A RETURN TO FACT PLEADING?

Viable Complaints After *Twombly*

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In what will surely be one of the most analyzed decisions of the 2006–2007 Term, the U.S. Supreme Court in *Bell Atlantic v. Twombly*[1] announced the "retirement" of the longstanding principle set forth 50 years ago in *Conley v. Gibson*[2] that complaints 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."[3] The Court's ruling is likely to have a significant impact on Arizona practice.

The "Short and Plain" Statement Rule

The Rules of Civil Procedure set forth a simple standard for assessing the substantive sufficiency of a complaint. Except for cases alleging fraud or mistake, a complaint need only contain "[a] short and plain statement of the claim showing that the pleader is entitled to relief."[4] The federal Appendix of Forms illustrates this standard with short and simple "guide" complaints that contain little factual detail, but which are deemed "sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate."[5]

For example, Form 6 provides that a claim for money lent can be stated as simply as "Defendant owes plaintiff _____ dollars for money lent by plaintiff to defendant on June 1, 1936." Similarly, Form 9 provides that a claim for negligence can be stated as simply as "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."[6]

U.S. Supreme Court Analysis of Rule 8(a)(2)

Although the "short and plain statement" rule sounds simple on its face, the rule has been difficult to apply, as shown by the U.S. Supreme Court's inability over the past few Terms to articulate a cohesive standard.

For example, in 2002, the Court in *Swierkiewicz v. Soreman* unanimously ruled that a plaintiff in an employment discrimination case need not plead facts sufficient to state a prima facie claim of discrimination to survive a motion to dismiss.[7] The Court explained that a prima facie case is an evidentiary standard, rather than a pleading requirement.[8] The Court further stated that the applicable pleading standard is set forth in Rule 8(a)(2), which requires that a complaint simply give the defendant "'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'"[9] Rule 8(a), according to the Court, is not a mechanism for weeding out groundless claims. Rather, Rule 8(a) "relies on liberal discovery rules and summary judgment motions to define facts and issues and to dispose of unmeritorious claims."[10]

In 2005, however, the Court seemed to make an about-face. In *Dura Pharmaceuticals v. Broudo* the Court dismissed a securities class action complaint as legally insufficient because the plaintiffs failed to adequately plead loss causation (*i.e.*, a causal connection between the alleged securities fraud and the plaintiffs' losses).[11] The Court reached that conclusion even though the plaintiffs alleged in their complaint that they purchased stock in reliance on the integrity of the market price, that they paid artificially inflated prices for their stock as a result of misrepresentations by the defendant, and that they suffered damages thereby.[12] Nevertheless, the Court deemed the complaint inadequate because it failed to plead the details of what the relevant economic loss might be or the causal connection between the plaintiffs' losses and the defendant's alleged misrepresentations.[13] The Court explained that allowing a plaintiff to forego these details would permit a "largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the discovery process will reveal relevant evidence."[14] Although the Court cited its *Swierkiewicz* decision, the Court failed to harmonize its ruling with *Swierkiewicz*'s command that discovery and summary judgment, rather than motions to dismiss, are the proper means to dispose of unmeritorious claims.

This past Term in *Twombly*, the Court went even further than it did in *Dura*.

The Court, in a 7–2 decision, upheld dismissal of a complaint alleging an antitrust conspiracy between former Baby Bells not to compete in each others' markets.[15] The Court upheld dismissal on the grounds that the alleged "antitrust conspiracy was not suggested by the facts adduced" in the complaint.[16]

Under the antitrust laws, independent parallel conduct by competitors is lawful even where it results in decreased competition, whereas anticompetitive conduct that results from an agreement between competitors is illegal. The "crucial question" is whether the challenged conduct was the result of inde-

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The Court explained that neither discovery nor summary judgment is sufficient to weed out frivolous claims: Discovery is subject to abuse.

pendent decisions, or instead resulted from an agreement between competitors.[17] With that question in mind, the Court looked at whether the allegations of the complaint presented plausible grounds to infer the existence of an unlawful agreement as opposed to independent parallel conduct. Although the complaint expressly alleged that the defendants "have entered into a contract, combination or conspiracy to prevent competitive entry into their respective local … markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another,"[18] the Court held those allegations inadequate to state a claim because they are "merely legal conclusions resting on the prior allegations" and did not invest the conduct alleged "with a plausible suggestion of conspiracy."[19] The Court held that to survive dismissal, the complaint needed to allege enough facts "to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement."[20]

The Court justified its decision through reliance on "the practical significance" of Rule 8's pleading requirements. The Court quoted *Dura* that "a largely groundless claim" should not be permitted to "take up the time of a number of other people" or scare a defendant into settlement.[21] The Court then expanded upon *Dura*, declaring that when a plaintiff's allegations, even if true, could not entitle the plaintiff to relief, "'this basic deficiency should be exposed at the point of minimum exposure of time and money by the parties and the court.'"[22] Discovery expenses, in particular, guided the Court's reasoning: "'[A] district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'"[23]

In a stark departure from *Swierkiewicz*, the Court explained that neither discovery nor summary judgment is sufficient to weed out frivolous claims: Discovery is subject to abuse, and "the success of judicial supervision in checking discovery abuse has been on the modest side."[24] And summary judgment is inadequate because "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."[25]

A Gold Watch for *Conley*

In an even greater departure from precedent, the *Twombly* Court addressed head-on the longstanding rule set forth in *Conley v. Gibson* 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."[26] The Court found this "no set of facts" language to be overbroad when read literally because it would allow wholly conclusory allegations to survive a motion to dismiss "whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of undisclosed facts' to support recovery."[27] Reading the "no set of facts" language of *Conley* literally would preclude dismissal upon "any showing of a 'reasonably founded hope' that a plaintiff would be able to make a case."[28] To avoid that result, the Court proceeded to give the "no set of facts" language "its retirement," finding it "best forgotten."[29]

Federal Pleading After *Twombly*

So where does *Twombly* leave pleading in federal court? It will be tempting for courts to distinguish *Twombly* as applicable only to antitrust cases, as much of the opinion discusses the unique nature of the particular antitrust theory at issue in the case (*i.e.*, parallel conduct vs. conspiracy). But the Supreme Court stated expressly that it was not applying a heightened pleading standard, nor was it invoking the particularity standard of Rule 9(b).[30] Hence, *Twombly* involves the same basic Rule 8(a)(2) standard applicable to other civil cases, and thus should be difficult to sidestep easily. Likewise, although the Court's concern about the burdens of discovery in antitrust litigation is warranted, such burdens are not unique to antitrust cases, but rather are often present in many sorts of cases. Accordingly, the rationale for *Twombly* should extend broadly to a wide range of federal cases.

Arizona Pleading After *Twombly*

Arizona's versions of the rules at issue in *Twombly*—Rules 8(a)(2) and 12(b)(6)—are identical to their federal counterparts. Arizona courts typically give considerable weight to the federal interpretations of the rules because Arizona's rules substantially adopted the Federal Rules of Civil Procedure.[31] In addition, Arizona cases often invoke language similar to the *Conley* language that was retired in *Twombly*.[32] Consequently, *Twombly* is likely to have a significant impact on Arizona proceedings.

The impact, however, may be a return to the Arizona Supreme Court's earlier pleading practice. In 1944—just a few years after Arizona adopted Rules 8 and 12—the Arizona

Supreme Court analyzed the sufficiency of a complaint alleging negligence, and reached a result strikingly similar to that of *Twombly*.

In *Malin v. Southern Pacific*,[33] Mr. and Mrs. Malin sued for injuries they sustained when their car crashed into a stopped train. The plaintiffs claimed in their complaint that the train had been negligently stopped across a highway, that defendants had negligently failed to provide warning signals, and that the train constituted a hidden trap to motorists. The superior court dismissed under Rule 12(b)(6), and the Supreme Court affirmed. On appeal, the Malins invoked case law similar to the retired *Conley* standard, arguing that a complaint should never be dismissed unless the facts are such that under no possible theory could the requested relief be granted.[34] The Court rejected that argument because the Malins' allegations merely tracked in conclusory manner the elements of their claim without providing factual support.

Like *Twombly*, *Malin* turned on the sufficiency of the factual allegations of the complaint when measured against the legal standard for liability. The then-applicable legal standard was that a railroad company is not liable for injuries to motorists who run into a stopped train unless the company failed to give adequate warning of the train such that the presence of the train was a "hidden trap."[35] As was the case in *Twombly*, the complaint at issue in *Malin* expressly alleged a violation of the applicable legal standard: The plaintiffs alleged that the defendants had failed to provide warning signals or other notice of the train such that the train constituted a hidden trap. Nevertheless, the Court held that the complaint failed to state a claim because it failed to state facts showing that the train was a hidden trap: "[N]o circumstances were alleged even tending to support the statement that the railroad train 'constituted a hidden trap and danger,' leaving it but a pure conclusion."[36]

Stating a Claim After *Twombly*

So what guidance do *Malin* and *Twombly* provide to Arizona practitioners? Both cases show that conclusory allegations, unsupported by specific factual contentions, expose a complaint to attack. Beyond that, *Twombly* provides some answers on what it takes to plead a viable complaint:

- The complaint must provide the grounds of the plaintiff's entitlement to relief, which requires "more than labels and conclusions."[37]
- Simply alleging the elements of a cause of action is not sufficient to survive a motion to dismiss.[38]
- Speculative allegations will be viewed with scrutiny.
- The complaint must include factual allegations presenting "plausible grounds" indicating that the pleader is entitled to relief.[39]
- Allegations must cross "the line between possibility and plausibility" to survive dismissal.[40] The complaint must "*in toto* . . . render plaintiffs' entitlement to relief plausible."[41]

As these guidelines indicate, plaintiffs should now expect their complaints to be subject to a fairly rigorous challenge.

Is this what the drafters of the Federal Rules had in mind? Probably not. But is requiring plaintiffs to present plausible grounds for relief before commencing discovery a good thing? Probably. Requiring plaintiffs to come forth at the outset with more than mere conclusory allegations is nothing new. And ferreting out patently deficient pleadings makes sense for both litigants and the judicial system. Requiring plaintiffs to come forth in their complaints with enough factual allegations to raise a reasonable expectation that discovery will reveal evidence entitling them to relief is a minor cost compared with the expenses and burdens of litigation noted in *Twombly* and the strain that rising caseloads and tight fiscal constraints have imposed on our courts. AZAT

endnotes

1. 550 U.S. _____, 127 S. Ct. 1955 (2007).
2. 355 U.S. 41, 45-46 (1957).
3. *Id.* at 45-46.
4. FED.R.CIV.P. 8(a)(2).
5. FED.R.CIV.P. 84 & 1937 Advisory Committee Notes.
6. Of course, the complaint also must allege jurisdiction and damages. *See* Form 9, Appendix of Forms.
7. 534 U.S. 506, 508 (2002).
8. *Id.* at 510.
9. *Id.* at 512 (quoting *Conley*, 355 U.S. at 47).
10. *Id.* at 512.
11. 544 U.S. 336, 339-40 (2005)
12. *Id.* at 339-40.
13. *Id.* at 347.
14. *Id.* (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)).
15. *Twombly*, 127 S. Ct. 1955.
16. *Id.* at 1973.
17. *Id.* at 1964.
18. *Id.* at 1963.
19. *Id.* at 1970, 1971.
20. *Id.* at 1965.
21. *Id.* at 1966 (quoting *Dura*, 544 U.S. at 347).
22. *Id.* (quoting 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (2d ed. 1987), at 233-34).
23. *Id.* at 1967 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528 n.17 (1983)).
24. *Id.* at 1967.
25. *Id.*
26. 355 U.S. at 45-46 (quoted in *Twombly*, 127 S. Ct. at 1968.
27. *Twombly*, 127 S. Ct. at 1968.
28. *Id.* at 1969 (quoting *Dura*, 544 U.S. at 347).
29. *Id.*
30. *Id.* at 1973 n.14.
31. *Anserv Ins. Services, Inc. v. Albrecht in and for County of Maricopa*, 192 Ariz. 48, 49 ¶ 5 (1998).
32. *E.g.*, *Fidelity Sec. Life Ins. Co. v. Dep't of Ins.*, 191 Ariz. 222 (1998) (a complaint should not be dismissed unless "plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof"); *Newman v. Maricopa County*, 167 Ariz. 501, 503 (Ct. App. 1991) (a complaint should not be dismissed 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").
33. 62 Ariz. 126 (1944).
34. *Id.* at 128.
35. *Id.*
36. *Id.* at 130.
37. *Twombly*, 127 S. Ct. at 1965.
38. *Id.*
39. *Id.*
40. *Id.* at 1966.
41. *Id.* at 1973 n.14.