

**University of San Francisco**

---

From the SelectedWorks of Celine Mui

---

October 2009

# Deconstructing Bell Atlantic v. Twombly

Contact  
Author

Start Your Own  
SelectedWorks

Notify Me  
of New Work



Available at: [http://works.bepress.com/celine\\_mui/1](http://works.bepress.com/celine_mui/1)

# Deconstructing *Bell Atlantic v. Twombly*

By Celine Mui<sup>1</sup>

## I. Introduction

In 2007, the Supreme Court in *Bell Atlantic Corp. v. Twombly*<sup>2</sup> changed not just antitrust parallel conduct claims but the entire landscape for complaints at the pleading stage. Though the case is known to be of great importance, it has also been known to be confusing and fraught with contradictions, causing great uncertainty for assessing the adequacy of a pleading.<sup>3</sup> Given the importance of *Twombly* for pleadings and antitrust jurisprudence, the Supreme Court should clarify the issues arising out of the decision for the benefit of the lower courts that have struggled with its interpretation and for the benefit of the claimants to determine the requisite level of detail to withstand a motion to dismiss.

The case of *Bell Atlantic Corp. v. Twombly* began when William Twombly and Lawrence Marcus (“plaintiffs”) sued four of the regional providers of local telephone and high speed internet services, known as the Baby Bells or Regional Bell Operating Companies (“RBOCs) or Incumbent Local Exchange Carriers (“ILECs”) (collectively “defendants”), on behalf of a putative class consisting of all subscribers of such services from February 8, 1996 to the time of filing the suit. Plaintiffs sought treble damages and declaratory and injunctive relief for violations of Section 1 of the Sherman Act.<sup>4</sup>

---

<sup>1</sup> Juris Doctor, Class of 2009, University of San Francisco School of Law.

<sup>2</sup> 550 U.S. 544, 127 S.Ct. 1955 (2007) (“*Twombly*”). Note: Although the citation for the official United States Report is known, the pages in that report have not been made available to the public yet. Therefore, only page reference to the Supreme Court Reporter will be cited.

<sup>3</sup> *Iqbal v. Hasty*, 490 F.3d 143, 155-57 (2d Cir. 2007) (“Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court’s decision in *Bell Atlantic Corp. v. Twombly*.”).

<sup>4</sup> *Id.*

The plaintiffs claimed that defendants<sup>5</sup> conspired to keep out competition known as Competitive Local Exchange Carriers (CLECs) in one of two ways.<sup>6</sup>

1. Plaintiffs allege that the ILECs “engaged in parallel conduct” in their respective service areas to inhibit the growth of upstart CLECs.<sup>7</sup> Allegedly, the ILECs made “unfair agreements with CLECs for access to ILEC networks, provid[ed] inferior connections to the networks, overcharge[ed], and bill[ed] in ways designed to sabotage the CLECs’ relations with their own customers.”<sup>8</sup>
2. Plaintiffs also allege that the ILECs agreed to refrain from competing against one another.<sup>9</sup> However, there was no allegation of an actual agreement among them, instead an agreement was “inferred from the ILECs common failure ‘meaningfully [to] pursu[e]’ ‘attractive business opportunit[ies]’ in contiguous markets where they possessed ‘substantial competitive advantages’ . . . and from a statement of Richard Notebaert, CEO of Qwest (an ILEC), that competing in the territory of another ILEC ‘might be a good way to turn a quick dollar but that doesn’t make it right.’”<sup>10</sup>

Defendants denied any wrongdoing and have litigated for years to resist entry of the CLECs, since Congress pressured them to open the local telephone markets to competition in the Telecommunications Act of 1996 (“1996 Act”). The 1996 Act forced the ILECs to open their local telephone networks to competition from the CLECs.<sup>11</sup> In exchange, the ILECs regained

---

<sup>5</sup> Defendants consisted of Bell South Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc.

<sup>6</sup> *Id.* at 1962, n.1.

<sup>7</sup> *Id.* at 1962.

<sup>8</sup> *Id.* at 1962.

<sup>9</sup> *Id.* at 1962.

<sup>10</sup> *Id.* at 1962 (citation omitted).

<sup>11</sup> *Id.* at 1961.

access to the long distance markets, which they were stripped of by the 1984 divestiture.<sup>12</sup>

Because each Baby Bell had enjoyed a regional monopoly as a result of the 1984 divestiture, Congress was uneasy and responded by passing the 1996 Telecommunications Act into law.<sup>13</sup> The government's changed positions over time illustrate the government's uncertainty over how to deal with a former government-sanctioned monopoly. The Court in *Twombly* similarly showed uncertainty over how to deal with the defendants, which was why they were conferred special treatment, as discussed below.

The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted.<sup>14</sup> Quoting *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*,<sup>15</sup> “[t]he District Court acknowledged that ‘plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement,’ but emphasized that ‘while “[c]ircumstantial evidence of conscious parallel behavior may have heavy inroads into the traditional judicial attitude toward conspiracy[,] . . . ‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely.”<sup>16</sup> The District Court found that plaintiff's allegations with regards to parallel actions by the ILECs were inadequate because their resistance to the CLECs' entry into the market was explained by the ILECs' individual interest in maintaining its regional dominance and its reticence to change as a former monopolist.<sup>17</sup>

The Court of Appeals for the Second Circuit reversed, holding that the District Court

---

<sup>12</sup> The divestiture was what broke up the formerly government-created monopoly into the Baby Bells, consisting of Bell Atlantic, Bell South, Pacific Telesis Group, U.S. West, Ameritech, SBC, and Nynex.

<sup>13</sup> *Id.* at 1961.

<sup>14</sup> *Id.* at 1963.

<sup>15</sup> 346 U.S. 537, 541 (1954)

<sup>16</sup> *Twombly* at 1963.

<sup>17</sup> *Id.*

erred by applying the wrong standard.<sup>18</sup> The court held that “plus factors” are not required in order to survive a dismissal of an antitrust claim based on parallel conduct.<sup>19</sup> Instead, what is required, according to the Second Circuit, was alleging enough facts to give defendants “fair notice” of the claim, so as to prepare an answer.<sup>20</sup>

The Supreme Court reversed the Court of Appeals decision in a 7-2 decision by dismissing the complaint for failure to state a valid Section 1 Sherman Act claim of conspiracy.<sup>21</sup> The Court agreed with the District Court that plaintiffs’ conspiracy claim was not plausible, because the claim described the presence of parallel conduct but failed to allege an actual agreement among the ILECs.<sup>22</sup> The Court was not convinced that there was an agreement by the mere allegation that there is an absence of any meaningful competition between the ILECs, and the presence of parallel conduct that sought to prevent competition from the CLECs.<sup>23</sup> The Court held that these allegations conclude a conspiracy and lack the requisite steps to show how the CLECs were kept out, and how the ILECs’ refusal to compete against each other was merely a common market practice.<sup>24</sup>

The Court arrived at this holding by announcing the “no alternative explanation” test and the “plausibility standard.” Part II will describe the rationale behind these new rules. Part III will explain how the new rules have been interpreted in different ways by the lower courts, and how the Supreme Court could resolve the uncertainty surrounding the new rules.

## II. Basis of the Twombly decision

*Twombly* dealt with the issue of what should be the correct standard in which to infer an

---

<sup>18</sup> *Id.*

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

<sup>20</sup> *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 116 (2d Cir. 2005).

<sup>21</sup> *Id.* at 1960-61, 1973.

<sup>22</sup> *Id.* at 1970.

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

<sup>24</sup> *Id.* at 1971.

agreement from parallel conduct. The law has been that parallel conduct, without more, is not enough to suggest a conspiracy.<sup>25</sup> The principle rests on the basis that parallel conduct could be the result of “rational and competitive, business strategy unilaterally prompted by common perceptions of the market.”<sup>26</sup>

a) *Twombly* Replaced the “Plus Factor” Test with the “No Alternative Explanation” Test.

The courts before *Twombly* were split on the correct standard to apply the “plus factor” test. The “plus factor” test required additional direct or circumstantial evidence of a conspiracy in order to raise a valid Section 1 Sherman Act claim.<sup>27</sup> “Additional direct or circumstantial evidence” was so open-ended that courts have come up with a variety of “plus factors.” For instance, the Northern District Court of Alabama has identified direct or indirect evidence of a price-fixing agreement as a “plus factor.”<sup>28</sup> The Second Circuit has identified coerced parallelism as a “plus factor.”<sup>29</sup>

The Northern District of Georgia has created the following formulation that a “plus factor” . . . needs to have some substance in order to tilt the balance. Merely labeling something a ‘plus factor’ does not make it so, and a weak ‘plus factor’ is not sufficient to withstand a

---

<sup>25</sup> *Theatre Enterprises*, 346 U.S. at 540-41.

<sup>26</sup> *Twombly* at 1964.

<sup>27</sup> See *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984) (“[S]omething more than evidence of [conspiracy] . . . There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.”); *United States v. Container Corp. of America*, 393 U.S. 333, 334-35 (1969) (Evidence of parallel conduct plus an exchange of price information is sufficient to establish a combination or conspiracy.); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 193 (1963) (Conspiracy may be proven by agreement, tacit understanding or by acquiescence coupled with assistance in furthering a common plan.); *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946) (“Where the conspiracy is proved . . . from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy. The essential combination or conspiracy . . . may be found in a course of dealings or other circumstances . . . such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.”); *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939) (“Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.”)

<sup>28</sup> *North Jackson Pharmacy, Inc. v. Express Scripts, Inc.*, 345 F. Supp. 2d 1279, 1284 (N.D. Ala. 2004).

<sup>29</sup> *Ambook Enterprises v. Time Incorporated*, 612 F.2d 604, 616, 618 (2d Cir. 1979) (The court found that magazine publishers were forced to adopt a certain advertising rate for fear of reprisal).

motion for summary judgment because the ‘plus factor’ analysis is really a surrogate for looking at a case in its entirety.”<sup>30</sup> “Facilitating practice,” an activity that makes it easier for parties to coordinate price or other anticompetitive behaviors, is not a “plus factor,” because it would be difficult to establish causation in fact between the activity and the alleged conspiracy.<sup>31</sup> Another weak “plus factor” is “signaling,” the act of using signals to communicate with competitors, because the act of “signaling” is not significant when there is an oligopoly and each company is aware of the other’s actions.<sup>32</sup> Also, the “economics of the marketplace,” which shows high market concentration, product fungibility, high barriers to entry, and absence of close substitutes, are not “plus factors,” because they are merely characteristics of an oligopolistic market.<sup>33</sup> The Second Circuit also held that not all “plus factors” necessarily lead to an inference of conspiracy.<sup>34</sup> “Plus factors” that “could lead to an equally plausible inference of mere interdependent behavior” are unreliable inference of a conspiracy.<sup>35</sup>

Rather than pour through years of case law to determine whether the specific facts of the case are sufficient to prove collusion and to create new factors where case law is silent, the modern approach taken by some courts is to determine whether the conduct is contrary to the economic self-interest of the alleged co-conspirators absent an agreement.<sup>36</sup> The Court in *Twombly* decided to endorse this modern approach, and it did so by replacing the old “plus factor” test with the “no alternative explanation” test.

Under the new “no alternative explanation” test, “plaintiffs must allege additional facts

---

<sup>30</sup> *Holiday Wholesale Grocery Co. v. Philip Morris, Inc.*, 231 F. Supp. 2d 1253, 1272 (N.D. Ga. 2002).

<sup>31</sup> *Id.* at 1274-75.

<sup>32</sup> *Id.* at 1274, 84.

<sup>33</sup> *Id.* at 1305.

<sup>34</sup> *Apex Oil Company v. DiMauro*, 822 F.2d 246, 254 (2d Cir. 1987).

<sup>35</sup> *Id.*

<sup>36</sup> *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1303 (11th Cir. 2003) (“[E]vidence creates the requisite inference of conspiracy if it ‘tends to exclude the possibility that the alleged conspirators acted independently.’”); *Intervest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 165 (3rd Cir. 2003) (“‘[P]lus’ factors include: ‘(1) actions contrary to the defendants’ economic interests, and (2) a motivation to enter into such an agreement.’”).

that ‘ten[d] to exclude independent self-interested conduct as an explanation for defendants’ parallel behavior.’<sup>37</sup> The claim must suggest an agreement, not merely parallel conduct that tends to exclude the possibility of independent actions.<sup>38</sup> Examples include:

“[P]arallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties” . . . “[C]omplex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason” would support a plausible inference of conspiracy.<sup>39</sup>

The Court in *Twombly* stated that this was in line with Supreme Court precedents which have refused to accept allegations of parallel conduct as an inference of conspiracy at the summary judgment<sup>40</sup> or jury trial stage.<sup>41</sup> The Supreme Court has stated in the seminal case of *Theatre Enterprises* that more facts are required to show a conspiracy, which led to the creation of various “plus factors.” The Court stated that “‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely.”<sup>42</sup> It also held that the crucial question is whether the challenged anticompetitive conduct stems from an independent decision or from an agreement.<sup>43</sup> The Court reiterated this concept in *Monsanto* and *Matsushita*.<sup>44</sup> But it is questionable whether the rule announced in *Twombly* is truly in line with these precedents, because *Twombly* is requiring facts tending to prove that there are no alternative explanations for

---

<sup>37</sup> *Twombly*, 127 S.Ct. at 1963.

<sup>38</sup> *Id.* at 1966.

<sup>39</sup> *Id.* at 1966, n.4 (citation omitted).

<sup>40</sup> *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). “[P]roof of a §1 conspiracy must include evidence tending to exclude the possibility of independent action.” *Twombly*, 127 S.Ct. at 1964.

<sup>41</sup> *Theatre Enterprises*, 346 U.S. at 540. “The crucial question is whether the challenged anticompetitive conduct ‘stem[s] from independent decision or from an agreement, tacit or express.’” *Twombly* at 1964 (citation omitted); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). “[A]t the summary judgment stage a §1 plaintiff’s offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently.” *Twombly*, 127 S.Ct. at 1964, 1968.

<sup>42</sup> *Theatre Enterprise*, 346 U.S. at 541.

<sup>43</sup> *Id.* at 540.

<sup>44</sup> *Monsanto*, 465 U.S. at 764 (“There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.”); *Matsushita* at 575 (“To survive a motion for a summary judgment, a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence ‘that tends to exclude the possibility’ that the alleged conspirators acted independently.”).

the defendants' parallel behavior. This is a much higher standard than the standard required by the Court's precedents. *Theatre Enterprises*, *Monsanto*, and *Matsushita* all required more facts to be alleged, but not until the trial began at the summary judgment or jury trial stage. Although the Court suggests that *Twombly* is in line with the court's precedent, the announcement of the new "no alternative explanation" test could also be seen as a fundamental shift.

Applying the "no alternative explanation" test, the Court in *Twombly* held that nothing in the complaint, assuming all of the allegations are true, suggests that the ILECs' parallel conduct was "anything more than the natural, unilateral reaction of each ILEC intent on preserving its regional dominance."<sup>45</sup> As the Court explained, there was "a natural explanation for the noncompetition [which] is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same."<sup>46</sup> The Court gave the ILECs the benefit of a doubt by assuming that the "Baby Bells" were sitting tight on their former policies of not competing with each other when they were all part of a monopoly. As a result, the Court granted the defendants' motion to dismiss on this claim.

b) *Twombly* Changed the Pleading Landscape with the New "Plausibility Standard."

In the pleading context, *Twombly* also made some changes. Before *Twombly*, the courts were unclear as to the proper pleading standard for Sherman Act, Section 1 complaints. Traditionally, courts required facts tending to prove more than a conspiracy to fix prices and restrain trade.<sup>47</sup> The modern trend has been to require more than conclusory allegations of conspiracy and unreasonable restraint of trade, and to require evidence that tends to exclude

---

<sup>45</sup> *Twombly*, 127 S.Ct. at 1960.

<sup>46</sup> *Id.*

<sup>47</sup> *See supra* note 28.

independent self-interested conduct.<sup>48</sup> But some courts, like the Second Circuit, continued to be satisfied with pleadings that give the defendants, at a minimum, “fair notice.”<sup>49</sup>

Partly because of this split, the Court announced the new “plausibility standard.” The other reason for announcing this new rule is “to avoid the potentially enormous expense of discovery . . . [where there is] ‘no “reasonably formed hope that the discovery process will reveal relevant evidence”’ to support a §1 claim.”<sup>50</sup> Gone are the days when discovery documents consist only of paper documents. Today, voluminous amount of information is available to be studied during the discovery process. There are now copied materials, electronic transmission, and other sources of information which were absent before when notice pleadings were first introduced. Discovery expense can be so costly, that it has been known to discourage defendants to settle even a weak case in order to save costs. The Court believed that this is especially true of antitrust cases, where discovery can be broad, time-consuming, and expensive.<sup>51</sup>

Under the new “plausibility standard,” in order for any factual allegation to be sufficient, allegations must be placed in a context that plausibly suggests that the parallel conduct was the result of an agreement rather than independent actions.<sup>52</sup> There must be plausible, not probable grounds to an agreement at the pleading stage.<sup>53</sup> Such that a “well pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely.’”<sup>54</sup> “[A]ll allegations in the complaint are [assumed to be] true (even if doubtful in fact)” or if the plaintiff is unlikely to prevail on the merits.<sup>55</sup>

The Court stated that such a standard reflects the general rules of pleading, Federal Rules

---

<sup>48</sup> See *supra* note 41.

<sup>49</sup> *Twombly v. Bell Atlantic Corporation*, 425 F.3d 99, 116 (2d Cir. 2005).

<sup>50</sup> *Twombly*, 127 S.Ct. at 1967 (citation omitted).

<sup>51</sup> *Id.* at 1967, n.6.

<sup>52</sup> *Id.* at 1966.

<sup>53</sup> *Id.* at 1965.

<sup>54</sup> *Id.* (citation omitted).

<sup>55</sup> *Id.* at 1965, 1969, n.8.

of Civil Procedure 8(a)(2), which required all pleadings to have “‘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.’”<sup>56</sup> This general rule of pleading is read in combination with the Federal Rules of Civil Procedure 12(b)(6), which does not require a complaint to provide detailed factual allegations in order to survive a motion to dismiss, but it needs to be more than labeling and conclusions or a formulaic recitation of the elements of a cause of action.<sup>57</sup> The Court also has stated that “[f]actual allegations must be enough to raise a right to relief above the speculative level.”<sup>58</sup>

With this new “plausibility standard,” the Court retired the “no set of facts” pleading standard from *Conley v. Gibson*.<sup>59</sup> *Conley* was a case where the union allegedly refused to protect black railroad workers from discriminatory charges in violation of the National Railway Labor Act.<sup>60</sup> The union was unsuccessful in their motion to dismiss on the ground that the general allegations lacked sufficient specificity.<sup>61</sup> The *Conley* rule was “‘that 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.’”<sup>62</sup> This was retired by *Twombly* because any complaint containing allegations of parallel conduct would easily satisfy the pleading requirement and survive a motion to dismiss when there is almost always a set of facts available to support one possible explanation of a conspiracy.<sup>63</sup> As a result,

---

<sup>56</sup> *Id.* at 1964 (citation omitted).

<sup>57</sup> *Id.* at 1965.

<sup>58</sup> *Id.* at 1965.

<sup>59</sup> 355 U.S. 41 (1957).

<sup>60</sup> *Twombly*, 127 S.Ct. at 1977 (Stevens, J., dissent).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (citation omitted).

<sup>63</sup> *Id.* at 1969; Brief for the United States Amicus Curiae at 24, *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) (No. 03-9213).

this standard improperly allowed plaintiff to prove facts it has not alleged.<sup>64</sup> Because of the conclusory nature of the *Conley* standard to survive a motion to dismiss, the standard had been a source of puzzlement for more than fifty years, and the “no set of facts” language was never adequately explained by a dozen opinions by the Supreme Court.<sup>65</sup> Due to the endless confusion, the Court held that “Conley’s ‘no set of facts’ . . . phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard.”<sup>66</sup>

By retiring *Conley*, the Court proceeded to apply the new “plausibility standard.” As to the first conspiracy claim that the ILECs’ disobeyed the 1996 Act by thwarting the CLECs’ attempt to compete, the Court held that nothing in the complaint plausibly suggests that the parallel conduct “was anything more than the natural, unilateral reaction of each ILEC intent on preserving its regional dominance.”<sup>67</sup> As to the second conspiracy claim that the ILECs were reticent into entering into each other’s territory, the Court held that the parallel conduct did not plausibly suggest a conspiracy, because the ILECs were merely “sitting tight” just like they were before they as “[g]overnment-sanctioned monopolists.”<sup>68</sup> Failing the “plausibility” standard for both claims, the Court dismissed the complaint.<sup>69</sup>

### III. *Twombly* Led to More Confusion.

*Twombly* made two significant changes to antitrust jurisprudence. Despite the significance of these changes, the Court’s opinion lacked clarity and guidance for the lower courts. In the antitrust context, the Court provided little guidance in the application of the “no alternative explanation” test by assuming the presence of an alternative explanation for the parallel conduct without addressing the legitimate allegations that were made, and by giving the

---

<sup>64</sup> *Brief for the United States Amicus Curiae* at 24.

<sup>65</sup> *Twombly* at 1978 (Stevens, J., dissent).

<sup>66</sup> *Id.* at 1969.

<sup>67</sup> *Id.* at 1960.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1974.

facts of the case special treatment. In the civil procedure context, the Court put pleading rules into doubt by retiring *Conley*'s "no set of facts" standard while at the same time, suggesting that the plausibility standard should apply only where the cost of discovery can be great.<sup>70</sup>

A. The Facts of *Twombly* Was Not the Best Vehicle for the "No Alternative Explanation" test.

It remains to be seen how the lower courts will apply the "no alternative explanation" test to determine the sufficiency of a conspiracy claim based on parallel conduct. As Justice Stevens pointed out in his dissent, the majority in *Twombly*, instead of giving defendants a chance to respond to allegations of a conspiracy, embraced the defendants' arguments that there are alternative explanations for the ILECs' parallel conduct to keep the CLECs out of the local telephone and high speed internet services markets.<sup>71</sup> The majority concluded that there is "an obvious alternative explanation [considering that] monopoly was the norm in telecommunications . . . in the decade preceding the 1996 Act."<sup>72</sup> It was the opinion of the Court that the ILECs, who were "former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing."<sup>73</sup> Therefore, the Court assumed that "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway, . . . [and that] there was just no need for joint encouragement to resist the 1996 Act."<sup>74</sup> The Court discredited the statements made by Qwest's CEO Richard Notebaert as just "a few stray statements" that are "merely legal conclusions resting on the prior allegations."<sup>75</sup> The Court concluded that nothing in the complaint plausibly suggests a conspiracy.<sup>76</sup> It agreed with the District Court that the ILECs' resistance to upstarts was just a "natural, unilateral reaction of

---

<sup>70</sup> *Id.* at 1979 (Stevens, J., dissent).

<sup>71</sup> *Id.* at 1975 (Stevens, J., dissent).

<sup>72</sup> *Id.* at 1972.

<sup>73</sup> *Id.* at 1972.

<sup>74</sup> *Id.* at 1971.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

each ILEC[’s] intent on keeping its regional dominance.”<sup>77</sup>

This conclusion is problematic. In *Twombly*, the plaintiffs point to a statement allegedly made by CEO of Qwest, Richard Notebaert, that was printed in a newspaper article as saying “that for Qwest competing in the territory of SBC/Ameritech ‘might be a good way to turn a quick dollar but that doesn’t make it right.’”<sup>78</sup> The plaintiffs’ claim that this statement was made at a time when Qwest’s revenues were declining and it was losing money, was used to prove that it was not in their best interest for the ILECs to refrain from competing in other ILEC territories.<sup>79</sup> Given the context of the statement, the plaintiffs argued that the statement should be treated as an admission of collusive conduct among the ILECs.<sup>80</sup> The defendants should have a chance to address that claim. In the least, the defendant should confirm or deny whether such a statement was stated accurately by the newspaper. If it is reflected properly in the newspaper, then Qwest should be able to prove or disprove whether that statement was made against their self-interest by showing whether their revenues were declining and needed to compete in other areas dominated by other ILECs. Rather than doing that, the Court assumed that there is an alternative explanation and that was the assumption that Qwest and other ILECs were merely sitting tight as former government-sanctioned monopolists.

According to Stevens’ dissent, the Court should have “requir[ed] knowledgeable executives such as Notebaert to respond to these allegations” through depositions or limited discovery.<sup>81</sup> Additionally, the agreement not to compete with one another “is not just one of ‘a few stray statements.’”<sup>82</sup> Stevens believed that dismissal without even requiring defendants to

---

<sup>77</sup> *Id.*

<sup>78</sup> *Twombly*, 425 F.3d at 103 (2d Cir. 2005)

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1975 (Stevens, J, dissent).

<sup>82</sup> *Id.* (citation omitted).

file answers denying the allegations was inappropriate.<sup>83</sup> For this reason, *Twombly* is not the best vehicle to promote the “no alternative explanation” test. By assuming that there are alternative explanations for the defendants’ parallel conduct, this ruling invites the lower courts to similarly give defendants a benefit of a doubt on a motion to dismiss.

The Court also did not address plaintiff’s assertion that the defendants communicate frequently with one another “‘through a myriad of organizations,’ providing an opportunity for a conspiracy to form and be conducted without the likelihood of detection.”<sup>84</sup> Although this claim does not specify what those organizations are and whether an agreement or an invitation to conspire was made, it may be plausible that the defendants belong to many of the same organizations, having been a subsidiary of the same monopoly, and could have conspired without detection. The defendants should be given a chance to prove or disprove whether the ILECs belong to the same organizations and could have crossed each other’s paths. But the Court merely assumed that no such meeting or agreement was made, because the defendants were merely acting independently of each other by refusing to open their networks to the CLECs.

Again, *Twombly* was not the best vehicle to promote the “no alternative explanation” test. The Court was probably more interested in replacing the old “plus factor” test, and gloss over the facts of the case. But if that is the case, then this begs the question of whether *Twombly* should be limited to its facts, and whether the Court gave special treatment because of the nature of the industry and its former monopolistic ways.

If *Twombly* is not limited to its facts, then the application of the rule seems to approve the improper assumption that defendants can prove alternative explanations that they have not allege. This would set the bar too high for the plaintiff to sufficiently plead a claim of

---

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

conspiracy involving parallel conduct. Thus far, the only court that had the opportunity to apply this test did not take the same liberty to assume alternative explanations for the defendants;<sup>85</sup> and it should continue to be that way.

1. *Twombly*'s "No Alternative Explanation" Test Has Been Limited to its Facts.

As of this writing, the only court that has interpreted *Twombly*'s "no alternative explanation" test is the Pennsylvania District Court in the *Pressure Sensitive Labelstock* case. That court limited *Twombly* to its facts "in light of the industry at issue."<sup>86</sup> The plaintiffs there were purchasers of the self-adhesive labelstock and had sued the producers of labelstock products for conspiring to not compete for customers.<sup>87</sup> The defendants responded by filing a motion to dismiss.<sup>88</sup> Citing *Twombly* and assuming all of the allegations were true on a motion to dismiss, the Pennsylvania District Court distinguished the labelstock industry from the telecommunications industry as an industry not susceptible to collusion.<sup>89</sup> Because not enough facts were alleged to show that the industry is susceptible to collusion and because the plaintiffs alleged more than conclusory allegations of a conspiracy, the court did not assume that there were alternative explanations to the allegations put forth by the plaintiff and denied the defendant's motion to dismiss.<sup>90</sup>

If *Twombly* is limited to industries that are susceptible to collusion, then who is to say what those industries are? Would this apply to only industries such as utilities, telecommunications, postal service and other industries that were once government-sanctioned

---

<sup>85</sup> In re Pressure Sensitive Labelstock Antitrust Litigation, 566 F. Supp. 2d 363, 373 (M.D. Pa. 2008).

<sup>86</sup> *Id.*.

<sup>87</sup> *Id.* at 366.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 373.

<sup>90</sup> *Id.*

monopolists?<sup>91</sup> Federal Chief Judge Richard A. Posner suggests a two-step approach to determine whether an industry is susceptible to collusion. The first step is to examine the structure of the market by looking at factors that indicate a favorable climate for collusion, such as a concentration of large sellers, a lack of small, fringe sellers, inelastic demand at the competitive price, significant barriers to entry into the market, a standardized product, and emphasis on price over other forms of competition.<sup>92</sup> The second step is to examine actual data in the market to determine if there is a pattern of collusion.<sup>93</sup> Posner identified the following evidence of collusion: exchanges of price information, consistent levels and patterns of profits, and base-point pricing.<sup>94</sup>

Although these factors help narrow the search, Posner himself admits flaws with these factors.<sup>95</sup> He admits that economic evidence is often ambiguous and subject to varying expert interpretation.<sup>96</sup> Also, he admits that the two-step approach was not meant to discriminate between natural and contrived oligopoly pricing.<sup>97</sup> Despite the shortcomings of Posner's two-step approach, the issue is whether the courts should consider this to be a viable test. Considering the Court's concern with controlling discovery costs at the pleading stage<sup>98</sup> and the potential costs of gathering various expert opinions under Posner's two-step approach, the Court may not want to adopt such an approach.

Another way to determine whether an industry is susceptible to collusion is by looking at

---

<sup>91</sup> *Twombly*, 127 S.Ct. at 1960 (Where the telecommunications companies were called government-sanctioned monopolists.); *Braintree Elec. Light Dep't. v. F.E.R.C.*, 550 F.3d 6, 14 (D.C. 2008) (Where a heavily-regulated utility company was referred to as a government-sanctioned monopoly); *United States v. Choate*, 422 F. Supp. 261, 271 (D.C. Cal. 1976) (Finding that the Postal Service is a government-sanctioned monopoly.).

<sup>92</sup> Richard A. Posner, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 55-60 (Univ. of Chicago Press 1976).

<sup>93</sup> *Id.* at 55.

<sup>94</sup> *Id.* at 62-70.

<sup>95</sup> Richard A. Posner, *Oligopolistic Pricing Suits, the Sherman Act, and Economic Welfare*, 28 *STAN. L. REV.* 903, 910 (1976).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Twombly*, 127 S.Ct. at 1967.

the presence of horizontal restraints in the past.<sup>99</sup> This approach assumes that once an industry has been found guilty of collusion, they are likely to repeat it. It may be true that certain industries are more susceptible to repeated collusion, given the structure or players in the industry. Such an approach has the benefit of being a bright line rule. If there were previously a finding of collusion, then that would automatically trigger the “no alternative explanation” test. Also, it would save on discovery costs, because all it requires is a previous court ruling. This is a viable approach if the “no alternative explanation” test were limited to industries that are susceptible to collusion.

But it is questionable whether the “no alternative explanation” test should be limited to industries that are susceptible to collusion in the first place. The “no alternative explanation” test places the burden on the plaintiff to show enough evidence to suggest that there is no alternative explanation for the parallel conduct other than collusion. This is a higher standard than the old “plus factor” test, where plaintiffs merely need to allege facts additional to parallel conduct in order to prove that collusion exists. Why should *Twombly* require plaintiffs to present more factual allegations for a Section 1 antitrust claim, if the industry is susceptible to collusion? If the industry is susceptible to collusion, then the burden of proof should be set lower, not higher, for the plaintiffs. Because it is unfair to limit *Twombly*’s “no alternative explanation” test to only industries susceptible to collusion, the “no alternative explanation” test should apply to all industries. The Courts’ focus on the ILECs’ susceptibility to collusion should be read as dicta.

#### B. Uncertainty Followed After *Twombly*’s Announcement of the Plausibility Standard.

The plausibility standard also raised other uncertainties. Firstly, Souter’s majority

---

<sup>99</sup> William Blumenthal, ABA Antitrust Section, *Monograph No. 12, Horizontal Mergers: Law and Policy*, 258 (1986), available at [http://books.google.com/books?id=t-R1wB3zyggC&printsec=frontcover&source=gbs\\_summary\\_r&cad=0](http://books.google.com/books?id=t-R1wB3zyggC&printsec=frontcover&source=gbs_summary_r&cad=0).

opinion is fraught with self-contradictory statements on what must be pled in a complaint at the pleading stage. Secondly, there is considerable uncertainty over what is merely dicta, and what is the holding in terms of the Court's emphasis on costs. Lastly, there is confusion on whether the plausibility standard is limited to the antitrust context.

### 1. Contradictory statements

There are numerous formulations of the “plausibility standard” in Souter’s majority opinion that it led to considerable uncertainty on the adequacy of pleadings.<sup>100</sup> For instance, there are a variety of phrases that suggest that the complaint is adequate without a heightened pleading of the specifics. Towards the very end of the majority opinion, the Court stated that “we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”<sup>101</sup> Also the Court emphasized the continued viability of *Swierkiewicz v. Sorema N.A.*,<sup>102</sup> which declined to adopt a heightened pleading standard without Congress amending the Federal rules.<sup>103</sup>

But at the same time, the Court also had a variety of phrases that suggest the opposite. The Court required a §1 claim to have “enough factual matter (taken as true) to suggest that an agreement was made.”<sup>104</sup> Applying this rule, the Court found that it was not plausible for the plaintiffs to merely make the conclusory allegation that a conspiracy exists because of an absence of any meaningful competition between the ILECs and a presence of parallel conduct.<sup>105</sup> In order to be plausible, the Court added that the pleading must have “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement;”<sup>106</sup> “allegations

---

<sup>100</sup> *Iqbal*, 490 F.3d at 155-56.

<sup>101</sup> *Twombly*, 127 S.Ct. at 1974.

<sup>102</sup> 534 U.S. 506, 515 (2002).

<sup>103</sup> *Twombly*, 127 S.Ct. at 1973, n.14.

<sup>104</sup> *Id.* at 1965.

<sup>105</sup> *Id.* at 1970.

<sup>106</sup> *Id.*

of parallel conduct . . . must be placed in a context that raises a suggestion of a preceding agreement;”<sup>107</sup> “allegations plausibly suggesting (not merely consistent with) agreement;”<sup>108</sup> and under “the threshold requirement of Rule 8(a)(2) . . . the ‘plain statement’ [must] possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”<sup>109</sup> The Court also suggested that specifics are required by endorsing Form 9 of the Federal Civil Rules, so that pleadings should include specific time, place or person involved in the alleged conspiracy.<sup>110</sup>

Although these contradictory phrases have caused some confusion, it has largely been resolved because the Supreme Court issued an opinion two weeks after *Twombly*’s opinion was issued, stating that there is no heightened pleading standard.<sup>111</sup> The lower courts have all but recognized that there is no heightened pleading standard.<sup>112</sup> The only exception is the Second Circuit which interpreted *Twombly* as “requir[ing] a heightened pleading standard ‘in those contexts where [factual amplification is needed to render [a] claim *plausible*.’”<sup>113</sup> Because the lower courts have overwhelmingly concluded that *Twombly* does not require a heightened

---

<sup>107</sup> *Id.* at 1966.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 1971, n.10.

<sup>111</sup> “Specific Facts are not necessary; the statement need only “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 2200 (2007). Note: Although the citation for the official United States Report is known, the pages in that report have not been made available to the public yet. Therefore, only page reference to the Supreme Court Reporter will be cited.

<sup>112</sup> *Iqbal*, 490 F.3d at 157 (holding that *Twombly* does “not requir[e] a universal standard of heightened fact pleading but . . . requir[es] a flexible ‘plausibility standard.’”); *CBT Flint Partners, LLC v. Goodmail Systems, Inc.*, 529 F. Supp. 2d 1376, 1379 (N.D. Ga. 2007) (“[*Twombly*] made clear that it was not imposing a heightened pleading standard.”); *Limestone Development Corp. v. Village of Lemont, Illinois*, 520 F.3d 797, 803 (7th Cir. 2008) (“[*Twombly*] denied that it was ‘requir[ing] heightened fact pleading of specifics.’”); *Behrend v. Comcast Corp.*, 532 F. Supp. 2d 735, 741 (E.D. Pa. 2007) (“[*Twombly*] did not impose a heightened pleading standard.”); *Ollie v. Plano Indep. School Dist.*, 564 F. Supp. 2d 658, 661 (E.D. Tex. 2008) (*Twombly* reversed *Swierkiewicz*’s heightened pleading standard, so that it is unnecessary to plead prima facie facts in the employment discrimination context.); *In re Motor Fuel Temperature Sales Practices Litigation*, 534 F. Supp. 2d 1214, 1237, n.25 (D. Kan. 2008) (*Twombly* doesn’t require a heightened fact pleading of specifics); *Hear-Wear Technologies, LLC v. Oticon, Inc.*, 551 F. Supp. 2d 1272, 1277 (N.D. Okla. 2008) (“[C]onspiracy claim did not have to meet a heightened fact pleading of specifics.”); *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1, 4 (D.D.C. 2008) (*Twombly* did not require heightened pleading.); *Hackman v. Dickerson Realtors, Inc.*, 557 F. Supp. 2d 938, 944 (N.D. Ill. 2008) (*Twombly* does not require “heightened fact pleading of specifics.”).

<sup>113</sup> *Ross v. Bank of America, N.A.*, 524 F.3d 217, 227 (2d Cir. 2008) (citation omitted).

pleading standard, *Twombly* should be read as such.

## 2. Separating Dicta from Holding in Regards to Costs

Because of the Court's emphasis on costs, *Twombly*'s plausibility standard may be limited to cases where discovery costs are high. But the trouble is whether the court's emphasis on costs is part of the holding or dicta. The Court emphasized that its motivation for the "plausibility standard" is to "avoid the potentially enormous expense of discovery in cases with no "reasonably founded hope that the [discovery] process will reveal relevant evidence" to support a §1 claim."<sup>114</sup> The Court discredited Stevens' dissenting argument that costs can be controlled through careful case management, because the courts have not had much success in checking discovery abuse.<sup>115</sup> But this view that costs cannot be controlled runs contradictory to the earlier Supreme Court opinion of *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit et al*,<sup>116</sup> where the Court expressed more faith in allowing the discovery process to weed out unmeritorious claims. It would have been different if the Court in *Twombly* disclaimed its prior statement, but the fact that it did not, causes uncertainty as to whether the Court intended to limit the application of the "plausibility standard" to costly cases.

One could argue that the cost analysis was central to the Court's ruling in replacing *Conley*'s "no set of facts" standard with the "plausibility standard" and therefore should be a part of the holding. If it weren't for the escalating discovery costs, the Court would not have created this new standard. The Court also made the point to mention costs several times.<sup>117</sup> If it were just a passing statement, then the Court would not have placed so much emphasis on it.

---

<sup>114</sup> *Twombly*, 127 S.Ct. at 1967.

<sup>115</sup> "It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management,' . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. *Id.* at 1959 (quoting *id.* at 1975 (Stevens, J., dissenting)).

<sup>116</sup> 507 U.S. 163, 168-69 (1993) ("[F]ederal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims.")

<sup>117</sup> *See supra* note 59-60.

But one could also argue that the Court’s cost analysis was not necessary to the ruling, and therefore should be treated as dicta, because it had only an incidental bearing on the issue before the court. The cost analysis was not the determining factor that drove the Court to announce the plausibility standard. It was the conclusory nature of *Conley*’s “no set of facts” standard coupled with the confusion over *Conley* that prompted the Court’s announcement of the new standard.

If the “plausibility standard” were intended to be limited to costly cases, then that would apply to complex cases where massive discovery (i.e. antitrust cases, class actions) is almost a certainty. There are some courts that limit *Twombly* to cases that demand high costs.<sup>118</sup> If this is what the Court intended, then this would leave intact long-standing pleading requirements for all other non-complex cases.

But if the “plausibility standard” were to be limited to complex and costly cases, then this could lead to some troubling results. As Stevens’ dissent pointed out, the Supreme Court cases of *Swierkiewicz* and *Leatherman* stood for the principle that the “fear of the burdens of litigation does not justify the factual conclusions supported only by lawyers’ arguments rather than sworn admissible evidence.”<sup>119</sup> This is because it is unfair to only consider potentially high costs for those parties that are best able to withstand such costs at the pre-answer stage; and complex cases tend to involve large, wealthy organizations. Stevens’ dissent argued that dismissal prior to discovery should be granted sparingly, especially in antitrust cases where the burden of proof is

---

<sup>118</sup> *Limestone Dev. Corp.*, 520 F.3d at 802-03 (7th Cir. 2008) (*Twombly* instructs that defendants should not be forced into costly discovery unless complaint contains enough details to indicate a substantial case); In re Netflix Antitrust Litigation, 506 F. Supp. 2d 308, 321 (N.D. Cal. 2007) (*Twombly* recognized that staying discovery may be appropriate in antitrust cases, where discovery tends to be broad, time-consuming and expensive); *Filipek v. Krass*, 576 F. Supp. 2d 918, 923 (N.D. Ill. 2008) (Civil rights cases are distinguishable from complex patent or antitrust case, so that a complaint lacking in detailed facts is sufficient, as long as it is plausible and gives defendants fair notice.).

<sup>119</sup> *Twombly*, 127 S.Ct. at 1983.

largely on the conspirators.<sup>120</sup> If plaintiffs are required to flesh out their allegations more at the pleading stage, then this will likely drive out potentially meritorious claims, especially involving cartels, who often act in secrecy. Plaintiffs often rely on discovery to establish their claim. If plaintiff's claim is dismissed before defendants could answer the complaint under the plausibility standard, then this will make it harder to prosecute conspirators.<sup>121</sup>

However, one could argue that this dire result is mitigated by existing programs, which will allow plaintiffs to gather enough facts to file a plausible claim. For instance, in the event the government intervenes, the plaintiffs can learn, from government proceedings, incriminating facts about the defendants without fronting the costs themselves.<sup>122</sup> Plaintiffs can also learn facts from the Antitrust Division's Corporate Leniency Program, which allows companies to report their own antitrust violations in exchange for full immunity from criminal prosecution.<sup>123</sup> The same goes for the related program called Amnesty Plus Program, which gives individuals or companies who are ineligible for full immunity, to receive a penalty reduction if they are the first to report another violation for which they will receive full immunity.<sup>124</sup> It is doubtful though, that all plaintiffs can benefit from these programs. The Court should not consider costs as a factor when dealing with large, wealthy defendants and hard-core cartels.

### 3. Scope of the "Plausibility Standard"

Another issue posed by the "plausibility standard" in *Twombly* is whether the test is limited to antitrust cases. The Court suggested that staying discovery may be appropriate in

---

<sup>120</sup> *Id.* at 1984 (Stevens, J., dissent).

<sup>121</sup> William J. Blechman, *Why Twombly Does Not (and Should Not) Apply to Hard-Core Cartels*, THE ANTITRUST SOURCE 34-35 (Oct. 2007), available at <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Blechman10-18f.pdf>.

<sup>122</sup> Steven F. Cherry and Gordon Pearson, *Why Twombly Does (and Should) Apply to All Private Antitrust Actions, Including Alleged Hard-Core Cartels: A Reply to William J. Blechman*, THE ANTITRUST SOURCE 28 (Dec. 2007), available at <http://www.abanet.org/antitrust/at-source/07/12/Dec07-Cherry12-17.pdf>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

antitrust cases where it can be “sprawling, costly, and hugely time-consuming” and it may drive “cost-conscious defendants to settle even anemic cases.”<sup>125</sup> As Stevens’ dissent pointed out, the majority were also concerned with the mistakes that antitrust courts make when jurors mistakenly conclude that evidence of parallel conduct establishes an agreement, when in fact it is the result of independent decisions influenced by common perceptions of the market.<sup>126</sup> Since *Twombly*, the Supreme Court has expressed this concern that antitrust cases are prone to mistakes in the case of *Credit Suisse Securities, LLC v. Billing*.<sup>127</sup>

Due to the Court’s concerns for costs and mistakes in antitrust cases, the Court may have intended to limit the “plausibility standard” to antitrust cases. But according to Stevens, in his concurrence in *Credit Suisse*, “the risk ‘that antitrust courts are likely to make unusually serious mistakes’” should not be a factor in determining how to proceed with a case, as there is no proof that such mistakes are being made in antitrust cases.<sup>128</sup> Nevertheless, Stevens suggested in his dissent in *Twombly* that this case leaves wide open the question of whether the new “plausibility standard” should be applied to all cases or confined to antitrust cases.<sup>129</sup> The fact that *Twombly* cites to *Crawford-El v. Britton*<sup>130</sup> without disclaiming it suggests that the new pleading standard should be limited to antitrust cases.<sup>131</sup> In *Crawford-El*, the Supreme Court required a heightened burden of proof in cases against government officials alleging unconstitutional motives.<sup>132</sup> If the Court intended to apply the new “plausibility standard” to cases outside of antitrust, then it

---

<sup>125</sup> *Twombly*, 127 S.Ct. at 1967.

<sup>126</sup> *Twombly*, 127 S.Ct. at 1975 (Stevens, J., dissent).

<sup>127</sup> 551 U.S. 264, 127 S.Ct. 2383, 2386 (2007) (The Court suggested that “antitrust courts are likely to make unusually serious mistakes.”). Note: Although the citation for the official United States Report is known, the pages in that report have not been made available to the public yet. Therefore, only page reference to the Supreme Court Reporter will be cited.

<sup>128</sup> *Credit Suisse*, 127 S.Ct. at 2398 (Stevens, J., concurrence).

<sup>129</sup> *Twombly*, 127 S.Ct. at 1988 (Stevens, J., dissent) (“Whether the Court’s actions will benefit only defendants in antitrust treble damages cases, or whether the test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer.”).

<sup>130</sup> 523 U.S. 574 (1998).

<sup>131</sup> *Twombly*, 127 S.Ct. at 1988.

<sup>132</sup> *Crawford-El*, 523 U.S. at 598.

should indicate that when it mentioned *Crawford-El* in the majority opinion in the course of explaining the cost rationale behind the “plausibility standard.”<sup>133</sup>

But the Court’s language relating generally to Rule 8 pleading standard, which applies to all cases, appears to signal application of the new “plausibility standard” to cases outside of antitrust.<sup>134</sup> If the new pleading standard applies outside of antitrust cases, then that raises the question of what kind of cases to which it should apply. The Court mentioned complexity and costs, but how can the courts determine with consistency which cases are costly and complex enough to warrant application of the new pleading standard? The Federal Rules of Civil Procedures do not explicitly state what types of cases are provisionally classified as complex and costly. California Rules of the Court, however, do and have defined costly and complex cases as ones that “require . . . exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants.”<sup>135</sup> Cases that have been deemed provisionally complex in California courts are cases dealing with the following areas of law: antitrust/trade regulation, construction defect, construction defect claims involving many parties, securities claims or investment losses involving many parties, environmental/toxic tort involving many parties, class actions, mass tort, and insurance coverage claims arising out of provisionally complex case types.<sup>136</sup> Whether the federal court should follow suit is up to debate. The American Law Institute’s Complex Litigation Project has endorsed a law review article by Linda S. Mullenix, in which the following cases were deemed complex: mass tort, antitrust, securities, employment discrimination, and

---

<sup>133</sup> *Twombly*, 127 S.Ct. at 1988, n.13.

<sup>134</sup> *Id.* at 1960, 66. (“The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects Rule 8(a)(2)’s threshold requirement that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’ . . . Plaintiffs’ main argument against the plausibility standard at the pleading stage is its ostensible conflict with a literal reading of *Conley*’s statement construing Rule 8. . . The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the “plain statement” possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”

<sup>135</sup> Cal. Rules of Court § 3.400 (West 2009).

<sup>136</sup> *Id.*

labor law.<sup>137</sup> Perhaps the “plausibility standard” should be limited to those complex cases.

The lower courts have dealt with this question of whether to limit the “plausibility standard” to antitrust cases, and by and large been, they have applied it not only to antitrust cases, but to cases involving ADEA (Age Discrimination Employment Act),<sup>138</sup> RICO (Racketeer Influenced & Corrupt Organizations),<sup>139</sup> mass tort,<sup>140</sup> civil rights,<sup>141</sup> copyright infringement,<sup>142</sup> and consumer protection.<sup>143</sup> But why should the “plausibility standard” apply to those cases and not others? Because of the higher burden of proof that the “plausibility standard” requires at the pleading stage, it is likely that many cases will be dismissed. If that is the case, then this would put plaintiffs at a severe disadvantage, because often plaintiffs rely on discovery to flesh out their allegations. If their claims are summarily dismissed at the pleading stage for lack of factual allegations to make a plausible claim, then this will have the effect of driving out potentially meritorious claims. The result favors the large corporate defendants over the small, individual plaintiffs, who may not have the financial means in which to fully develop their claim at the outset. This would be disadvantageous for those plaintiffs in cases such as employment discrimination, mass torts, civil rights, and consumer protections, where the plaintiffs are often individuals suing large entities. There may be less impact for plaintiffs in cases involving RICO and intellectual property infringement, where government agencies or large corporations have more financial resources.

There are only a few courts that have limited the “plausibility standard” to certain cases.

The Second Circuit in the case of *Iqbal* held that *Twombly* should be limited to antitrust cases,

---

<sup>137</sup> Linda S. Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 LA. L. REV. 977, 988 (1994).

<sup>138</sup> *Ollie v. Plano Indep. School Dist.*, *supra* note 114; *Davis v. Ind. State Police*, 341 F.3d 760 (7th Cir. 2008).

<sup>139</sup> *Limestone Dev. Corp. v. Village of Lemont, Ill.*, *supra* note 114.

<sup>140</sup> *In re Flood Litigation Coal River Watershed*, 668 S.E. 2d 203 (W. Va. 2008).

<sup>141</sup> *Filipek v. Krass*, 576 F. Supp. 2d 918; *Iqbal*, 490 F.3d 143.

<sup>142</sup> *Arista Records LLC v. Does, Nos. CV-07-162-B-W, CV-08-028-B-W*, 2008 WL 4761926 (D. Me. Oct. 29, 2008).

<sup>143</sup> *In re Motor Fuel Temperature Sales Practices Litigation*, *supra* note 114.

because *Twombly* left *Leatherman* and *Crawford-El* undisturbed, which required a heightened pleading standard.<sup>144</sup> In the Northern District Court of Georgia, the court held that *Twombly*'s pleading standard doesn't apply to all antitrust cases, specifically in the patent context, because the Local Patent Rules already required plaintiffs to disclose extremely detailed information.<sup>145</sup> For now, *Twombly*'s plausibility standard mostly applies to all cases, except where detailed allegations are required by other rules or regulations.

#### IV. Conclusion

*Twombly* decision is a seminal case on two fronts. First, it replaced the "plus factor" test with the "no alternative explanation" test for pleadings dealing with parallel conduct that amounts to a Sherman Act, Section 1 conspiracy. Second, it replaced *Conley*'s "no set of facts" standard with the "plausibility standard" for pleadings. By creating the "no alternative explanation" test and the "plausibility standard," *Twombly* created some confusion. Some of it has been resolved in the lower courts, while others require further clarification from the Court.

As to the "no alternative explanation" test, the Court should provide guidance on how to apply the test. By assuming that alternative explanation exists for defendants' parallel conduct, the Court did not demonstrate how the "no alternative explanation" test should be applied. As a result, the Court's holding has been limited to its facts by lower courts, and the test has been limited to industries that are susceptible to collusion at the pleading stage. The Court must not have intended to limit the "no alternative explanation" test to industries that are susceptible to collusion, because it is unfair to require a higher standard of proof for such industries. The Court should clarify that the "no alternative explanation" test applies to all industries, regardless of its susceptibility to collusion.

---

<sup>144</sup> *Iqbal*, 490 F.3d at 157.

<sup>145</sup> *CBT Flint Partners, LLC v. Goodmail Systems, Inc.*, 529 F. Supp. 2d at 1379-80.

As to the plausibility standard, there were several contradictory statements in Souter’s opinion in *Twombly* that cast into doubt whether the Court is requiring a heightened pleading standard. However, the lower courts have all but recognized that there is no heightened pleading standard, because the Court explicitly said that no such pleading standard is required in an opinion published two weeks after *Twombly*.

*Twombly* also raised the question of whether the plausibility standard should apply only to cases where discovery costs can be high. Such a limitation is troubling, because costs should not be considered only for those parties that are best able to withstand such costs at the pleading stage. Also, this might have the effect of making it more difficult to prosecute hard-core cartels, who act in secret. If the Court intended to consider costs when applying the “plausibility standard,” then the Court may consider making an exception for large, wealthy defendants and hard-core cartels.

Another issue brought up by *Twombly* is the question of whether the “plausibility standard” should be limited to antitrust cases. This question has been largely settled by the lower courts. The lower courts have not limited the test to antitrust cases, but it has limited the test to certain types of antitrust cases, such as patent antitrust cases, where the pleading standard is higher than the “plausibility standard.” However, the Court may want to rethink whether the “plausibility standard” should apply to cases outside of antitrust, where the plaintiffs often rely on discovery to flesh out their allegations and are unable to allege enough facts at the outset.