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Judicial Application of the *Twombly/Iqbal* Plausibility Standard in Antitrust Cases

BY GREGORY G. WROBEL, MICHAEL J. WATERS, AND JOSHUA DUNN

FOLLOWING THE SUPREME COURT decisions in *Twombly* and *Iqbal*, courts have articulated and now apply a revised legal standard (T/I standard) in ruling on motions to dismiss antitrust claims in federal court.[1] This standard incorporates and juxtaposes open-ended concepts of "plausibility," "probability," and "possibility," tempered by basic economic principles, common sense, and judicial experience. This article identifies trends among courts in applying the T/I standard to particular elements of antitrust claims, with summaries of selected decisions to illustrate the range of factual content, logical inferences, and analytical methods that courts have described as grounds for decision.

The decisions discussed below are selected from a separate, comprehensive Appendix intended to cover all published rulings on motions to dismiss antitrust claims issued following the *Twombly* decision in May 2007 through September 2011.[2]

The article describes categories of factual sources courts have considered in deciding motions to dismiss (including judicially noticed materials, discovery materials, and collateral proceedings), the analytical methods courts employ in their deliberations (including consideration of market structure and performance, economic theory, and business factors), and practical suggestions on how to draft antitrust claims to survive a motion to dismiss and, conversely, how to draft arguments to prevail on such motions.

Judicial Description of T/I Standard

A court ruling on a motion to dismiss an antitrust claim now must determine whether the claim is "plausible" in light of basic economic principles, as well as judicial experience and common sense.[3] In *Iqbal*, the Supreme Court stated 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."[4] Judge Richard Posner of the Seventh Circuit described the inherent ambiguity in these statements:

> This is a little unclear because plausibility, probability, and 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.[5]

Stated another way, the complaint must state enough facts to "raise a reasonable expectation that discovery will reveal evidence of illegality."[6]

The T/I standard is approaching its five-year anniversary with a legacy of wide-ranging judicial applications in antitrust cases by district courts, and to a lesser extent by courts of appeals, for virtually all claims and elements. The data on court decisions in the Appendix show that courts ruling on antitrust claims have not yet reached consensus on how to apply the concept of plausibility at the core of the T/I standard. Given the inherent pliability of this concept, continued close analysis of judicial reasoning applied to particular claims and elements is warranted to guide tactical decisions on the content of complaints and motions to dismiss.

Trends Among Courts

The Appendix contains further commentary on aggregate data for the decisions covered therein. The data show significant numbers of rulings by courts in the Second, Third, Sixth, Seventh, and Ninth Circuits, and in particular by district courts for the Northern District of California, Southern District of New York, District of New Jersey, Northern District of Illinois, and Eastern District of Pennsylvania. Dismissal rates, post-*Twombly*, do not appear to have shifted significantly over time. Courts dismissed one or more antitrust claims in 74 percent of decisions (annual rates of 73 to 76 percent), and denied dismissal of one or more antitrust claims in 41 percent (annual rates of 39 to 46 percent and trending somewhat higher for 2008–2011). Further detailed review of case information is needed to account for the large number of rulings in which some claims are dismissed and others are not, and in which dismissal is granted without prejudice.

Gregory G. Wrobel is a shareholder and head of the Antitrust Practice Group of Vedder Price P.C. and is Articles Editor of ANTITRUST *magazine. Michael J. Waters and Joshua Dunn are associates at Vedder Price.*

Court decisions vary greatly in the depth of analysis used to apply the T/I standard. Most courts, however, now reject antitrust claims that only recite the judicial label or formulation of a claim element without at least some supporting factual allegations, and courts increasingly are focusing in greater depth on whether (and why) supporting allegations should be accepted as well-pleaded facts entitled to a presumption of truth, or legal conclusions that the court should disregard.

Although the T/I standard arose from review of allegations on the conspiracy element of a Section 1 claim, courts applied the standard to other antitrust claims and elements after the ruling in *Twombly*, and the ruling in *Iqbal* now requires application to all elements of civil claims in federal courts.

Judicial Application of the *Twombly/Iqbal* Standard to Elements of Antitrust Claims

Below is a general discussion of how courts have applied the T/I standard to the principal elements of antitrust claims, with selected summaries of court decisions to illustrate the range of factual content, analytical methods, and depth of analysis that courts have applied in their rulings.

Standing, Causation, Antitrust Injury. Courts have stated both pre- and post-*Twombly* that "the existence of antitrust injury is not typically resolved through motions to dismiss."[7] Defendants, nevertheless, frequently seek and obtain dismissal for failure to plead standing, causation, and antitrust injury.

Courts have not always analyzed challenges to these elements by assessing the plausibility of factual allegations and inferences, as is common for indirect proof of conspiracy. This may be because proof of these elements depends on objective facts about the plaintiff's position in the industry and market, which in turn are used to evaluate whether the challenged conduct is capable of causing harm to competition and, through a chain of causation, to the plaintiff. Courts consider whether (i) the plaintiff alleged an actual injury or rather stands to benefit from the challenged conduct, (ii) allegations of threatened injury are not inherently speculative, (iii) the plaintiff made more than naked allegations of "antitrust injury" without (or contrary to) supporting facts,[8] (iv) the plaintiff alleged harm to competition,[9] or (v) the plaintiff alleged a sufficiently direct causal link between the alleged conduct and injury.[10]

- ***Jebaco.***[11] Plaintiff operated docks for casino boats and alleged that it was a prospective casino operator and that the defendants illegally divided the Louisiana casino market, causing the plaintiff to lose per-patron docking fees and the ability to purchase Harrah's assets and participate in the market. The court observed: "Following *Twombly* and *Iqbal*, it is likely that Jebaco's mere allegations of potential competitor status, without any facts to demonstrate its financial status or its ability to fulfill the demanding requirements of Louisiana gaming law, are insufficiently pled. Further, any potential competitor's antitrust claim would have to be viewed skeptically in a market where entry is fully controlled by a regulatory body." The court also held that even if plaintiff satisfactorily pled its preparedness and ability to operate a casino, its injury did not flow from an antitrust law violation.
- ***Madison Square Garden.***[12] The court observed that, although complaint allegations focused on harm to the plaintiff, it was plausible that the alleged conduct—requiring the migration of the plaintiff-owned New York Rangers' website to a league-operated server—constituted a form of output reduction that harmed market-wide competition.

Relevant Market, Market Power. Relevant market and market power allegations typically are based on objective facts that are observable in the relevant industry and geographic area. The plaintiff's ability to sustain these allegations may turn on detailed expert analysis and resulting opinions that have not been a part of complaints under traditional notice pleading standards. Yet, courts regularly apply the T/I standard to allegations of these elements, and, although the depth of analysis varies greatly, some courts have required more detailed facts to support allegations of relevant markets and market power.

- ***National Athletic Trainers Association.***[13] An association for athletic trainers alleged that an association of physical therapists and its members possessed market power in a nationwide market for manual therapy services for athletes. The court cited *Twombly* and briefly analyzed the plausibility of the relevant services market, noting that the plaintiff defined manual therapy, described how and when athletic trainers and physical therapists provide these services, and described how those practices overlap. The court required little more than conclusory allegations on geographic market and market power, and rejected the argument that the market was implausibly broad given that customers use therapy services locally: "[T]here are no heightened pleading requirements in an antitrust case, and this court will not look behind the [plaintiff's] allegations at the pleading stage of this case to explore facts concerning the complaint's market definition." The court accepted market power allegations, which the court described as allegations of anticompetitive conduct aimed at creating barriers to entry and manipulation of billing code definitions to favor physical therapists over trainers, stating simply: "[T]hese allegations, however thin they may appear, are sufficient."[14]
- ***Rick-Mik Enterprises.***[15] The court held that an operator of franchised gasoline stations failed to sufficiently allege that Equilon, a franchisor, had market power in the market for gasoline franchises: "[A]t least for purposes of adequate pleading in antitrust cases, the [Supreme] Court specifically abrogated the usual 'notice pleading' rule." Although plaintiffs alleged that "[Equilon] rank[s] number one in the industry in branded gasoline stations" and provided statistics that show Equilon is an important player in the petroleum industry, the court noted that the complaint did not allege (i) Equilon's share of gasoline franchises, (ii) the share of retail gasoline sales by nonfranchise outlets, (iii) the amount or nature of Equilon's

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power or control over prospective franchisees, or (iv) facts showing the relative difficulty of franchisees switching among brands.

■ ***DuPont v. Kolon Industries.***[16] The court reversed dismissal of Section 2 claims based on the plaintiff's failure to allege a relevant geographic market that includes non-U.S. areas in which foreign sellers operate who make some U.S. sales. The court ruled that the plaintiff alleged a plausible market limited to the United States based on allegations that (i) there are only five worldwide producers, (ii) U.S. prices are high while supply is low, (iii) three of four foreign manufacturers do not sell to U.S. commercial customers, (iv) there are high technical and legal barriers to entry into the U.S. market, and (v) DuPont dominates the market through exclusive, multiyear contracts.

Conspiracy. The Supreme Court first articulated the T/I standard in connection with the Section 1 conspiracy element. The plausibility concept may fit best for this element due to the wide range of evidence offered to prove that alleged conspirators "had a conscious commitment to a common scheme to achieve an unlawful objective."[17] Indirect proof typically consists of circumstantial evidence about observable conduct—communications with rivals, decisions on competitive terms of business, actual purchase and sale transactions—coupled with information on market structure and trends, and allegations about how these facts and circumstances support an inference of conspiracy. The need for indirect proof of conspiracy rests on the view that participants in hard-core anticompetitive conduct keep such agreements secret to avoid criminal prosecution. Courts, however, accept indirect proof for all types of Section 1 claims, including rule-of-reason claims based on public conduct.

The use of indirect proof and plus factors as circumstantial evidence of conspiracy is well established, even though courts have long grappled with how to avoid stifling and even punishing lawful independent conduct.[18] The T/I standard does not appear to have changed the categories of circumstantial evidence used to establish an inference of conspiracy,[19] but courts now must set probabilistic limits at the pleading stage on the "range of permissible inferences from ambiguous evidence"[20] alleged in the complaint, without resort to the summary judgment standard that courts have applied for the past twenty-five years, or even a clear delineation of the degree of likelihood between "possible" and "probable" that the plausibility concept requires.

The challenge for plaintiffs is to frame allegations that show why observable conduct fits well with the premise of an underlying conspiracy and cannot readily be rebutted by logical explanations that the defendants were acting independently in furtherance of their own rational competitive interests. The converse challenge for defendants—who for the most part must work within the confines of complaint allegations, is to show that economic principles, business factors, and logical inconsistencies undermine the premise of conspiracy, and that the prospect for finding evidence to sustain the allegations is remote and unjustified in light of the cost and burden of discovery.

Courts typically ignore allegations that only recite the judicial formulation of a claim element and "conclusory" allegations offered as support.[21] Instead, they judge whether the remaining factual allegations, accepted as true, permit the court to draw a reasonable inference that the defendants entered into a conspiracy. Decisions applying the T/I standard reflect a wide range of factual details that courts require and analytical methods that courts use to evaluate indirect proof of conspiracy.

■ ***Text Messaging.***[22] The court affirmed the denial of a motion to dismiss on interlocutory appeal based on factual allegations of plus factors, and gave plaintiffs the benefit of the doubt on the strength of inferences that these factors imply without delving into details of contrary explanations for the conduct. The plus factors alleged were oligopoly market structure, information exchanges, meetings among rivals, price increases that coincide with declining costs, and parallel conduct in adopting a complex new pricing structure. The court explained the factual grounds for its ruling in several brief analytical points.[23]

■ ***Starr.***[24] The court reversed the dismissal of Section 1 claims. Similar to *Text Messaging*, the court gave the plaintiffs the benefit of the doubt on the strength of inferences and did not delve into details of contrary explanations for conduct. The plus factors alleged were oligopoly market structure, joint ventures and other parallel business practices that maintained prices despite rapidly declining production costs, anecdotal evidence that affiliated digital music websites were of poor quality and that use of these sites was contrary to each defendant's independent economic interests, government investigations, and an admission that one joint venture was formed to maintain prices. The court enumerated specific factual grounds[25] and plus factors[26] for its analysis.

■ ***Insurance Brokerage.***[27] The court affirmed dismissal of some and reversed dismissal of other Section 1 claims. The analytical method is distinct from *Text Messaging* and *Starr* in that the court delves into considerable detail of contrary explanations for conduct, and ultimately gives the plaintiffs the

benefit of the doubt on the strength of inferences only with respect to hard core bid-rigging in which the insurer defendants allegedly participated, finding it plausible that they would do so only if they expected to (and thus had agreed to) receive reciprocal treatment from their rivals. The court focused on plus factors, consisting of government enforcement, parallel business practices, information exchanges, and meetings among rival insurers. The court did not give plaintiffs the benefit of the doubt that allegations of unsavory parallel business practices implied various types of horizontal conspiracies, mostly because economic incentives, and business and regulatory factors facing the insurers, provided an equal or more plausible explanation for the conduct. The factual grounds for the court's analysis are more complex than in *Text Messaging* and *Starr*, in part because the court addressed several different conspiracy claims, but also because the court dissected and ultimately accepted many of the defendants' nonconspiratorial explanations for the alleged parallel conduct.

District court decisions on the conspiracy element reflect an even greater range in the factual detail, inferences, and analytical methods that courts have considered in determining the plausibility of conspiracy allegations based on indirect proof.[28]

Anticompetitive Conduct. The anticompetitive conduct element encompasses virtually all antitrust claims, so case examples below provide only a sampling of the full range of claims under the Sherman and Clayton Acts.

■ ***Travel Agent Commission.***[29] The court affirmed dismissal of Section 1 claims in a ruling that reflects a typical pattern for Section 1 price-fixing and bid-rigging claims. The defendants did not challenge allegations about their actual pricing conduct but did hotly dispute whether they engaged in the conduct in furtherance of a conspiracy and whether the conduct was indirect proof of conspiracy. The majority ruled that the pricing conduct and other indirect proof were not sufficient to prove a conspiracy. The dissent argued vigorously that the inference of conspiracy was obvious ("[a]lthough at present there is no written contract . . . the facts alleged present so plain a case that they might as well have put the plan in writing") but did not challenge the majority's depiction of defendants' actual pricing conduct.

■ ***Watson Carpet.***[30] The court reversed dismissal of a Section 1 concerted refusal to deal claim, with a similar focus on conspiracy rather than alleged anticompetitive conduct. The court accepted allegations that 2005–2007 refusals to deal stemmed from an alleged 1998 agreement between the supplier and a competing dealer. The court did not address the plausibility of allegations that defendant refused to sell to the plaintiff, but rather focused on indirect proof that the refusal to deal was part of a vertical conspiracy with a rival dealer.

The plaintiff's complaint made no reference to prior state court litigation over the earlier refusals to deal, or the state court ruling that the supplier had a privilege under state law to make decisions on what companies to deal with and on what terms. Nevertheless, the court found the inference of a continuing conspiracy to be plausible: "There was . . . nothing more for Watson Carpet to plead. It articulated in detail the facts of the 1998 agreement. That the actions were taken *pursuant* to the plan is evident from the fact that the actions were the same ones contemplated as part of the plan. The agreement called for Mohawk to refuse to sell carpet, which is exactly what Mohawk allegedly did . . . . The district court gave improper weight to the absence of reaffirmation." The court of appeals observed that "[o]ften, defendants' conduct has several plausible explanations. Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage."[31]

■ ***Astra Media Group.***[32] The court ruled directly on the anticompetitive conduct element and found allegations of predatory pricing for taxi-top ads to be conclusory and implausible, based on the business context for the alleged conduct:

> Astra Media provides no facts to support its contention that $170 is actually close to the standard industry cost. It is unclear from the complaint whether the industry standard is higher or lower than $170 or by how much . . . [I]t gives no basis to infer reasonably that Clear Channel—which, as the largest supplier of taxi-tops in New York City, may enjoy substantial economies of scale—has the same cost structure as the rest of the industry. Astra Media, therefore, failed properly to plead that Clear Channel's prices were below an appropriate measure of its costs . . . [E]ven if the complaint did contain adequate factual assertions about Clear Channel's price and cost with respect to Disney . . . the complaint provides no reasonable inference that a company as large as Clear Channel would suffer a meaningful loss from underpricing a single contract.

■ ***Time Warner Set-Top Box.***[33] The court rejected allegations of tying premium cable service to the purchase of set-top boxes. The court found plausible allegations of separate products but rejected allegations of coercion for services that could be accessed with a cable card available from other sources: "Plaintiffs' allegation that Time Warner did not promote CableCARDs as a viable alternative to leased cable boxes does not adequately or plausibly allege actual coercion to lease the cable boxes."[34]

■ ***Scooter Store.***[35] The court found adequate allegations of anticompetitive conduct and specific intent to monopolize for a Section 2 counterclaim based on the plaintiff's use of trademark litigation to drive the defendant from a North American market for power mobility devices. Even though courts often rule that excluding others from using a trademark does not confer exclusionary power over products and services,[36] the court accepted relatively cursory allegations that the plaintiff was using its larger size, and its limited trademark registration covering use of the work only for the business of insurance claims, to prevent the defendant from using the mark for retail sales of power mobility devices.

Thus, the court reasoned, the plaintiff threatened to drive defendant out of business with high litigation costs.

Anticompetitive Effect. The T/I standard appears to have affected how courts analyze allegations of anticompetitive effects, requiring plaintiffs to provide detailed facts to support the allegations, and in some cases analyzing the economic plausibility of such allegations.

- ***Jacobs.***[37] The plaintiffs alleged that prices they paid for Tempur-Pedic mattresses "have been artificially elevated due to the conduct of [Tempur-Pedic] and its distributors in eliminating price competition for [Tempur-Pedic] mattresses." The plaintiffs also alleged that the defendants had eliminated price competition for Tempur-Pedic mattresses, and that "Tempur-Pedic has harmed the Plaintiffs and all putative class members by overcharging substantially for Tempur-Pedic mattresses." The court dismissed the Section 1 claim due to inadequate allegations of anticompetitive harm, stating that the allegations were "precisely the kind of 'labels and conclusions' and 'formulaic recitation of the elements of a cause of action' that the Supreme Court condemned in *Twombly*."
- ***Leegin.***[38] The plaintiff alleged that the conduct of defendant manufacturer in suspending shipments to the plaintiff retailer for violating the manufacturer's policy on suggested resale prices caused consumers to pay "artificially" high prices and that the policy deprived consumers of "free and open competition." The court affirmed dismissal of Section 1 claims, stating that the allegations defied basic laws of economics and ignored economic realities, including the existence of interbrand competition.

Other Antitrust Claims. Courts have applied the T/I standard to Robinson-Patman claims. Courts have dismissed Section 2(a) secondary line claims for lack of supporting facts about transactions with the favored wholesale customer,[39] and about the plaintiff's assertion that the favored buyer was controlled by the supplier (and thus resales by this buyer should count as discriminatory sales by the supplier).[40] Courts have applied the T/I standard to claims by private parties under Section 7 of the Clayton Act, often focusing on standing and relevant market allegations.[41] Courts also have applied the T/I standard to claims under state antitrust laws, often asserted by indirect purchasers, including cases where direct purchasers also asserted claims under federal antitrust law.[42]

Defenses, Immunities, FTAIA. Affirmative defenses are not formally asserted until the defendant files an answer to the complaint, and courts continue to address whether and how the T/I standard applies to such defenses.[43] Courts in antitrust cases, however, have considered whether grounds for applying exceptions to certain immunities and defenses appear on the face of the complaint, thereby requiring the plaintiff to allege facts sufficient to plausibly show that the immunity or defense does not apply.[44] Courts have applied the T/I standard in ruling on *Noerr* immunity and its exceptions,[45] the filed rate doctrine,[46] statute of limitations exceptions for fraudulent concealment and continuing violations,[47] limitations in the Foreign Trade Antitrust Improvements Act (FTAIA),[48] and the requirement that challenged conduct involve interstate commerce.[49] Courts sometimes resolve these issues based on interpretation and application of controlling legal authority, but also have assessed the plausibility of pertinent factual allegations, in some cases in significant detail.

Judicial Reasoning: Reliance on Factual Sources and Analytical Methods

Factual Sources. The Appendix summarizes factual sources expressly relied on in written decisions on motions to dismiss, and reflects only limited use of information not set forth in the complaint. Nevertheless, courts have considered a limited array of other materials and information, and efforts to use such information may expand under the T/I standard.

Complaint and Referenced Documents. The T/I standard did not alter the basic limitation stated in Rule 12(d) that courts may not consider matters outside the pleadings without converting a Rule 12(b)(6) motion to one for summary judgment. Courts have considered documents attached to the complaint, and documents referenced in the complaint that are central or integral to the plaintiff's claims.[50]

Judicial Notice Materials. Courts may take judicial notice of facts that are not subject to reasonable dispute, i.e., facts generally known within the court's jurisdiction or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.[51] In addition to public records and government documents, courts have taken judicial notice of other materials for motions to dismiss, including publicly filed annual statements,[52] newspaper articles,[53] and bylaws of national and international organizations.[54] Courts have rejected other materials where authenticity may be questionable,[55] as well as factual contents from contested allegations in collateral proceedings.[56] Given that the scope of documents and information subject to judicial notice is not precisely defined in court rules or case law, practitioners may seek to make greater use of such materials as arguments on plausibility become more complex and fact-intensive.

Discovery Materials. Despite statements in *Iqbal* that plaintiffs are not entitled to discovery to meet the plausibility standard,[57] rulings in some complex antitrust cases reflect consideration of materials obtained through discovery that the court may allow for other purposes, e.g., merits discovery on principal claims where antitrust counterclaims are filed, class certification, challenges to personal or subject matter jurisdiction, and preliminary injunctions.[58] In cases where the plaintiff has filed one or more amended complaints, information from discovery materials may be set forth, selectively, in the complaint.

Collateral Proceedings. Related private litigation and government enforcement actions have long been sources of indirect discovery. Parties continue to use such information, and the proceedings themselves, particularly in complex industry-

wide cases that follow in the wake of government enforcement actions, and courts have considered such information in ruling on motions to dismiss.[59]

Given the restriction of Rule 12(d) and courts' general reluctance to rely on judicial notice materials, plaintiffs continue to enjoy certain tactical advantages in determining what factual matters may be considered on a motion to dismiss. This advantage may grow in importance as plaintiffs selectively include greater factual content in complaints to meet the T/I standard.

Analytical Methods. The Appendix includes summary descriptions of analytical methods reflected in written rulings on motions to dismiss as an aid for tactical decisions on how to draft and challenge complaint allegations for particular claims and elements.

Factual Details. Courts have observed that the T/I standard does not establish a fact pleading requirement, but courts still focus on the absence or presence of factual details when assessing plausibility. Courts typically do not accept allegations that parrot the judicial formulation of a claim element without at least some supporting facts that show the element is satisfied, but written decisions vary widely in the nature and extent of factual detail that courts have required to meet the plausibility standard. Courts in some cases have accepted allegations that add only modest case-specific details, using other analytical methods and the general presumption of truth for well-pleaded facts to rule that the allegations are plausible. In other cases, courts have dissected lengthy and detailed allegations, in particular on the conspiracy element, and found the allegations to be implausible.[60]

Market Structure and Performance. Courts often evaluate market structure and performance in determining plausibility, not only where the plaintiff makes specific factual allegations on these topics, but also where the court relies on economic principles and other analytical methods. Courts have considered market structure and performance as a plus factor for indirect proof of conspiracy, as context for market definition and market power allegations, and to establish standing, causation, and antitrust injury, among other purposes.[61] Perhaps because such information typically is accessible to all parties, courts have dismissed claims due to factual and logical pleading deficiencies even though market structure and performance are frequent issues for expert analysis and evidence following discovery.

Economic Theory. Even where courts do not recite economic theory and analysis as explicit grounds for decision, this analytical method is implicit in a wide range of plausibility rulings. A key example is where courts assess whether the plaintiff made plausible allegations that the defendants engaged in anticompetitive conduct that would not be in their rational interest unless they had entered into the alleged conspiracy. Underlying this plus factor is a potentially wide-ranging array of economic principles and analytical methods that are used to predict and test the behavior of rivals, in particular in concentrated markets where conscious parallel conduct may be feasible and economically rational without an actual agreement among rival firms. Some courts have engaged in detailed assessments of whether complaint allegations on this plus factor are plausible.[62] Courts also apply economic principles in ruling on allegations of relevant markets and market power, standing, causation, antitrust injury, and anticompetitive effect, often intertwined with factual assessment of market structure and trends.

Business Factors. Courts often describe facts about the parties' business and industry in assessing plausibility, focusing on customary practices among customers and suppliers, how suppliers communicate competitive actions such as price increases, and the ability and propensity of customers to use other suppliers or products, among other factors. Courts have considered business factors for a wide range of claim elements, including indirect proof of conspiracy (i.e., whether alleged conduct is consistent with normal independent business conduct in the market), relevant market definition, and anticompetitive conduct and effect. Courts sometimes use the plaintiff's own allegations on business factors to rule that a posited inference or conclusion is not plausible, but also appear to rely on common sense and general perceptions of normal business practices.

Common Sense, Logical Consistency, Plausibility of Inferences. The T/I standard invites courts to make plausibility determinations based in part on judicial experience and common sense,[63] although courts typically do not recite this analytical method as an explicit ground for decision. Courts that rely on the logical consistency or inconsistency of complaint allegations and arguments often do so in conjunction with other analytical methods. The T/I standard requires courts to make an ultimate determination of plausibility for antitrust claims based on the complaint as a whole, but courts also consider plausibility in more discrete ways to evaluate posited inferences from factual allegations on particular claim elements and subissues. Courts have made such assessments about plus factors offered as indirect proof of conspiracy as well as other claim elements, including relevant market, market power, and anticompetitive effect.

Legal Grounds. Courts often apply legal grounds for decision in conjunction with fact-based plausibility determinations. For example, the court may apply controlling case law as the principal ground for decision on whether a plaintiff has standing or suffered antitrust injury, but in doing so may assess the plausibility of factual allegations and inferences in support of particular aspects of the legal standard.[64] Courts typically cite and apply controlling authority on the general judicial formulation of a claim element (e.g., pleading requirements for standing, antitrust injury, exceptions to affirmative defenses), but as courts of appeals issue more rulings on plausibility determinations for fact-intensive claim elements (e.g., conspiracy, anticompetitive effect), lower courts may have greater occasion to consider whether they are bound to follow such authority as a matter of law.

Appellate Review

Dismissal with and Without Prejudice. Courts often grant plaintiffs leave to file amended antitrust claims, irrespective of the claim element(s) that the court determined to be deficient, and these interlocutory rulings are not subject to automatic appellate review. Also, many antitrust cases involve multiple claims under federal antitrust law and other statutes and common law doctrines. Courts often dismiss one or more, but not all of these claims. Such rulings also may not be subject to automatic appellate review even if the court states that the dismissal of an antitrust claim is with prejudice, if other claims that provide a basis for federal jurisdiction are not dismissed. District court rulings dismissing all claims with prejudice are subject to appeal from the entry of final judgment, and this has been the predominant path to appellate review of district court rulings applying the T/I standard.[65]

Interlocutory Review. Courts in a limited number of cases have certified rulings applying the T/I standard for interlocutory appeal.[66] In *In re Text Messaging*, the Seventh Circuit analyzed in some detail the grounds for accepting such interlocutory appeals.[67] The district court allowed the plaintiffs to file a second amended complaint despite the defendants' objection based on *Twombly* that amendment would be futile. The court of appeals accepted the question certified on whether the complaint was adequate under the T/I standard, observing that review was warranted because the T/I standard is "designed to spare defendants the expense of bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand," and that interlocutory review should not be precluded altogether by a narrow interpretation of whether the appeal presents a "question of law."

District courts presented with petitions for interlocutory appeal on the denial of a motion to dismiss may consider whether the plaintiff is likely to be granted leave to amend if the court of appeals disagrees and dismisses the complaint. In *In re Text Messaging*, the court stated that the question of whether the complaint states a claim under the T/I standard is a controlling question because the case would likely be over if the court ruled that the second amended complaint failed to state a claim.[68] In contrast, in *In re Blood Reagents Antitrust Litigation* the district court denied a petition to certify its denial of a motion to dismiss because the court of appeals would likely give the plaintiff leave to amend even if the court dismissed the complaint. Thus, the appeal would not materially advance the ultimate termination of the litigation.[69]

Guidance for Practitioners

Antitrust practitioners will continue to adjust pleading and motion practice to the T/I standard as judicial guidance evolves, but the review conducted here suggests several considerations for drafting antitrust claims to survive a motion to dismiss, and for crafting arguments to support such motions.

[C]ourt decisions show that factual details may persuade the court to deny a motion to dismiss and permit discovery.

Plausibility Is Undefined and Open to a Broad Range of Interpretation. Courts have adopted formulaic statements of how the T/I standard applies to antitrust claims and in some instances to particular claim elements, but the Seventh Circuit's statement in *In re Text Messaging* reminds that plausibility is inherently open to varying definitions and applications, and thus to reasoned arguments of counsel on how the concept should be applied in a particular case. Courts have addressed similar claims and elements with a wide range of implicit and explicit standards on the factual detail and relative plausibility of inferences needed to satisfy the T/I standard. For practitioners who are risk-averse, this means that complaints should be supported by in-depth pre- and post-filing case investigation, close attention to logical consistency, and factual detail that errs on the side of inclusion, perhaps in consultation with an economic expert.

Factual Allegations Count. Courts continue to reject many antitrust claims as unduly conclusory or lacking in factual support, including in cases where the plaintiffs filed lengthy and detailed complaints. Courts frequently observe that the T/I standard does not necessarily require more details,[70] but rather requires a more focused assessment of the logical and analytical support for posited inferences and conclusions. Nevertheless, court decisions show that factual details may persuade the court to deny a motion to dismiss and permit discovery. For practitioners, this means that antitrust claims should include not only a plain statement of the plaintiff's position on each claim element, but also factual allegations that focus on why the claim element is logical and believable in the context of the industry, market, and business relationships among the parties.

Focus on Each Claim Element. Courts often reach split decisions on claim elements for a particular case and claim, and may grant leave to amend to cure perceived deficiencies on particular elements. For practitioners, this means that the same rigor in investigation and drafting is warranted for each claim element.

Presumption of Truth Still Favors the Plaintiff. Plaintiffs still benefit from a presumption of truth for "well-pleaded" allegations of fact that do not state obvious legal conclusions or parrot the judicial formulation of claim elements. Courts will continue to face close questions on whether allegations that parrot the judicial formulation of claim elements should be disregarded as legal conclusions if the allegation requires consideration of supporting facts not

set forth in the complaint to determine whether the referenced legal determination is appropriate. Courts apply the presumption of truth with varying degrees of deference. For practitioners, this means crafting allegations and arguments for plaintiffs that show discovery is warranted because the claims provide a logical and sensible basis to find supporting proof through discovery, and arguments for defendants that show the prospect for such proof is negligible, making the burden of discovery unreasonable and unwarranted.

Craft Pleadings and Motions to Meet the Analytical Methods that Courts Use for Particular Claim Elements. Antitrust complaints may have become more detailed in part to include allegations that provide implicit or explicit support for the analytical methods that courts use to determine plausibility. Allegations of this type may reference business factors that are part of normal competitive conduct in the industry and market in question, economic theories that describe rational incentives that defendants face, likely actions in response to those incentives if defendants are acting independently, and details on market structure and performance, among other topics.

Avoid Pleading Admissions. Increasing detail in complaints and defense arguments present a heightened risk of adverse admissions. Courts sometimes use complaint allegations and arguments offered on one claim element as a basis to undermine or support the plausibility of another. For practitioners, this means careful cross-checking for logical and analytical flaws, perhaps with the aid of a consulting economist.

Amendment and Interlocutory Appeal May Be Viable Strategies. Courts often give plaintiffs multiple opportunities to amend claims, and sometimes even permit discovery before dismissing claims with prejudice.[71] Courts have certified close determinations of plausibility for interlocutory appeal, although the prospects for such review must be viewed as remote based on experience to date. Courts have engaged in detailed factual analysis on motions to dismiss, and the parties should review interlocutory rulings carefully for insights on how to adjust claims and defenses, and how to direct the course of later discovery and summary judgment proceedings.[72]

The T/I Standard Is a Two-Edged Sword. Defendants may face parallel pleading obligations under the T/I standard for affirmative defenses, even though as a practical matter defendants are not required to assert affirmative defenses until an answer is filed. Particularly in complex cases, defendants may no longer be able to assert shotgun affirmative defenses with a view to making adjustments following discovery, at least where plaintiffs are prepared to devote resources to challenging bare-bones pleading of defenses or the court raises the issue independently.

Conclusion

Courts have taken widely divergent approaches under the T/I standard in the factual content, analytical methods, and depth of analysis used to rule on motions to dismiss antitrust claims. Courts of appeals are providing increasing guidance through review of final judgments and even some interlocutory appeals, and district courts are weighing the approaches taken by other district courts in ruling on similar claims. Over time, the controlling and persuasive authority that courts generate may lead to consensus on how to apply the T/I standard to various antitrust claims and elements, and predictable patterns for practitioners to follow. For now, at least, the pleading process presents difficult challenges for parties, courts, and practitioners in deciding on the factual detail and logical inferences that are required to allege plausible antitrust claims. ■

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1 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

2 *See* Gregory G. Wrobel, Michael J. Waters & Joshua Dunn, Appendix: *Judicial Application of* Twombly/Iqbal *Plausibility Standard in Antitrust Cases*, ANTITRUST SOURCE, http://www.antitrustsource.com [References].

3 *Twombly*, 550 U.S. at 556; *Iqbal*, 129 S. Ct. at 1950.

4 *Iqbal*, 129 S. Ct. at 1949.

5 *In re* Text Messaging Antitrust Litig., 630 F.3d 622, 629 (7th Cir. 2010).

6 *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 319 (3d Cir. 2010) (quoting Arista Records, LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010)).

7 Schuylkill Energy Res., Inc. v. Pa. Power & Light Co., 113 F.3d 405, 417 (3d Cir. 1997); *In re* Gabapentin Patent Litig., 649 F. Supp. 3d 340, 355 (D.N.J. 2009).

8 *See, e.g.*, CBC Cos. v. Equifax, Inc., 561 F.3d 569, 571–73 (6th Cir. 2009).

9 *See, e.g.*, Menkes v. St. Lawrence Seaway Pilots' Ass'n, 269 Fed. App'x 54, 55 (2d Cir. 2008).

10 *See, e.g.*, LiveUniverse, Inc. v. MySpace, Inc., 304 Fed. App'x 554, 557 (9th Cir. 2008).

11 Jebaco, Inc. v. Harrah's Operating Co., 587 F.3d 314 (5th Cir. 2009).

12 Madison Square Garden, L.P. v. National Hockey League, No. 07 CV 8455, 2008 U.S. Dist. LEXIS 80475, at *37 (S.D.N.Y. Oct. 10, 2008).

13 Nat'l Ath. Trainers' Ass'n v. Am. Physical Therapy Ass'n, No. 08-CV-0158, 2008 U.S. Dist. LEXIS 70131 (N.D. Tex. Sept. 9, 2008).

14 *But see* Bayer Schering Pharma AG v. Sandoz, Inc., Nos. 08 Civ. 3710/8112, 2011 WL 4478302 (S.D.N.Y. Sept. 28, 2011) (holding plaintiff failed to plead sufficient facts about alternative treatments for medical condition to make proposed product market plausible).

15 Rick-Mik Enters. v. Equilon Enters., 532 F.3d 963 (9th Cir. 2008).

16 E.I. du Pont de Nemours & Co. v. Kolon Indus., 637 F.3d 435 (4th Cir. 2011).

17 Monsanto v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984).

18 *See, e.g.*, ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 5 (6th ed. 2007) ("Particularly in the past half-century, courts have struggled to define the amount and quality of proof that is required to support an inference of agreement.").

19 *Cf.* Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 IOWA L. REV. BULL. 55, 59 (2010), *available at* http://www.uiowa.edu/~ilr/bulletin/ILRB_95_Hovenkamp.pdf (passage in *Twombly* on when, where, and who for conspiracy element requires plaintiffs "to plead something in its claim that existing law did not require it to show in order to avoid summary judgment or judgment as a matter of law at trial").

20 Matsushita Elec. Indus. Co. v. Zenith Radio Co., 475 U.S. 574, 588 (1986).

21 Identifying recitations of a claim element often is more straightforward than distinguishing conclusory and well-pleaded factual allegations. *See, e.g.*, *In*

re Polyurethane Foam Antitrust Litig., MDL No. 2196, No. 10 MD 2196, (N.D. Ohio Sept. 15, 2011) (memorandum opinion denying motion to reconsider denial of motion to dismiss; court (i) accepted allegations about existence and general content of affidavits concerning disclosures and admissions during government investigation into price fixing, (ii) rejected defense arguments that complaint allegations are conclusory and declined to consider whether content of statements actually made in affidavits are conclusory, (iii) observed that veracity of a factual allegation can be demonstrated on its own terms whereas a legal conclusion requires analysis of underlying facts to determine whether asserted legal determination is appropriate, and (iv) observed that legal conclusions are acceptable to provide framework for complaint but must be supported elsewhere in complaint by factual allegations).

[22] *In re* Text Messaging Servs. Antitrust Litig., 630 F.3d 622 (7th Cir. 2010).

[23] *Id.* at 628 ((i) four defendants sell 90 percent of U.S. text messaging services, and it would not be difficult for such a small group to agree on prices and detect cheating; (ii) defendants belonged to a trade association and exchanged price information directly at association meetings, a practice that facilitates price fixing and would be difficult for authorities to detect; (iii) defendants, along with two other large sellers of text messaging services, constituted and met in an elite "leadership council" within the association, with a stated mission to urge its members to substitute "co-opetition" for competition; (iv) in the face of steeply falling costs, defendants increased prices, which is anomalous behavior because falling costs increase a seller's profit margin at the existing price, motivating him, in the absence of agreement, to reduce his price slightly in order to take business from his competitors, and certainly not to increase his price; and (v) all at once, defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third; the change was so rapid that it could not have been accomplished without agreement on details of the new structure, the timing of its adoption, and the specific uniform price increase that would ensue on its adoption).

[24] Starr v. Sony BMG Music Entm't, 592 F.3d 314 (2d Cir. 2010).

[25] *Id.* at 323 ((i) defendants agreed to launch MusicNet and pressplay, both of which charged unreasonably high prices and contained similar digital rights management terms (DRMs); (ii) none of the defendants dramatically reduced their prices for Internet music even though they experienced dramatic cost reductions in producing Internet music; (iii) by May 2005 the costs of distributing Internet music had fallen because digitization costs of the initial Internet cataloging had been completed and technological improvements reduced the remaining costs of digitizing new releases; (iv) when defendants began to sell Internet music through entities they did not own or control, they maintained the same unreasonably high prices and DRMs as MusicNet itself; (v) defendants used "most favored nation" clauses (MFNs) in their licenses that had the effect of guaranteeing that the licensor who signed the MFN received terms no less favorable than terms offered to other licensors; (vi) defendants used the MFNs to enforce a wholesale price floor of about 70 cents per song; (vii) all defendants refused to do business with eMusic, the number two "Internet music retailer; (viii) in or about May 2005, all defendants raised wholesale prices from about $0.65 per song to $0.70 per song; the price increase was enforced by MFNs).

[26] *Id.* at 323–24 ((i) four main defendants control over 80 percent of digital music sold to end purchasers in the United States; (ii) one industry commentator noted that "nobody in their right mind" would want to use MusicNet or pressplay, suggesting that some form of agreement among defendants would have been needed to render the enterprises profitable; (iii) a quote from the CEO of one defendant suggests that pressplay was formed expressly as an effort to stop the "continuing devaluation of music"; (iv) defendants attempted to hide their MFNs because they knew they would attract antitrust scrutiny; (v) eMusic charged $0.25 per song but defendants' wholesale price was about $0.70 per song; and (vi) defendants raised wholesale prices from about $0.65 per song to $0.70 per song in or about May 2005, even though earlier that year defendants' costs of providing Internet music had decreased substantially).

[27] *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300 (3d Cir. 2010). *See also* Burtch v. Milberg Factors, Inc., No. 10-2818, 2011 WL 5027511 (3d Cir. Oct. 24, 2011) (affirming dismissal of Section 1 claim due to failure to allege plausible inference of conspiracy based on communications among providers of factoring credit services about credit risk presented y borrower, and lack of plausible allegations of other plus factors).

[28] The summary codes in the Appendix describe in a shorthand way the courts' analytical methods and depth of analysis for indirect evidence of conspiracy, but a review of actual decisions may be warranted to comprehend the wide range of approaches that district courts have used in ruling on this claim element.

[29] *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896 (6th Cir. 2009).

[30] Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Nos. 09-6140/6173, 2011 U.S. App. LEXIS 12606 (6th Cir. 2011).

[31] *See also* RxUSA Wholesale v. Alcon Labs., 391 Fed. App'x 59 (2d Cir. 2010) (affirming dismissal due to lack of allegations supporting inference of antecedent agreement without questioning that defendants each refused to deal with the plaintiff).

[32] Astra Media Group, LLC v. Clear Channel Taxi Media, LLC, No. 10-0261-cv, 2011 WL 504766 (2d Cir. 2011).

[33] *In re* Time Warner Inc. Set-Top Cable Television Box Antitrust Litig., No. 08 Civ. 7616, 2010 U.S. Dist. LEXIS 22369 (S.D.N.Y. 2010).

[34] *See, e.g.*, Marchese v. Cablevision Sys. Corp., No. 10-2190, 2011 U.S. Dist. LEXIS 80117 (D.N.J. July 21, 2011); Downs v. Insight Commc'ns Co., No. 09-CV-00093, 2011 U.S. Dist. LEXIS 29616 (W.D. Ky. Mar. 22, 2011); Marchese v. Cablevision Sys. Corp., No. 10-2190, 2011 U.S. Dist. LEXIS 4718 (D.N.J. Jan. 14, 2011); Marchese v. Cablevision Sys. Corp., No. 10-2190, 2010 U.S. Dist. LEXIS 85752 (D.N.J. Aug. 18, 2010); Downs v. Insight Commc'ns Co., No. 09-CV-93, 2010 U.S. Dist. LEXIS 54577 (W.D. Ky. June 3, 2010); *In re* Cox Enters. Set-Top Cable Television Box Antitrust Litig., No. 09-ML-2048, 2010 U.S. Dist. LEXIS 58417 (W.D. Okla. Jan. 19, 2010).

[35] Scooter Store, Inc. v. SpinLife.com, LLC, No. 10-cv-18, 2011 U.S. Dist. LEXIS 32654 (S.D. Ohio Apr. 18, 2011).

[36] *See, e.g.*, ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1152 n.543 (6th ed. 2007).

[37] Jacobs v. Tempur-Pedic Int'l, No. 07-CV-02, 2007 U.S. Dist. LEXIS 91241 (N.D. Ga. Dec. 11, 2007).

[38] PSKS, Inc. v. Leegin Creative Leather Prods., 615 F.3d 412 (5th Cir. 2010).

[39] Coalition for a Level Playing Field, L.L.C. v. Autozone, Inc., 737 F. Supp. 2d 194 (S.D.N.Y. 2010) ("When functional discounts are at issue, Texaco v. Hascbrouck makes clear that such pleading includes facts rendering plausible the inference that a given discount is not a legitimate functional discount—that it is not substantially related to functions performed. And when complicated contracts such as the vendor agreements between defendants are alleged, such pleading must refute the inference that parts are not sold subject to materially different contract terms or, separately, that differentials simply reflect non-price terms of sale.").

[40] New Albany Tractor, Inc. v. Louisville Tractor, Inc., No. 10-5100, 2011 U.S. App. LEXIS 12457 (6th Cir. June 21, 2011).

[41] *See, e.g.*, Sprint Nextel Corp. v. AT&T, Inc., Nos. 11-1600/11-1690, slip op. (D.D.C. Nov. 2, 2011) (applying the T/I standard in analyzing the sufficiency of allegations on standing and antitrust injury).

[42] *See, e.g.*, *In re* Refrigerant Compressors Antitrust Litig., No. 09-md-02042, 2011 WL 2433392 (E.D. Mich. June 13, 2011); Oracle Am., Inc. v. Micron Technology, Inc., No. C 10-4340, 2011 U.S. Dist. LEXIS 28814 (N.D. Cal. Mar. 21, 2011) (denying motion to dismiss for lack of standing in part due to more liberal standard under California Cartwright Act); *In re* Plavix Indirect Purchaser Antitrust Litig., No. 06-cv-226, 2011 U.S. Dist. LEXIS 8940 (S.D. Ohio Jan. 31, 2011).

[43] *See, e.g.*, Barnes v. AT&T Pension Benefit Plan, 718 F. Supp. 2d 1167, 1171–72 (N.D. Cal. 2010) (noting majority of courts have applied the T/I standard to the pleading of affirmative defenses, and adopting majority position); Lopez v. Asmar's Mediterranean Food, Inc., No. 10 cv 1218, 2011 U.S. Dist. LEXIS 2265, at *3–8 (E.D. Va. Jan. 10, 2011) (same, but adopting minority position).

[44] *In re* Hawaiian & Guamanian Cabotage Antitrust Litig., 647 F. Supp. 2d 1250

(W.D. Wash. 2009); Love Terminal Partners, L.P. v. City of Dallas, Texas, 527 F. Supp. 2d 538, 549 (N.D. Tex. 2007) (quoting Clark v. Amoco Prod. Co., 794 F.2d 967, 970 (5th Cir. 1986)).

[45] *See, e.g.*, Williams v. Citigroup, Inc., No. 08 CV 9208, 2009 U.S. Dist. LEXIS 105864 (S.D.N.Y. Nov. 2, 2009). Some courts deny motions to dismiss that challenge whether the sham exception applies without subjecting pertinent factual allegations to a detailed plausibility determination. *See, e.g.*, *In re* Neurontin Antitrust Litig., MDL No. 1479, Master File No. 02-1390, 2009 U.S. Dist. LEXIS 77475 (D.N.J. Aug. 27, 2009); Dicar, Inc. v. Stafford Corrugated Prods., No. 05-cv-5426, 2009 U.S. Dist. LEXIS 52245 (D.N.J. June 22, 2009); La. Wholesale Drug Co. v. Sanofi-Aventis, No. 07 Civ. 7343, 2008 U.S. Dist. LEXIS 3611 (S.D.N.Y. Jan. 18, 2008).

[46] *See, e.g.*, *In re* Dairy Farmers of Am., Inc. Cheese Antitrust Litig., 767 F. Supp. 2d 880 (N.D. Ill. 2011).

[47] *See, e.g.*, *In re* Fasteners Antitrust Litig., No. 08-md-1912, 2011 U.S. Dist. LEXIS 90076 (E.D. Pa. Aug. 12, 2011) (fraudulent concealment exception); Rite Aid Corp. v. Am. Express Travel Related Servs. Co., 708 F. Supp. 2d 257 (E.D.N.Y. 2010) (continuing violation and speculative damages exceptions).

[48] *See, e.g.*, Minn-Chem, Inc. v. Agrium Inc., No. 10-1712, 2011 WL 4424789 (7th Cir. Sept. 23, 2011); *In re* Transpacific Passenger Air Transp. Antitrust Litig., No. C 07-05634, 2011 WL 1753738 (N.D. Cal. May 9, 2011); Hinds County v. Wachovia Bank N.A., 620 F. Supp. 2d 499 (S.D.N.Y. 2009); *In re* ATM Fee Antitrust Litig., No. C 04-02676, 2009 U.S. Dist. LEXIS 83199 (N.D. Cal. Sept. 4, 2009). Motions to dismiss based on the FTAIA have been fact-intensive in part because courts have permitted discovery on fact issues relevant to application of the Act, due to the prevailing view that the FTAIA limits the subject matter jurisdiction of U.S. courts. The Third Circuit ruled that the FTAIA does not establish a jurisdictional bar and that defendants should assert motions to dismiss based on the FTAIA under Rule 12(b)(6), for which the defendant has the burden of persuasion, not Rule 12(b)(1), for which the plaintiff has the burden. Animal Science Prods. Inc. v. China Minmetals Corp., No. 10-2288, 2011 U.S. App. LEXIS 17046 (3d Cir. Aug. 17. 2011). If the ruling is followed by other courts, plausibility determinations on motions to dismiss under the FTAIA may be based on complaint allegations rather than jurisdictional discovery materials.

[49] Gulf Coast Hotel-Motel Ass'n v. Mississippi Gulf Coast Golf Course Ass'n, No. 10-60844, 2011 U.S. App. LEXIS 19651 (5th Cir. Sept. 27, 2011).

[50] *Hinds*, 620 F. Supp. 2d at 517 n.4.

[51] *See* FED. R. EVID. 201(b); *see also* Total Benefits Planning Agency v. Anthem Blue Cross & Blue Shield, 630 F. Supp. 2d 842, 849 (S.D. Ohio 2007).

[52] *Total Benefits Planning Agency*, 630 F. Supp. 2d at 849 (relying on judicial notice of publicly filed annual statements to conclude that insurers were sister corporations and thus unable to conspire).

[53] W. Penn Allegheny Health Sys. v. UPMC, No. 09cv0480, 2009 U.S. Dist. LEXIS 100935, at *77 n.12 (W.D. Pa. Oct. 29, 2009), *reversed in part, vacated in part, and remanded*, 627 F.3d 85 (3d Cir. 2010).

[54] Championsworld LLC v. U.S. Soccer Fed., Inc., 726 F. Supp. 2d 961, 965 (N.D. Ill. 2010).

[55] *See, e.g.*, *In re* LTL Shipping Servs. Antitrust Litig., No. 08-MD-01895, 2009 U.S. Dist. LEXIS 14276, at *33 (N.D. Ga. Jan. 28, 2009) (refusing to judicially notice fuel surcharge rates published on unverified web archives).

[56] Anderson News L.L.C. v. Am. Media, Inc., 732 F. Supp. 2d 389, 404 (S.D.N.Y. 2010) (court took judicial notice of the existence of other publicly filed court documents, but not their contents).

[57] *Iqbal*, 129 S. Ct. at 1954; *see also In re* Hawaiian & Guamanian Cabotage Antitrust Litig., 647 F. Supp. 2d 1250, 1270 n.12 (W.D. Wash. 2009) (denying plaintiff's request for leave to take discovery before filing amended complaint).

[58] *See, e.g.*, *In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07-md-01819, 2010 U.S. Dist. LEXIS 141968 (N.D. Cal. Dec. 31, 2010) (considering external evidence for Rule 12(b)(1) motion to dismiss); Dayton Superior Corp. v. SPA Steel Prods., Inc., No. 08-CV-1312, 2010 U.S. Dist. LEXIS 100674 (N.D.N.Y. Sept. 24, 2010) (considering documents produced in discovery in determining whether to grant leave to amend various counterclaims).

[59] *See, e.g.*, *In re* Packaged Ice Antitrust Litig., 723 F. Supp. 2d 987 (E.D. Mich. 2010); *In re* Iowa Ready Mix Concrete Antitrust Litig., 768 F. Supp. 2d 961 (N.D. Iowa 2011); *In re* Delta AirTran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348 (N.D. Ga. 2010). *Cf.* Hinds County v. Wachovia Bank N.A., 708 F. Supp. 2d 348, 361 (S.D.N.Y. 2010) ("Although government investigations may bolster § 1 allegations, they may not constitute the entirety of nonconclusory allegations against § 1 defendants.").

[60] *See, e.g.*, *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300 (3d Cir. 2010).

[61] *See, e.g.*, Rick-Mik Enters. v. Equilon Enters., 532 F.3d 963 (9th Cir. 2008) (dismissing claims for failure to plead facts in support of market power allegations).

[62] *See, e.g.*, Starr v. Sony BMG Music Entm't, 592 F.3d 314 (2d Cir. 2010); *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300 (3d Cir. 2010); *In re* Florida Cement and Concrete Antitrust Litig., 746 F. Supp. 2d 1291 (S.D. Fla. 2010).

[63] *Iqbal*, 129 S. Ct. at 1950; *Starr*, 592 F. 3d at 329.

[64] *See, e.g.*, Warren Gen. Hosp. v. Amgen, Inc., 643 F.3d 77 (3d Cir. 2011) (analyzing detailed facts about purchase arrangements between supplier, hospital, and group purchasing organization to conclude that hospital plaintiff is indirect purchaser and lacks standing to assert damage claim).

[65] *See, e.g.*, Nicsand, Inc. v. 3M Co., 507 F.3d 442 (6th Cir. 2007); Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117 (2d Cir. 2007); *In re* Elevator Antitrust Litig., 502 F.3d 47 (2d Cir. 2007); Newcal Indus. v. Ikon Office Solution, 513 F.3d 1038 (9th Cir. 2008); *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896 (6th Cir. 2009); Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495 (9th Cir. 2010); *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300 (3d Cir. 2010); Starr v. Sony BMG Music Entm't, 592 F.3d 314 (2d Cir. 2010); E.I. du Pont de Nemours & Co. v. Kolon Indus., 637 F.3d 435 (4th Cir. 2011); New Albany Tractor, Inc. v. Louisville Tractor, Inc., No. 10-5100, 2011 U.S. App. LEXIS 12457 (6th Cir. June 21, 2011).

[66] *See, e.g.*, Minn-Chem, Inc. v. Agrium Inc., No. 10-1712, 2011 WL 4424789 (7th Cir. Sept. 23, 2011) (accepting certification for interlocutory appeal and reversing denial of motion to dismiss in *In re* Potash Antitrust Litig., 667 F. Supp. 2d 907 (N.D. Ill. 2009)); *In re* Text Messaging Servs., 630 F.3d 622 (7th Cir. 2010); Novell, Inc. v. Microsoft Corp., 505 F.3d 302 (4th Cir. 2007); Ritz Camera & Image, LLC v. Sandisk Corp., No. 10-cv-02787, 2011 U.S. Dist. LEXIS 100335 (N.D. Cal. Sept. 6, 2011) (certifying ruling for interlocutory appeal that customer has standing to assert *Walker Process* claim); *In re* Chocolate Confectionary Antitrust Litig., 607 F. Supp. 2d 701 (M.D. Pa. 2009) (certifying ruling for interlocutory appeal). *But see In re* Blood Reagents Antitrust Litig., 756 F. Supp. 2d 637 (E.D. Pa. 2010) (declining to certify ruling for interlocutory appeal); Lasmer Indus. v. AM Gen., L.L.C., 741 F. Supp. 2d 829 (S.D. Ohio 2010) (same).

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

[68] *Id.* at 624–25.

[69] *In re* Blood Reagents Antitrust Litig., 756 F. Supp. 2d 637 (E.D. Pa. 2010).

[70] See, e.g., *In re* Polyurethane Foam Antitrust Litig., No. 1:10 MDL 2196, 2011 U.S. Dist. LEXIS 104419, at *10–11 (N.D. Ohio, Sept. 15, 2011) ("[T]he plausibility pleading standard does not require the court to construct a mandatory checklist of the 'who, what, where, when, and how' of an antitrust agreement for each defendant. Common sense prevails, and a complaint survives if it contains 'enough factual matter (taken as true) to suggest that an agreement was made' among the defendants.").

[71] *Cf.* New Albany Tractor, Inc. v. Louisville Tractor, Inc., No. 10-5100, 2011 U.S. App. LEXIS 12457, at *9 (6th Cir. June 21, 2011) ("The plaintiff apparently can no longer obtain the factual detail necessary because the language of *Iqbal* specifically directs that *no* discovery may be conducted in cases such as this, even when the information needed to establish a claim . . . is solely within the purview of the defendant or a third party, as it is here.") (citing *Iqbal*, 129 S. Ct. at 1954).

[72] *See, e.g.*, *In re* Online DVD Rental Antitrust Litig., No. M 09-2029, 2010 U.S. Dist. LEXIS 67102 (N.D. Cal. July 6, 2010) (denying motion to dismiss but inviting early summary judgment motion on issue of proximate causation); *dismissed* 2011 U.S. Dist. LEXIS 49090 (N.D. Cal. Apr. 29, 2011) (granting summary judgment motion due to lack of evidence to prove proximate causation).

Appendix: Judicial Application of *Twombly/Iqbal* Plausibility Standard in Antitrust Cases*

BY GREGORY G. WROBEL, MICHAEL J. WATERS, AND JOSHUA DUNN

IN OUR ARTICLE PUBLISHED IN THE FALL 2011 issue of ANTITRUST magazine, we discuss how courts have applied the *Twombly/Iqbal* plausibility standard (T/I standard) to the elements of antitrust claims in ruling on motions to dismiss. The article provides brief descriptions of selected court decisions to illustrate the range of analytical methods and depth of analysis used to assess the plausibility of allegations on particular claim elements.

This Appendix expands on the selected decisions covered in the article with an extensive Database on all published decisions that the authors could locate on motions to dismiss antitrust claims following the May 2007 decision in *Twombly* through approximately September 2011. The Database provides details on each decision with filtering functionality to allow selection and review of decisions with particular characteristics. The comments that follow describe the methodology used to identify and select decisions for review, the criteria used to prepare the Database, and preliminary comments on aggregate data reflected therein.

Data Collection

The Database consists of all published decisions that the authors could locate that federal courts issued following the May 2007 ruling in *Twombly* through September 2011 in which the court ruled on a motion to dismiss one or more antitrust claims. Decisions were identified using Lexis and Westlaw searches, review of decisions published in the CCH Trade Regulation Reporter, and decisions noted in daily e-mail bulletins and other published reports. Federal court dockets were not searched to identify unpublished decisions, including in cases for which one or more decisions were published.

Decisions were omitted in which the court did not rule on a motion to dismiss or for judgment on the pleadings (for which courts apply essentially the same standard); decisions typically were not omitted based on whether the court discussed or explicitly applied the T/I standard in ruling on the motion.

The main focus during review of decisions was the disposition of federal antitrust claims. The Database includes some information about rulings on state antitrust claims but does not show dismissals of such claims without prejudice for lack of ancillary jurisdiction after federal claims were dismissed, and does not cover claims under other state statutes and common law.

Data Categories

The Database provides summary information on each decision, the products and services at issue, the claims and claim elements at issue, the court's disposition of the motion, the analytical methods and depth of analysis reflected in the decision, and a short narrative summary of the ruling and selected ancillary information. Detailed descriptions follow of criteria that apply to each column in the Database.

Case/Decision Information.

A. Case Number. Sequential numbers assigned to track decisions, with "*" notations for cases with two or more related decisions, which may be located using the filtering tool in the Case Name column. Decisions in some MDL cases use the name assigned to the MDL proceeding, but others use the name of the original case for which the decision was issued. Some cross-checking may be warranted using product and service descriptions to identify other potentially related decisions. Gaps in numbering result from decisions that were determined to be irrelevant, and non-sequential numbering results from the order in which decisions were located and added to the Database.

B. Year. Year of decision.

C. Circuit. Federal circuit in which court is located.

D. Court. Court that issued decision. Court of appeals decisions are designated "Cir." to permit separate analysis of these decisions. District court decisions are designated by state and district (e.g., "CA N" for Northern District of California).

Gregory G. Wrobel is a shareholder and head of the Antitrust Practice Group of Vedder Price P.C. and is articles editor of ANTITRUST magazine. Michael J. Walters and Joshua Dunn are associates at Vedder Price.

* This Appendix is a supplement to the Authors' article by the same title in the Fall 2011 issue of ANTITRUST.

E. Case Name. Name used in decision.

F. Citation. West citation, LEXIS or Westlaw citation, or slip opinion.

Case Type.

G. Case Type. Lists claims by individual plaintiff (I), individual pro se plaintiff (IP), direct purchaser class (CD), and indirect purchaser class (CI).

Industry Information.

H. Manufacturing/Distribution. Describes physical products at issue in claims.

I. Service. Describes services at issue in claims.

J. Intellectual Property. Lists patents, trademarks or other intellectual property rights at issue in claims.

Entries may appear in multiple columns for tying and other claims that involve more than one product or service, and claims challenging use of intellectual property rights in connection with products or services.

Claim Information.

K. Sherman Act Section 1 claims, with separate codes for principal types of claims, including general rule of reason claims (1), and per se claims for price fixing, bid rigging, and market/customer allocation (2).

L. Sherman Act Section 2 claims, with separate codes for monopolization (M), attempted monopolization (AM), and conspiracy to monopolize (CM).

M. Other antitrust claims, with separate codes for Sections 3 and 7 of the Clayton Act (C3, C7), Sections 2(a) and 2(c) of the Robinson Patman Act (RA, RC), and state antitrust laws (SL). Given the primary focus on federal claims, details on state law claims may not be reflected in columns for claim/defense elements, analytical methods, and depth of analysis.

Claim, Defense Elements.

Information on all claims and elements is listed in a single line, so review of court decisions may be warranted to identify analytical methods and depth of analysis for particular claims and elements.

N. Standing, Causation, Antitrust Injury. Separate codes are used for each element that the court addressed as a separate ground for decision; codes for causation and antitrust injury are used if the court focused on these elements as a basis for ruling on plaintiffs' standing.

O. Relevant Geographic and Product Market, Market Power. Codes are used for each element that the court addressed as a separate ground for decision.

P. Conspiracy. Codes are used where it appears that the court addressed direct evidence (D), circumstantial evidence (C), and plus factors (P) as material grounds for decision. Codes are not used to show that the court noted the absence of allegations of one or more types of evidence on the conspiracy element.

Q. Anticompetitive Conduct. Codes are used for each type of anticompetitive conduct that the court addressed as a ground for decision.

R. Anticompetitive Effect. Codes are used for each type of anticompetitive effect that the court addressed as a ground for decision.

S. Defense Elements. Codes are used for each statute, immunity, defense exception, and other doctrine that the court addressed as a ground for decision.

Disposition.

T. Lists denial of motion (D), grant of motion with prejudice (GP), grant of motion without prejudice (GW), and certification of ruling for interlocutory appeal (I). Court decisions do not always state clearly whether dismissal was with or without prejudice; court dockets were not reviewed to verify the type of dismissal order entered, or to check for separate court orders certifying a ruling for interlocutory appeal.

U. Lists rulings by courts of appeals affirming (A) and reversing (R) district court decisions, and decisions reviewed by interlocutory appeal (I).

Complaint/Other Materials.

V. Lists reference to complaint (C), judicial notice material (J), discovery material from the same or related case (D), and other materials such as documents referred to in the complaint that are not attached (O). Court dockets were not reviewed to verify sources of factual content referenced in published decisions; the code for complaint was used for decisions that do not expressly rely on other materials as a ground for decision.

Grounds for Decision.

W. Lists analytical methods that the court expressly referenced as a material ground for decision, including methods that appear to be used even though the court does not use the precise terminology stated in the code.

X. Depth of Analysis.

Code "1" is used where the court accepted or rejected complaint allegations without engaging in any focused discussion of one or more analytical methods to determine plausibility, and did not identify and discuss factual details alleged in support of a claim element.

Code "2" is used where the court accepted or rejected complaint allegations after engaging in some focused discussion of one or more analytical methods to determine plausibility, and identified some factual details beyond the judicial formulation of a claim element that are alleged in support.

Code "3" is used where the court accepted or rejected complaint allegations after engaging in detailed discussion of multiple analytical methods to determine plausibility, identified and analyzed multiple factual details beyond the judicial formulation of a claim element that are alleged in support, and/or expressly considered and evaluated the plausibility of inferences posited by one or more parties.

Summary of Decision.

Short narrative summary of court's disposition of the motion for each claim and for principal claim elements that serve as a ground for decision.

Miscellaneous Information.

Information of interest that is not fully reflected in other categories.

Preliminary Data Analysis

The focus of the article and this Appendix is not statistical analysis, and in many respects the court decisions covered by the data are not directly comparable or may warrant differential weighting in terms of importance or the aggregation of cases and claims in individual cases, among other factors. Further detailed analysis may be warranted to consider such factors, some of which may require supplements and refinements to the data captured here. Subject to these caveats, summaries are set forth below and in Tables that follow of basic statistics on the court decisions in the database.

Court, Year.

The Database covers 347 total decisions with calendar year breakdowns as follows (total/dist. ct./ct. app.): 2007 (27/21/6), 2008 (57/44/13), 2009 (70/59/11), 2010 (99/86/13), and 2011 year to date (94/80/14).

Courts of appeals with the most decisions: Second (12), Ninth (12), Sixth (10), Third (8), Seventh (5), and Fifth (4). Circuits with the most district court decisions: Ninth (82), Third (50), Second (36), Sixth (31), Seventh (21). These courts of appeals have the greatest potential to impact application of the T/I standard to antitrust claims absent further guidance from the U.S. Supreme Court.

District courts with the most decisions: Northern District of California (53) (includes eight decisions in one MDL case), Southern District of New York (25), District of New Jersey (19), Northern District of Illinois (18), Eastern District of Pennsylvania (15).

Case Type.

Breakdown of decisions by case type: individual plaintiffs (219), direct purchaser class (110), indirect purchaser class (28), individual pro se plaintiffs (12).

Industry.

Breakdown of decisions by industry type: products (186), services (177), IP (45).

Claims.

Breakdown of decisions by claim type: Section 1 (265), Section 2 (168), state antitrust law (46), Clayton Act Section 7 (14), Clayton Act Section 3 (9), Robinson-Patman Act Section 2(a) (10), other (3).

Claim Elements.

Breakdown of decisions by claim element: (i) standing, causation, antitrust injury (149); (ii) geographic market (40), product market (92), market power (56); (iii) conspiracy (132); (iv) anticompetitive conduct (167), including price fixing/market allocation (32), refusal to deal/boycott (35), exclusive dealing (39), tying (32), predatory/bundled pricing (9), IP acquisition/enforcement/licensing (32), other (34); (v) anticompetitive effect (114), including price/output/quality (31), foreclosure (45), market power acquisition/maintenance (45), other (16); (vi) defense elements (74), including FTAIA (8), Noerr immunity (20), state action doctrine (4), statute of limitations exceptions (28), McCarran Ferguson Act (4), other (11).

Disposition.

Table 1 shows dispositions by year for all court of appeals decisions, all district court decisions, and all decisions in MDL cases, as well as aggregate dispositions for all years by leading courts of appeals, and by all district courts within leading circuits.

District courts issued 290 decisions, dismissing one or more claims in 205 decisions (71 percent), and denying dismissal of one or more claims in 132 decisions (46 percent). Courts of appeals issued 57 decisions, dismissing one or more claims in 47 decisions (82 percent), and denying dismissal of one or more claims in 14 decisions (25 percent), including three decisions on interlocutory appeal.

For MDL cases, which may illustrate dispositions in complex class action cases, district courts issued 75 decisions, dismissing one or more claims in 44 decisions (59 percent), and denying dismissal of one or more claims in 54 decisions (72 percent). Courts of appeals issued six decisions, dismissing one or more claims in four decisions (67 percent), and denying dismissal of one or more claims in three decisions (50 percent).

Courts in MDL cases often rule on federal claims for direct purchaser classes, and claims under federal law as well as numerous state antitrust laws for indirect purchaser classes. Some decisions in these cases address issues such as standing based on the jurisdiction in which putative class representatives reside, which result in multiple dispositions that do not focus on the plausibility of substantive claims. Further detailed analysis of these decisions may be warranted to identify dispositions that focus only on how courts have applied the T/I standard to substantive claim elements in these cases.

Table 2 shows dispositions by case type, product/service, and claim type. The narrative summaries in the Database provide some information to identify separate dispositions for particular claims, but further refinements may be warranted to segregate coded data on dispositions for individual and class claims, for different types of claims, and perhaps for different claim elements, all of which are now listed on a single line for each decision.

The data show some meaningful differences for decisions with at least one individual claim (80 percent granted, 30 percent denied), compared to decisions with at least one claim for direct purchaser classes (60 percent granted, 61 percent denied), and indirect purchaser classes (61 percent granted, 75 percent denied). Meaningful differences also appear for (i) decisions involving products (67 percent granted, 50 percent denied), compared to services (81 percent granted, 29 percent denied), and (ii) decisions on both Section 1 and Section 2 claims (88 percent granted, 31 percent denied), compared to decisions on Section 1 claims only (73 percent granted, 40 percent denied), and Section 2 claims only (66 percent granted, 39 percent denied).

Depth of Analysis.

Table 3 shows depth of analysis with breakdowns by disposition and claim element, and separately for MDL cases.

The total figures show a breakdown of approximately 20 percent, 60 percent, and 20 percent for codes 1 (minimal), 2 (moderate), and 3 (in-depth). These codes are subjective to some extent, but the data also appear to show a consistent pattern in depth of analysis across diverse claim elements (range of 17 to 21 percent for code 1, 55 to 65 percent for code 2, and 17 to 23 percent for code 3), although this outcome may be due in part to the fact that many decisions address multiple claim elements but only a single code is assigned for the decision as a whole.

The figures for MDL cases show a significantly lower percentage of decisions with code 1 and significantly higher percentage with code 3, suggesting that courts are more likely to engage in detailed analysis of factual allegations and inferences in complex cases with class action claims, and perhaps that courts are more likely to encounter detailed factual allegations and inferences to analyze.

Other detailed breakdowns of information on depth of analysis and analytical methods do not appear to reveal meaningful variations, due in part to use of a single line in the Database for information on all claims and elements addressed in each decision. Further refinements in the Database may be warranted, and are welcome from others, to segregate information on the different analytical methods and depth of analysis that courts have used to rule on individual claims and claim elements.

Summary of Decisions, Miscellaneous Information.

The narrative summaries and miscellaneous information in the Database may be used as an aid to interpreting other information about individual decisions, but are not well suited for statistical breakdowns.

Further Research and Analysis.

Additional work may be warranted to add decisions to the Database that were not published or were not identified, and decisions that are issued in the future. Additional work also may be warranted on the cases and decisions covered in the Database to analyze the reasoning courts use to decide whether complaint allegations are well-pleaded facts entitled to a presumption of truth or legal conclusions that are not; and to gather additional information from court dockets on the actual complaint allegations at issue in decisions, and later case history, among other topics. The authors welcome input from others to correct errors and omissions as well as updates for use in publishing a revised version of the Database.

TABLE 1
DISPOSITION BY COURT AND MDL CASES

COURTS OF APPEALS

Total Decisions for All Years

	2nd Circuit		3rd Circuit		6th Circuit		7th Circuit		9th Circuit		Other Circuits		Total Circuits		MDL Cases	
Total	12		8		10		5		12		10		57		6	
Granted # / %	9	75%	7	88%	9	90%	4	80%	11	92%	7	70%	47	82%	4	67%
Denied # / %	3	25%	3	38%	2	20%	1	20%	2	17%	3	30%	14	25%	3	50%

Breakdown by Year for All Circuits

	2007		2008		2009		2010		2011 YTD		Total	
Total	6		13		11		13		14		57	
Granted # / %	5	83%	12	92%	10	91%	10	77%	10	71%	47	82%
Denied # / %	3	50%	1	8%	1	9%	5	38%	4	29%	14	25%

DISTRICT COURTS WITHIN CIRCUITS

Total Decisions for All Years

	2nd Circuit		3rd Circuit		6th Circuit		7th Circuit		9th Circuit		Other Circuits		Total Circuits		MDL Cases	
Total	36		50		31		21		82		70		290		75	
Granted # / %	29	81%	33	66%	19	61%	11	52%	64	78%	49	70%	205	71%	44	59%
Denied # / %	11	31%	25	50%	16	52%	15	71%	36	44%	29	41%	132	46%	54	72%

Breakdown by Year for All Circuits

	2007		2008		2009		2010		2011 YTD		Total	
Total	21		44		59		86		80		290	
Granted # / %	15	71%	31	70%	41	69%	61	71%	57	71%	205	71%
Denied # / %	6	29%	22	50%	25	42%	36	42%	43	54%	132	46%

Breakdown by Year for MDL Cases

	2007		2008		2009		2010		2011 YTD		Total	
Total	9		8		15		19		24		75	
Granted # / %	5	56%	4	50%	10	67%	11	58%	14	58%	44	59%
Denied # / %	4	44%	7	88%	8	53%	14	74%	21	88%	54	72%

Notes: Figures in each cell show total decisions and percentage of this total with the specified disposition for the specified court and/or years. Figures on disposition show the total number of decisions in which dismissal was granted or denied as to one or more antitrust claims. Decisions with both dispositions as to one or more claims are included in both figures, so the sum of figures on dispositions may exceed the total number of decisions in a particular cell, and the percentage figures may sum to more than 100 percent. MDL Cases are all decisions in the Database with "*In re*" case names, reported separately to reflect dispositions in complex class action cases; these decisions also are included in the breakdowns by court and year.

TABLE 2
DISPOSITION BY CASE TYPE, PRODUCT/SERVICE, AND CLAIM

CASE TYPE

Total Decisions for All Years

	Individual Plaintiff		Pro Se Plaintiff		Direct Purchaser Class		Indirect Purchaser Class	
Total	219		12		110		28	
Granted # / %	175	80%	12	100%	66	60%	17	61%
Denied # / %	66	30%	1	8%	67	61%	21	75%

Breakdown of Decisions by Year

		Individual Plaintiff		Direct Purchaser Class		Indirect Purchaser Class	
2007	Total	15		8		6	
	Granted # / %	12	80%	5	63%	3	50%
	Denied # / %	3	20%	3	38%	3	50%
2008	Total	38		15		2	
	Granted # / %	32	84%	8	53%	2	100%
	Denied # / %	11	29%	10	67%	2	100%
2009	Total	43		23		5	
	Granted # / %	32	74%	16	70%	3	60%
	Denied # / %	14	33%	11	48%	5	100%
2010	Total	66		31		5	
	Granted # / %	52	79%	18	58%	3	60%
	Denied # / %	18	27%	20	65%	4	80%
2011 YTD	Total	57		33		10	
	Granted # / %	47	82%	19	58%	6	60%
	Denied # / %	20	35%	23	70%	7	70%

Product/Service

	Products		Services		Intellectual Property	
Total	185		177		45	
Granted # / %	124	67%	144	81%	27	60%
Denied # / %	92	50%	52	29%	22	49%

Claim Type

	Section 1 Only		Section 2 Only		Section 1 and Section 2 with or w/o Other	
Total	139		61		96	
Granted # / %	101	73%	40	66%	84	88%
Denied # / %	56	40%	24	39%	30	31%

Notes: Figures in each cell show total decisions and percentage of this total with the specified disposition for the specified case type, product/service, claim type, and/or year. Figures on disposition show the total number of decisions in which dismissal was granted or denied as to one or more antitrust claims. Decisions with both dispositions as to one or more claims are included in both figures, so the sum of figures on dispositions may exceed the total number of decisions in a particular cell, and the percentage figures may sum to more than 100 percent.

Table 3
Depth of Analysis by Disposition and Claim Element

	Total Decisions	Depth of Analysis					
		Minimal		Moderate		In-Depth	
Total	347	73	21%	204	59%	70	20%
Breakdown by Disposition							
Dismissal granted in entirety	212	54	25%	126	59%	32	15%
Dismissal denied in entirety	88	15	18%	56	64%	17	19%
Dismissal granted in part, denied in part	47	4	9%	22	47%	21	45%
Breakdown by Claim Element							
Standing, Causation, Antitrust Injury	149	27	18%	97	65%	25	17%
Relevant Market, Market Power	122	21	17%	76	62%	25	20%
Conspiracy	132	28	21%	73	55%	31	23%
Anticompetitive Conduct	168	28	17%	102	61%	37	22%
Anticompetitive Effect	114	20	18%	72	63%	22	19%
Defenses	74	14	19%	46	62%	14	19%
MDL Cases	81	7	9%	51	63%	23	28%

Notes: Column for Total Decisions shows the number of decisions for all years with the specified disposition or antitrust claim element. Columns for Depth of Analysis show the number and percentage of decisions with the specified disposition or claim element, and the specified depth of analysis (minimal (code 1), moderate (code 2), in-depth (code 3)). Codes for depth of analysis apply to the decision as a whole, although depth of analysis may vary in individual court decisions with respect to particular antitrust claims and elements. Accordingly, percentage figures in each line total 100 percent subject to rounding errors.