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Pleading Standards after Bell Atlantic v. Twombly

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ESSAY

PLEADING STANDARDS AFTER BELL ATLANTIC CORP. V. TWOMBLY

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ON May 21, 2007, the U.S. Supreme Court decided *Bell Atlantic Corp. v. Twombly*[1] and gutted the venerable language from *Conley v. Gibson* that every civil procedure professor and student can recite almost by heart: 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 entitled him to relief."[2] This Essay explains how *Bell Atlantic* did so and discusses some of its implications for pleading claims in the future.

THE DECISION

In *Bell Atlantic*, representatives of a putative class of local telephone and internet service subscribers sued a group of local telephone line operators for antitrust violations under Section 1 of the Sherman Act.[3] The plaintiffs' complaint alleged that the defendants conspired to restrain trade by inflating charges for the services in "parallel conduct." The plaintiffs also alleged that the conduct arose from an "agreement" between the defendants.

Section 1 of the Sherman Act does prohibit unlawful agreements to restrain trade. But, a critical element of Section 1 violations is the

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[1] Bell Atlantic v. Twombly, 127 S. Ct. 1955 (2007).
[2] Conley v. Gibson, 355 U.S. 41, 45–46 (1957).
[3] 15 U.S.C. § 1 (2006).

existence of an "agreement"; independent conduct that results in a restraint of trade is not prohibited by Section 1. Before *Bell Atlantic*, the Court had not explained what role "parallel conduct" allegations might play at the pleading stage.

The defendants moved to dismiss the complaint under Rule 12(b)(6). The district court agreed and dismissed the case. The U.S. Court of Appeals for the Second Circuit reversed, but the Supreme Court, per Justice Souter, then reversed the Second Circuit and ordered the case dismissed.[4]

The Court first explained that *Conley v. Gibson*'s requirement that the complaint "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" is critical.[5] "[G]rounds," the Court wrote, "requires more than labels and conclusions, and a formulaic recitation of the elements of a case of action will not do."[6] In short, some factual allegations must accompany the elements of a claim.

To state a Section 1 claim, the Court reasoned, that means that the plaintiff must allege facts "plausibly" suggesting the existence of a conspiracy. This "plausibility" standard, while not a "probability" standard, requires "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[7]

The Court then explained that the need for additional fact pleading is particularly necessary in antitrust litigation because antitrust discovery—especially antitrust class action discovery—can be potentially massive and expensive. Because "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases," the requirement of fact pleading is necessary to weed out, at the pleading stage, those cases "with no reasonably founded hope that the [discovery] process will reveal relevant evidence to support a [Section] 1 claim."[8]

The Court noted that *Conley* had famously stated 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 entitled him to relief."[9] But the

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[4] *Bell Atlantic*, 127 S. Ct. at 1974.
[5] Id. at 1964.
[6] Id. at 1965.
[7] Id.
[8] Id. at 1967 (internal quotations omitted).
[9] Id. at 1968.

Court disavowed an isolated interpretation, saying instead that the phrase means that a plaintiff can rely on facts not stated in the complaint to provide his claims; it does not set a minimum pleading standard.

Applying this standard, the Court found the allegations insufficient to survive a motion to dismiss and therefore reversed the Second Circuit's opinion.[10]

Justice Stevens, joined in large part by Justice Ginsburg, dissented and would have allowed the claim to proceed on limited discovery.[11] Unlike the majority, Justice Stevens would have followed *Conley*'s "no set of facts" standard. All that should be required, according to Justice Stevens, is notice of a viable claim. The *Conley* standard, he wrote, "reflects a philosophy that, unlike in the days of code pleading, separating the wheat from the chaff is a task assigned to the pretrial and trial process."[12] In his view, the allegations satisfied the pleading standards of Rule 8.

Justice Stevens said that the majority's concerns of costly and perhaps fruitless discovery could have been ameliorated through careful case supervision. He also pointed out that requiring additional facts suggesting a conspiracy will be particularly difficult for antitrust plaintiffs. In such cases, facts are often held exclusively by the defendant, and dismissals prior to discovery prevent the plaintiff from discovering those facts.[13]

SOME COMMENTARY

Bell Atlantic is a significant statement from the Court from a proceduralist perspective (even if perhaps unremarkable from an antitrust perspective). The Supreme Court had cited to the "no set of facts" language in *Conley* twelve times in controlling opinions, and many lower courts had adhered to it and its liberal notice-pleading standard. For example, just a few weeks ago, Judge Easterbrook wrote for the U.S. Court of Appeals for the Seventh Circuit in *Vincent v. City Colleges of Chicago*: "[A] judicial order dismissing a complaint because the plaintiff did not plead facts has a short half-life. Any decision declaring 'this complaint is deficient because it does not allege

[10] Id. at 1974.
[11] Id. at 1989 (Stevens, J., dissenting).
[12] Id. at 1981 (Stevens, J., dissenting).
[13] Id. at 1986–89 (Stevens, J., dissenting).

X' is a candidate for summary reversal, unless X is on the list in Fed. R. Civ. P. 9(b)."[14] The Seventh and other circuits will now have to change their pleading jurisprudence.

The question, though, is what that change will look like. What does *Bell Atlantic* really mean? Clearly, *Conley*'s "no set of facts" language is dead, at least as to the meaning that was customarily ascribed to it. And, at least for the kinds of costly class action antitrust cases like the one initiated by Twombly, *Bell Atlantic* erects an additional "plausibility" requirement of fact pleading in its place, what I have called "notice-plus."[15]

But the Court's opinion presages more expansive application. True, it relies on the detriments of costly but fruitless discovery, and one way to read *Bell Atlantic* is to limit it to the kinds of costly litigation at issue in that case. But his repudiation of the *Conley* "no set of facts" standard and his conclusion that Rule 8 requires more are not cabined by the costs and expenses that might accrue. The best reading of *Bell Atlantic* is that the new standard is absolute, that mere notice pleading is dead for all cases and causes of action. Several courts have already interpreted it beyond antitrust,[16] and non-antitrust industries, such as those whose views are represented on the Drug and Device Law blog,[17] are suggesting the same.

Safeguarding defendants from meritless strike suits is all fine and good. But using fact pleading standards to do so is problematic. Antitrust plaintiffs often do not possess evidence of an agreement to conspire, and requiring such evidence prior to discovery may prevent them from ever having it. It may be that Twombly did not allege more facts because he simply did not have them yet, not because they did not exist. This "information asymmetry," as Professor

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[14] Vincent v. City Colls. of Chicago, 485 F.3d 919, 923 (7th Cir. 2007) (internal quotations omitted).

[15] Posting of Scott Dodson to Civil Procedure Prof Blog, http://lawprofessors.typepad.com/civpro/2007/05/prof_scott_dods.html (May 21, 2007).

[16] See, e.g., Iqbal v. Hasty, 2007 WL 1717803, *8–*11 (2d Cir. 2007) (constitutional civil rights); Hicks v. Ass'n of Am. Med. Colls., 2007 WL 1577841, *2 (D.D.C. 2007) (wrongful discharge).

[17] Posting of James M. Beck and Mark Herrmann to Drug and Device Law, http://druganddevicelaw.blogspot.com/2007/05/long-overdue-retirement-for-anything.html (May 31, 2007, 04:31 EST).

Randy Picker calls it,[18] undermines the Court's suspicions that the pleading standard only will bar cases that have no "reasonably founded hope" of "reveal[ing] relevant evidence" in discovery.[19] On the contrary, the Court's standard is likely to bar many antitrust cases (and mass tort, discrimination, and a host of other cases) *with* merit.

Professor Michael Dorf has suggested that the case can be viewed as simply reiterating the rule that plaintiffs can plead themselves out of court.[20] If a plaintiff chooses to rely merely on parallel conduct, then (even if true) she cannot get relief, and so her complaint must be dismissed. But, if she instead pleads in the alternative, her complaint should go forward because she has not limited herself to a theory upon which no relief could be granted.

That reading would narrow *Bell Atlantic*'s reach, but there are several reasons why it seems unlikely. First, the Court seems to disavow this reading when it writes that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[21] Second, this interpretation would tend to penalize plaintiffs for providing *more* notice to the defendant rather than less, which would be in some tension with the implicit import of the Court's opinion suggesting the need for more supporting material.

Still others have suggested that *Erickson v. Pardus*,[22] a per curiam summary decision released just a week later, mitigates *Bell Atlantic*'s significance.[23] In *Erickson*, a prisoner asserted a Section 1983 claim under the Eighth Amendment and alleged (1) that he had hepatitis C, (2) that he was on a one-year treatment program for it, (3) that shortly after the program began the prison officials started withholding the treatment, and (4) that his life was in danger as a result.[24] The

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[18] Posting of Randy Picker to The University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2007/05/closing_the_doo.html (May 21, 2007, 16:45 EST).

[19] *Bell Atlantic*, 127 S. Ct. at 1967.

[20] Dorf on Law, The End of Notice Pleading?, http://www.michaeldorf.org/2007/05/end-of-notice-pleading.html (May 24, 2007, 07:35 EST).

[21] *Bell Atlantic*, 127 S. Ct. at 1969.

[22] 127 S. Ct. 2197 (2007).

[23] Posting of Amy Howe to SCOTUSblog, http://www.scotusblog.com/movabletype/archives/2007/06/more_on_yesterd_1.html (June 5, 2007, 17:10 EST) (discussing *Erickson*).

[24] *Erickson*, 127 S. Ct. at 2197–99.

U.S. District Court for the District of Colorado dismissed for failure to plead adequately the requirement of "substantial harm," and the U.S. Court of Appeals for the Tenth Circuit affirmed. The Supreme Court reversed and cited *Bell Atlantic* for the proposition that the complaint need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[25] In *Erickson*'s view, the prisoner provided such notice and grounds in his allegations.

Though the timing of *Erickson* is suspicious, I doubt it will temper the import of *Bell Atlantic*. As I wrote earlier, *Erickson* was a "no-brainer" of a reversal under any Rule 8 pleading standard.[26] And, Erickson was a *pro se* plaintiff, and the Court acknowledged that the pleading standards are more liberal in such cases. Thus, *Erickson*'s facts are different from those of *Bell Atlantic* in ways that make the two decisions perfectly consistent.

Indeed, *Erickson* reaffirmed *Bell Atlantic*'s requirement that the complaint provide notice *plus* grounds. If *Erickson* were meant to tell us that the Court's opinion in *Bell Atlantic* was not what it seemed, surely Justice Stevens' dissent would have been written differently to explain his understanding that *Bell Atlantic* was not so remarkable. But instead Justice Stevens viewed *Bell Atlantic* as dramatically changing the playing field, and—in my view—*Erickson* does not say otherwise. The two cases are looking at the same standard, just from worlds apart.

True, *Erickson* does say that "specific facts are not necessary,"[27] but that was the case in *Bell Atlantic*, too. "Specific facts" refers to the particularized pleading reserved for Rule 9 claims. What Rule 8 requires after both *Erickson* and *Bell Atlantic* are not specific facts, but *sufficient* facts such that the complaint as a whole makes a "showing" of entitlement to relief.

In short, the best reading of *Bell Atlantic* is that Rule 8 now requires notice-plus pleading for all cases (though especially for cases with costly discovery). It invites defendants to file motions to dismiss under Rule 12(b)(6) with greater frequency where the complaint does not allege supporting facts, and it suggests that at least some of those motions should be granted with more regularity.

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[25] Id. at 2200.

[26] Posting of Scott Dodson to Civil Procedure Prof Blog, http://lawprofessors.typepad.com/civpro/2007/06/dodson_on_erick.html (June 12, 2007).

[27] *Erickson*, 127 S. Ct. at 2200.

SOME LINGERING QUESTIONS

In addition to shifting the pleading landscape, *Bell Atlantic* raises new questions that will not be answered without more litigation.

First, what will state courts do? Twenty-six states and the District of Columbia patterned their dismissal standards on the now-repudiated "no set of facts" language from *Conley*. *Bell Atlantic* leaves those standards in limbo. They are free, of course, to refuse to follow the Supreme Court's interpretation of federal law when the sole question is a matter of state law, but there may be much rethinking to be had in the state courts to the extent their state procedures are built upon a now-repudiated federal standard.

Second, what is "plausible"? The Court made clear that the new pleading standard—at least in the antitrust context—was not a "probability" standard but only a "plausibility" standard. It adds some specific examples of factual assertions that "suggest" a conspiracy and thus would meet his plausibility test. But if the "plausibility" standard extends beyond the antitrust context, then these examples are in tension with Form 9 and prior precedent.

Form 9 of the appendix to the Federal Rules of Civil Procedure is a sample complaint for negligence, which states only: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."[28] Form 9 certainly provides notice of the claim, but the bare allegation of "negligently drove" contains no inclination one way or another that the defendant breached a duty. It is akin to a bare allegation of a "conspiracy" supported by factual allegations of parallel conduct. Requiring more in the antitrust context is in some tension with the approved allegation of negligence in Form 9.

Prior precedent also creates tension. In *Swierkiewicz v. Sorema N.A.*, the Court upheld a Title VII claim making a bald allegation of termination because of national origin discrimination, coupled with dates and other scant factual details of the termination.[29] To the extent *Bell Atlantic*'s plausibility standard applies, such a claim should have been dismissed because it lacked factual assertions that would have "suggested" the existence of a discriminatory motive instead of a lawful one. If *Bell Atlantic* does not change the result in

[28] Fed. R. Civ. P., App. of Forms, Form 9.
[29] Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2001).

Swierkiewicz, then it is difficult to understand exactly what the "plausibility" standard means.

Third, who will determine (and under what standards) what is "plausible" or not? The Court relied on commentators' examples and asserts that they would state a claim.[30] May a defendant moving to dismiss support his motion with expert opinions that the plaintiffs' allegations are not plausible? Must a plaintiff oppose the motion with his own expert's contrary opinions? Must the trial court then convert the motion into one for summary judgment? The answers are unclear.

Fourth, *Bell Atlantic* could be read as imposing a new notice-plus-grounds fact pleading standard across-the-board, of which the "plausibility" standard is merely an appropriate manifestation specifically for the antitrust context. If so, then what "grounds" are sufficient in other contexts? *Bell Atlantic* does not delineate what the "plus" might be in other contexts, and it therefore makes every complaint a test case on a motion to dismiss. This and the other questions left open are sure to lead to abundant litigation, if only to discern exactly what *Bell Atlantic* means.

CONCLUSION

So, one thing is certain after *Bell Atlantic*: it will spawn years of increased litigation. It encourages defendants to file motions to dismiss, both in the set of cases likely to be covered by its language, and also in the set less likely to be covered, if only to test its meaning and limits. Some defendants in current cases whose motions to dismiss were denied before *Bell Atlantic* may renew their motions under the new standard. Motions to dismiss will change from challenges to the legal sufficiency of a complaint to those challenging the factual sufficiency. It remains to be seen what *Bell Atlantic* ultimately means, but it is likely that it will take "sprawling, costly, and hugely time-consuming" litigation to get there.[31]

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[30] *Bell Atlantic*, 127 S. Ct. at 1972–73.
[31] Id. at 1967 n.6.