A New Federal Pleading Standard?

By Daniel Patrick Jackson

Both plaintiff and defense lawyers alike are familiar with the U.S. Supreme Court's articulation of the Rule 12(b)(6) dismissal standard, first articulated a half century ago in *Conley v. Gibson* ("*Conley*"): "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 335 U.S. 41, 45-46 (1957). This oft-quoted phrase was recently laid to rest by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly* ("*Twombly*"), 127 S. Ct. 1955 (2007).

The *Twombly* Court noted that "on [] a focused and literal reading of *Conley*'s 'no set of facts [standard],' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of undisclosed facts' to support discovery," and as a result of such possibility, several "judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard." *Id.* at 1969. In what can be described as a seismic pronouncement (at the time this article was written, *Twombly* has already been cited, mentioned, discussed and/or analyzed in nearly 1800 cases), the *Twombly* Court stated that because the "no set of facts" standard had been "questioned, criticized, and explained away" and had "puzzled the profession for 50 years," the "famous observation ha[d] earned its retirement." *Id.*

In its place, the Court set forth a "plausibility" standard of pleading under which complaints must contain enough facts to "state a claim to relief that is plausible on its face," or face dismissal. *Twombly*, 127 S. Ct. at 1965, 1973 n.14. (It appears Justice Souter borrowed the "plausibility" language from the Seventh Circuit's own Judge Richard Posner. *See Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase.") In so doing, the Court has created a standard in seeming conflict with the long-accepted notions of notice pleading under Fed Rule of Civil Procedure 8. This begs the question, where does *Twombly* leave the federal pleading standard, and how will this new "plausibility" standard affect both plaintiffs and defendants in federal court?

Twombly's Procedural History

In *Twombly*, consumers brought a putative class action against incumbent local exchange carriers ("ILECs") alleging antitrust conspiracy in violation of §1 of the Sherman Act, both to prevent competitive entry into local telephone and Internet service markets and to avoid competing with each other in their respective markets. *See* 127 S. Ct. 1955.

The district court for the Southern District of New York dismissed the complaint for failure to state a claim upon which

relief could be granted. *Id.* at 1963. The Court opined that the allegations of parallel business conduct alone did not state a claim under §1 and further stated that the plaintiffs needed to allege additional facts that "ten[ded] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003). As to the ILECs' supposed agreement or contact against competing with each other, the district court found that the complaint did not "alleg[e] facts … suggesting that refraining from competing in other territories as CLECs (Competitive Local Exchange Carriers) was contrary to [the ILECs'] apparent economic interests, and consequently [did] not rais[e] an inference that [the ILECs'] actions were the result of a conspiracy." *Id.* at 188.

The Court of Appeals for the Second Circuit reversed, holding that the district court utilized an incorrect standard in testing the sufficiency of the complaint. The Second Circuit, without citing *Conley* (although almost certainly referring to it), stated that "to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005). The U.S. Supreme Court granted *certiorari* to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct. 127 S. Ct. at 1963.

Twombly at the Supreme Court

The U.S. Supreme Court upheld the dismissal in a 7-2 decision. The Court recognized the general principle of the Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Conley*, 335 U.S. at 47. However, applying these general standards to a §1 claim, the Supreme Court held "that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement 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 evidence of illegal agreement." 127 S. Ct. at 1965. The Court stated that the complaint at question failed to meet the "plausibility" standard because "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 1966.

In a seeming win for federal defendants everywhere, the Court spent some time discussing a cost-benefit rationale behind its newly articulated "plausibility" standard. The Court noted that "it is one thing to be cautious before dismissing an antitrust complaint but quite another to forget that proceeding to antitrust discovery can be expensive." *Id.* at 1966-67. In so stating, the Court seemed to articulate its support for a pleading standard that disposes of seemingly groundless claims at an early stage to save time and money for both the parties and the judiciary.

Though the Court stated in reaching its conclusion that it did "not apply any heightened pleading standard," lawyers can be certain that *Twombly* will be construed and/or interpreted to require such a standard for future 12(b)(6) motions to dismiss. *Id.* at 1973 n.14. The majority concluded its opinion stating that it "d[id] not require heightened fact pleading of specifics, *but only enough facts to state a claim to relief that is plausible on its face.*" *Id.* at 1974 (emphasis added). With the Court making such a pronouncement, however, a new standard was arguably born.

The Seventh Circuit and *Twombly's* "Plausibility" Standard

How far will this new standard extend, and what will be its practical effect on federal pleading standards? Recently, the Supreme Court's reasoning in *Twombly*, has been interpreted as applicable beyond the specific antirust context in which it was formulated. *See In re Ocwen Loan Servicing, LLC Mortgage Servicing Litig.*, 491 F.3d 638, 649 (7th Cir. 2007). However, despite the recent fervor with which the *Twombly* decision has been met, a recent Seventh Circuit decision suggests that *Twombly*'s "plausibility" pleading standard may not be too great of a departure from the previous interpretations of notice pleading. *See Lang v. TCF Nat'l Bank*, No. 07-1415, slip. op. at 2 (7th Cir. Sept. 21, 2007) (stating that even after *Twombly*, complaints in federal court need only satisfy a notice pleading standard).

In *Walker v. S.W.I.F.T. SCRL*, the district court denied the defendant's 12(b)(6) motion to dismiss, quoting *Twombly* by noting that "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." 491 F. Supp. 2d 781, 788 (N.D. Ill. 2007) (*quoting Twombly*, 127 S. Ct. at 1959). The *Walker* court reasoned that plaintiffs' general factual allegations were enough to state a plausible claim to relief.

In *Airborne Beepers & Video, Inc. v. AT&T Mobility, LLC*, a district court for the Northern District of Illinois pronounced its understanding of the "new" *Twombly* pleading standard. No. 06-2949, 2007 WL 2406859 (N.D. Ill. Aug. 24, 2007). The *Airborne* court began by noting that two weeks after the *Twombly* decision came down, the U.S. Supreme Court noted in its subsequent decision in *Erickson v. Pardus* that its decision in *Twombly* did not signal a switch to fact pleading in federal courts. *Id.* at *4 (*citing Erikson v. Pardus*, 127 S. Ct. 2197 (2007)). According to *Airborne*, "taking *Erickson* and *Twombly* together, we understand the Court to be saying only at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim that the defendant is entitled to under Rule 8." *Id.*

Despite the seeming ease with which recent Seventh Circuit cases have sidestepped or downplayed *Twombly's* new pleading pronouncement, other recent decisions go the opposite way—making it difficult

continued on page 50

New Federal Pleading Standard
continued from page 47

to reconcile the conflicting opinions or to predict *Twombly*'s future application. In *EEOC v. Concentra Health Services, Inc.*, Charles Horn complained to the Equal Employment Opportunity Commission ("EEOC") that his employer, Concentra Health Services ("Concentra"), fired him when he reported a sexual affair between his supervisor and another employee. No. 06-3436, 2007 WL 2215764 (7th Cir. Aug. 3, 2007). The EEOC brought an action against Concentra arguing that Concentra had violated the anti-retaliation provision of Title VII of the Civil Rights Act of 1964. The district court dismissed the EEOC's complaint without prejudice, holding that the anti-retaliation provision did not protect Horn's report. *Id.* The EEOC responded by filing a "markedly less detailed amended complaint that did not allege the specifics of Horn's report." The district court dismissed the amended complaint with prejudice. The Court of Appeals for the Seventh Circuit affirmed, holding that the amended complaint failed to provide Concentra with sufficient notice of the nature of the EEOC's claim. *Id.* In his concurring opinion, Chief Judge Flaum noted that while the complaint would have withstood a motion to dismiss before *Twombly*, it could not under the new, post-*Twombly* standard. Flaum further stated he was "unable to share the majority's view that [*Twombly*] left our notice pleading jurisprudence in tact." *Id.*

Where Does *Twombly* Leave Us?

At this point, it seems that *Twombly* may be a case of "much ado about nothing." Undoubtedly, defense lawyers in federal courts across the country will (and should) cite to *Twombly* in Rule 12(b)(6) motions to dismiss and argue it has somehow heightened Rule 8(a)(2) notice pleading requirements. Plaintiffs' lawyers will undoubtedly (and should) argue the opposite—that *Twombly*'s "plausibility" standard is merely a restatement of the *Conley* notice pleading and really has not changed anything. To date, it seems the majority of the Seventh Circuit is approaching the latter viewpoint and taking the position that *Twombly* is not quite as earth-shattering as defense lawyers and defendants may have hoped. The fact that the chief judge for the Seventh Circuit has disagreed raises an interesting question as to the future impact and application that *Twombly* will have on federal litigation.

In the meantime, while *Twombly*'s meaning is interpreted and debated in the courts, defendants have new precedent to cite when seeking to dismiss factually deficient complaints, and plaintiffs have new incentive for putting more information in their pleadings to survive such motions. ■

Daniel Patrick Jackson is a second-year associate at the Gloor Law Group, LLC in Chicago. He concentrates his practice in civil litigation. *Jackson would like to thank Philip J. Fowler and Steven Vernon for their contributions to the article.*

Close to Home
continued from page 49

corporation (via the Illinois corporation's web site) to reserve a hotel room in Russia. The web site allegedly "contained a choice of law clause selecting Illinois law." *Id.* at *4-5. The plaintiff alleged that, when the Illinois corporation charged him for the Russian hotel room, it deceptively used an inflated exchange rate. *Id.* at *1-3. The federal district court granted the defendant's motion to dismiss the plaintiff's ICFA claim for failure to establish standing under the ICFA. *Id.* at *3-8. The plaintiff argued that the defendant "should be held liable under the ICFA because of [*sic*] the choice of law provision on [defendant's] web site specifies Illinois law." *Id.* at *6. The court rejected that argument, holding that "the existence of such a clause has no impact on whether the ICFA applies in the first instance." *Id.* at ** 6-7. Moreover, the "fact that Illinois law was selected to govern disputes arising out of [defendant's] web site does nothing to further the contention that the allegedly deceptive practices occurred in Illinois." *Id.* at *7.

The U.S. Court of Appeals for the Seventh Circuit found that the Illinois nexus was slight but "not ... non-existent" and affirmed on other grounds. *See Shaw v. Hyatt Int'l Corp.*, 461 F.3d 899, 900-02 (7th Cir. 2006).

While an Illinois choice-of-law provision will not automatically confer standing under the ICFA, a choice-of-law provision selecting another state's law may preclude the ICFA's application. *See Hall v. Sprint Spectrum L.P.*, 376 Ill. App. 3d 822, 2007 Ill. App. LEXIS 740, at *16 (5th Dist. June 27, 2007) (applying the Kansas Consumer Protection Act instead of the ICFA because the parties' contract contained a Kansas choice-of-law provision).

Vague or conclusory allegations of an Illinois nexus are insufficient.

In *Gen. Elec. Co. v. Good Guys, Inc.*, No. 05-5763, 2006 U.S. Dist. LEXIS 74259, at *17 (N.D. Ill. Oct. 6, 2006), General Electric attempted to meet the *Avery* standard by alleging, upon information and belief, that