the other hand, however, the panel rebuked the district court for dismissing the complaint on the grounds that, as pled, "unilateral parallel conduct [by the defendants wa]s completely plausible."[53] Thus, while allegations of plus factors are necessary to create an inference of liability, the Second Circuit retreated to the more ambiguous view that a plaintiff can carry its burden to plead a Section 1 conspiracy claim even if one can infer from the complaint that there was an innocuous basis for the defendants' consciously parallel conduct.[54]

Squaring *Anderson News* and *Sony BMG* on the one hand, with *Twombly* on the other hand, is not easy. Are plaintiffs required to allege facts that, if proven, would show the defendant did not act in its economic self-interest or otherwise act unilaterally? Or is something less sufficient so long as it is plausibly consistent with a conspiracy? The Second Circuit will now be left to clean up this doctrinal uncertainty in future decisions.

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47 *Id*.
48 In re *Digital Music Antitrust Litig.*, 592 F. Supp. 435, 441-42 (S.D.N.Y.) (J. Loretta A. Preska).
49 *Anderson News v. Am. Media, Inc.*, 732 F. Supp. 2d 389, 407 (S.D.N.Y. 2010).
50 *Starr,* 592 F.3d at 317.
51 *Twombly*, 550 U.S. at 556-57 ("It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice . . . . Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.").
52 732 F. Supp. 2d at 45 (citing *Iqbal*, 129 S. Ct. at 1949).
53 *Id.* at 66.
54 *Id.*at 67 ("Consequently, although an innocuous interpretation of the defendants' conduct may be plausible, that does not mean that the plaintiff's allegation that that conduct was culpable is not also plausible.").

B. West Penn: The Third Circuit Further Muddies the *Twombly* Waters

The Third Circuit's decision in *West Penn Allegheny Health System v. UPMC*[29] illustrates how the Third Circuit has similarly pushed back on *Twombly.* In *West Penn*, the Third Circuit reversed the district court's decision to grant the defendants' *Twombly* motion. The plaintiff (West Penn) was a hospital system in Pennsylvania that alleged that another Pennsylvania hospital system (University of Pittsburgh Medical Center or "UPMC") and a Pennsylvania health insurer (Highmark) conspired to protect each other from competition in violation of sections 1 and 2 of the Sherman Act. The district court granted defendants' motion to dismiss the complaint, concluding that it was "'long on innuendo and frequently [repeated] the buzz word that the defendants 'conspired'" but lacked any allegations of "any facts which evidence a concerted action."[56]

In its opinion reversing, the Third Circuit also pretended that it was following *Twombly*. It defined the pleading standard established in *Twombly* as that "a complaint must contain factual allegations that, taken as a whole, render the plaintiff's entitlement to relief plausible."[57] It went on to note that *Twombly* "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."[58]

The Third Circuit concluded that plaintiff had sufficiently alleged a plausible conspiracy and reversed the district court's decision.[59] Plaintiff alleged that defendants entered into an agreement in the summer of 2002 to use their respective power to strengthen each other and weaken each other's rivals. Plaintiff alleged that in 2005 and in 2006, one of the defendants told the plaintiff about defendants' agreement with the other defendant in two different contexts and at one time acknowledged that the agreement was "probably illegal."[60] In addition, plaintiffs alleged that during an internal meeting, one of defendant's CEOs acknowledged the agreement with the co-defendant.[61] The court concluded that these allegations were "sufficient to survive a motion to dismiss."[62]

Significantly, the Third Circuit's *West Penn* decision followed the court's earlier decision in *Insurance Brokerage Litigation*.[63] In that case, the panel applied a somewhat different analytical approach to analyze conspiracy claims. In *Insurance Brokerage*, the court addressed in detail the plaintiffs' allegations of plus factors, whether the plaintiffs' theory was economically plausible, and other specific allegations regarding the defendants' alleged anticompetitive conduct. Ultimately, the Third Circuit dismissed plaintiffs' many conspiracy claims, with the exception of one hard-core bid-rigging claim. The court concluded that plaintiffs had plausibly alleged that claim. The Third Circuit's approach in *Insurance Brokerage Litigation* stands in stark contrast to *West Penn*: in the former, the court applied a *Twombly*-esque analysis; in the latter, it applied a more cursory and superficial analysis where it simply asked whether, harkening back to a pre-*Twombly* era, it was possible that the plaintiff could prevail on the facts alleged.

55 *West Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85 (3d Cir. 2010).
56 *Id.* at 97.
57 *Id.* at 98 (citing *Twombly* 550 U.S. at 556).
58 *Id.* at 98 (quoting *Twombly*, 550 U.S. at 556).
59 *Id.* at 100.
60 *Id.*
61 *Id.*
62 *Id.*
63 In re *Ins. Brokerage Litig.*, 618 F.3d 200 (3d Cir. 2010).

C. Text Messaging: The Seventh Circuit's "Non-Negligible Probability" Gloss

The Seventh Circuit's decision in *In re Text Messaging Antitrust Litigation* is perhaps the most significant post-*Twombly* decision, not only because the panel included some of the most esteemed "antitrust expert" judges (Judges Posner and Wood), but also because the panel took the unusual step of hearing an interlocutory appeal on the question of whether the district court erred when it held that the plaintiffs sufficiently pled a Section 1 conspiracy.

The *Text Messaging* plaintiffs alleged that defendants, regional telephone companies, violated Section 1 of the Sherman Act by colluding to prevent competition in the market for text messaging services. The district court initially granted the defendants' motion to dismiss with leave to file an amended complaint and later denied the motion to dismiss based on that amended complaint.[64] Writing for a unanimous panel, Judge Posner affirmed the district court's decision. Judge Posner said that the Seventh Circuit accepted the certification for interlocutory appeal because "[p]leading standards in federal litigation are in ferment after *Twombly* and *Iqbal*, and therefore an appeal seeking a clarifying decision that might head off protracted litigation is within the scope of Section 1292(b)."[65]

Judge Posner began by noting that, as in *Twombly*, the court was presented with a case in which the plaintiffs alleged, at best, circumstantial evidence of a conspiracy. The legal question, then was what quantum of circumstantial evidence a plaintiff must plead to carry its burden under *Twombly*, *Iqbal*, and Rule 8. *Twombly* resolved that question in a context largely analogous to the one before the Seventh Circuit when the court held that a plaintiff must allege more than parallel behavior and, more specifically, must allege facts that are inconsistent with unilateral behavior. The court summarized this standard as requiring "plausible grounds to infer an agreement."[66] Judge Posner, however, sought to push back on *Twombly* by suggesting that *Twombly* did not create a black and white rule. Instead, he explained, a plaintiff's allegations should be viewed on a sliding scale.

Judge Posner parsed through *Iqbal*'s language that "the 'plausibility standard is not akin to a 'probability requirement' but asks for more than a sheer possibility that a defendant has acted unlawfully.'"[67] He lamented the lack of clarity because "plausibility, probability, and possibility overlap." To resolve this question, Judge Posner provided the following formulation: "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... ."[68] Judge Posner then concluded that the complaint satisfied his new "nonneglible probability" gloss on *Twombly*.[69] The court cited the industry structure, where a small group of companies controlled 90 percent of the market, as one that could "[facilitate] collusion."[70] In addition, the court pointed to plaintiffs' allegation that defendants' participation in trade association and "elite 'leadership council'" meetings where they exchanged price information.[71] Also, the court held that the allegation that prices increased while costs were decreasing dramatically suggested an agreement because ordinarily when costs decrease sellers have the incentive to decrease

64 *Text Messaging*, 630 F.3d 624-25, 628.
65 *Id.* at 627.
66 550 U.S. at 556.
67 *Id.* at 629 (quoting *Iqbal*, 129 S. Ct at 1949).
68 *Id.* at 629.
69 *Id.* at 627.
70 *Text Messaging*, 630 F.3d at 628.
71 *Id.*

prices to gain customers.[72] Finally, the court highlighted the allegation that all of the companies shifted to the same complex price structure at the same time.[73] These allegations provided what the court held was "a sufficiently plausible case to warrant allowing plaintiffs to proceed to discovery."[74]

At least in the Seventh Circuit, going forward the issue posed by a Rule 12(b)(6) motion is whether there is a "nonnegligble probability" that the plaintiff will succeed with its conspiracy claim. Superficially, at least that standard seems potentially far more plaintiff-friendly insofar as it replaces *Twombly*'s requirement that a plaintiff allege certain facts that disprove unilateral conduct with judicial discretion relating to the "probability" that a plaintiff will ultimately prevail. If nothing else, if Judge Posner intended to leave more to the eye of the judicial beholder, he certainly accomplished that much.

IV. THE QUEST FOR MIDDLE GROUND: TRENDS FOR THE FUTURE

A. Limited Discovery at Pleadings Stage?

The appellate cases discussed above essentially hold that, where the complaint allegations raise competing inferences of independent and collusive conduct, the plaintiff is entitled to go forward and impose the burden of discovery on the defendants (and, as Justice Stevens noted in his *Twombly* dissent, on themselves). Arguably, *Twombly* holds the opposite; if there is a tie between the inferences, the defendants win.

Justice Stevens' dissent presents an alternative to a straight up or down vote on the inferences. As discussed, he suggested that, if he were the trial judge, he would permit plaintiffs a period of "limited discovery" to see if they could find conspiracy evidence before letting them have massive discovery. This suggestion seems impractical at best, unfair to defendants at worst, and potentially unworkable.

But one district judge is trying it out. In *In re National Association of Music Merchants ("NAMM"), Musical Instruments and Equipment Antitrust Litigation*, plaintiffs alleged that defendant Guitar Center had orchestrated a conspiracy among the major vendors of guitar amplifiers and "fretted musical instruments" such as acoustic and electric guitars, banjos and mandolins, to implement and enforce minimum advertised price policies that had the effect of fixing resale prices on the Internet.[75] The complaint alleged that defendants reached and implemented this agreement at specifically identified trade association meetings between 2004 and 2007.[76]

The district court reviewed plaintiff's forty-eight page complaint and concluded that it failed to meet the *Twombly* plausibility standard, noting two specific deficiencies: (1) the market definition was too broad to be plausible because it included instruments that are not reasonably interchangeable (i.e., mandolins and electric guitars) and guitar amplifiers[77] and (2) the lack of specific detail in the conspiracy allegations.[78] The court said that "it is not clear who conspired with who, what exactly they agreed to, and how

72 *Id.* at 628.
73 *Id.*
74 *Id.* at 629.
75 In re National Association of Music Merchants ("NAMM"), Musical Instruments and Equipment Antitrust Litigation, No. 09-2002, slip op. at 4 (S.D.Ca. Aug. 22, 2011) (granting in part motion to dismiss).
76 *Id.* at 4.
77 *Id.* at 6.
78 *Id.* at 3.

the conspiracy was organized and carried out" and noted that "at this point plaintiffs frankly admit that they lack the information to plead specific facts in good faith, and seek discovery so they can learn who attended the meeting they have generally identified, what was said, and what was agreed."[79]

Now, because plaintiffs lacked that detail, it should mean under *Twombly* that, if they cannot do a better job on the allegations, then they are out of court. But that is not what Judge Burns held. Instead, he commented that "Defendants haven't put forward convincing arguments showing [that plaintiffs] couldn't state a claim if given the opportunity. Nor is there anything in the complaint to show that whatever Defendants may have been doing was necessarily protected or lawful".[80] So, to help the plaintiffs out, the judge has ordered a period of "limited discovery" so that they can state a conspiracy claim.[81] This may well be every defendant's worst nightmare; they won the motion to dismiss and they still are going to be subject to discovery to help the plaintiffs state a claim against them.

This result is probably the product of "judicial experience and common sense" if any one is. If defendants did reach an agreement, "the proof is largely in the hands of the conspirators" and the judge apparently believes that plaintiffs should be able to try to win their case if that is so. So, in an odd way, the decision embraces the tenets of *Iqbal* and reaches a result that could not be farther from the intended consequences of *Twombly*.

B. More Interlocutory Appeals?

The *Twombly* Court's unambiguous intent was to limit costly and time-consuming discovery when the plaintiff has not carried its pleading burden. This is a laudable goal and one that is difficult to criticize. Notwithstanding this fact, however, appellate courts have generally been loath to grant petitions for interlocutory review under Section 1292(b) by defendants who argue that a district court erred in denying a motion to dismiss.

The Seventh Circuit's decision in the *Text Messaging* decision suggests that a change to this practice may be overdue when it comes to complex litigations that are likely to spur costly discovery. There, Judge Posner wrote that when a district court by "misapplying the *Twombly* standard allows a complex case of extremely dubious merit to proceed, it bids fair to immerse the parties in the discovery swamp . . . and by doing so create irrevocable as well as unjustifiable harm to the defendant that only an immediate appeal can avert."[82] He added that "[s]uch appeals should not be routine, and won't be, because as we said both district court and court of appeals must agree to allow an appeal under section 1292(b); but they should not be precluded altogether by a narrow interpretation of question of law."[83]

Any doubt on the merit of that position can be resolved by looking at any number of the large class actions that are currently in year three or four of litigation at the district court level. To take one example, in 2007, following *Twombly*, several plaintiffs filed a putative class action against several of the largest private equity companies in the District of Massachusetts based on allegations that the defendants conspired to rig deals to take various

79 *Id.* at 8.
80 *Id.* at 12.
81 *Id.* at 13.
82 630 F.3d at 626.
83 *Id.*

public companies private. The defendants filed a motion to dismiss on various grounds, including that the plaintiffs failed to state a claim under Rule 8. In December 2008, Senior Judge Edward Harrington denied the motion to dismiss and in February 2009, Judge Harrington refused to certify his dismissal order for interlocutory appeal. More than three years of discovery has now passed in that case encompassing dozens of defendants, numerous major plaintiff and defense law firms, and costing tens of millions of dollars. Only when that litigation is complete (assuming that the defendants do not settle because the legal fees compel them to do so), will the First Circuit have the opportunity to evaluate, among other things, whether the district court erred when it denied defendants' motion to dismiss. Had the district court certified its order (and the First Circuit agreed to accept the defendants' 1292(b) petition), however, it is possible that literally tens of millions and dollars could have been saved.

It is inevitably avoiding these types of costs that Judge Posner and the *Twombly* Court had in mind. Since *Text Messaging*, there is some indication that courts of appeals are becoming more receptive to interlocutory appeals of decisions denying motions to dismiss in complex antitrust cases.[84] Whether this is a long-term trend is too soon to say, but Judge Posner's rationale in *Text Messaging* coupled with the *Twombly* Court's policy pronouncements may give courts more support to do so in the future.

C. More Dismissals of Antitrust Claims That Do Not Require An Inference of A Conspiracy?

The vast majority of the federal appellate decisions that apply *Twombly* to antitrust claims concern Section 1 horizontal conspiracy allegations. As our discussion illustrates, these cases confront the question of how, on the one hand, to require a plaintiff to plead a "plausible claim" and, on the other hand, to remain faithful to the summary judgment cases that set forth the standards for a "plausible conspiracy." This issue, however, falls away when a motion to dismiss challenges whether a plaintiff has sufficiently pled an element of an antitrust cause of action that is unrelated to a conspiracy. These circumstances arise, for example, when a defendant alleges that the plaintiff has not pled a cognizable relevant market, does not allege that the defendant possess market power, or fails to allege that the defendant's conduct has an anticompetitive effect.

In these cases, there is some evidence that the appellate courts are being more faithful to the letter and spirit of *Twombly*. In the Eleventh Circuit's decision in *Tempur-Pedic*, for example, the court held that the plaintiff failed to allege a relevant submarket comprised of the "visco-elastic foam mattresses" that Tempur-Pedic is well known for selling. [85] The court observed that the complaint was devoid of "factual allegations of the cross-elasticity of demand or other indications of price sensitivity that would indicate whether consumers treat visco-elastic foam mattresses differently than they do mattresses in general."[86] The court similarly found that the plaintiff failed to allege an anticompetitive effect. The court noted that other than "the bald statement that consumers lost hundreds of millions of dollars" as a result of the defendants' alleged resale price maintenance agreement, "there is nothing establishing the competitive level above which [Tempur-Pedic's] allegedly anticompetitive conduct artificially raised prices."[87]

84 *See, e.g.*, *Robertson v. Sea Pines Real Estate Cos.*, 2012 U.S. App. LEXIS 9694 (4th Cir. May 14, 2012 (same); *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650 (7th Cir. 2011).
85 *Tempur-Pedic*, 626 F.3d at 1338.
86 *Id.*
87 *Id.* at 1339. The court also affirmed the dismissal of the defendant's horizontal price-fixing claims because "when the inference of conspiracy is juxtaposed with the inference of economic self-interest" there were insufficient allegations from which one could infer a plausible conspiracy. *Id.* at 1343.

Similarly, in the remand proceedings following the Supreme Court's decision in *Leegin*, the Fifth Circuit affirmed the district court's dismissal of the complaint on largely the same basis as *Tempur-Pedic*.[88] First, the court held that the plaintiff failed to "plausibly define the relevant product and geographic markets" because the plaintiff's product markets did not "encompass[] reasonable substitute products."[89] Second, the court held that the plaintiff's alleged theory of economic harm was economically implausible.[90] Specifically, the court held that the plaintiff's claim that the defendant's resale price maintenance program forced consumers to pay "artificially" high prices for Brighton products "def[ied] the basic laws of economics" given that plaintiff did not allege that the defendant had market power.[91]

It may be that *Twombly* has emboldened courts to dismiss antitrust claims where the insufficiently pled element – be it the product market, the presence or absence of market power, or anticompetitive effects – implicates *facts* that are more likely to be publicly known or reasonably within the plaintiff's possession. Courts, after all, periodically dismissed complaints on this basis long before *Twombly*.[92]

The trickier issue, of course, is how courts should react when a defendant's primary argument for dismissing the plaintiff's complaint is that some element of the complaint, as pled, cannot be squared with basic economic principles. Those principles, of course, are arguably "publicly known" (much like market facts) insofar as they are accessible to both plaintiffs and defendants. The trouble, however, is that different judges may reach different conclusions in applying those principles at the pleading stage. This, after all, seems to be what is driving much of the disagreement between the district courts and appellate courts in *Anderson News*, *Text Messaging*, and the other decisions discussed above. Looking ahead, it seems safe to assume that, when an allegation falls short because it fails to allege objective facts that may be publicly known, courts will be more receptive to apply *Twombly* and *Iqbal*'s strictures. In contrast, when a defendant argues that the plaintiff's theory is economically implausible or that a court cannot infer wrongful conduct from plaintiffs' factual allegations, the subjective nature of that judgment call may provide appellate courts with enough doctrinal room to push back on *Twombly* and side with the plaintiff(s).

V. CONCLUSION

It seems clear that courts are increasingly resistant to applying *Twombly* and *Iqbal*'s holdings literally. They appear to be engaging in a kind of "*Twombly* nullification", by quoting its standard but not following it, or permitting plaintiffs multiple opportunities to amend, or using their own "common sense and judicial experience" to interpret the plausibility of plaintiffs' allegations in plaintiffs' favor. We have come a long way from letting a complaint go forward when it contains "a short plain statement of the claim showing that the pleader is entitled to relief", as Rule 8(a) literally requires. But if courts are to apply *Twombly* and *Iqbal* consistently, it seems we still have a long way to go.

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88 *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412 (5th Cir. 2010).
89 *Id.* at 417-19.
90 *Id.* at 419.
91 *Id.* The court also held that the plaintiff failed to allege its horizontal restraint claims because it did not allege an agreement among the defendant's distributors, which was a critical element to its hub-and-spoke theory.
92 *See, e.g.*, *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 443 (3d Cir. 1997) ("Because plaintiffs failed to plead any relevant tying market, the claim was properly dismissed."); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) ("Failure to identify a relevant market is a proper ground for dismissing a Sherman Act [restraint of trade] claim.").

APPENDIX A:

Set Top Box Cases:
Opinions Deciding Motions to Dismiss

Motions Granted:
Downs v. Insight Communications Co., No. 09-00093, 2010 WL 2228295 (W.D. Ky. June 3, 2010).
Marchese v. Cablevision Sys. Corp., No. 10-2190, 2010 WL 3311842 (D.N.J. Aug. 18, 2010).
Marchese v. Cablevision Sys. Corp., No. 10-2190, 2011 WL 149917 (D.N.J. Jan. 14, 2011).
Marchese v. Cablevision Sys. Corp., No. 10-2190, 2011 WL 3022529 (D.N.J. July 21, 2011).
In re Time Warner Cable Set-Top Cable Television Box Antitrust Litig., No. 08-7616, 2010 WL 882989 (S.D.N.Y. Mar. 5, 2010).
In re Time Warner Cable Set-Top Cable Television Box Antitrust Litig., No. 08-7616, 2011 WL 1432036 (S.D.N.Y. Apr. 8, 2011).
Motions Denied:
Parsons v. Bright House Networks, L.L.C., No. 09-0267, 2010 WL 5094258 (N.D. Ala. Feb. 23, 2010).
Scott v. Cable One, Inc., No. 09-212, 2010 WL 3023526 (S.D. Miss. July 28, 2010).
Bodet v. Charter Communications Inc., No. 09-3068, 2010 WL 5094214 (E.D. La. July 26, 2010).
In re Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litig., No. 09-2048, 2010 WL 5136047 (W.D. Okla. Jan. 19, 2010).
Downs v. Insight Communications Co., No. 09-00093, 2011 WL 1100456 (W.D. Ky. Mar. 22, 2011).
Knight v. Mediacom Communications Corp., No. 10-01730 (S.D.N.Y. Mar. 30, 2011).
Marchese v. Cablevision Systems Corp., No. 10-2190, 2012 WL 78205 (D.N.J. Jan. 9. 2012).