CON

BY MARK SAMSON

ARIZONA SHOULD AVOID *TWOMBLY'S* PERNICIOUS EFFECTS

The recent United States Supreme court opinion in *Bell Atlantic v. Twombly*[1] is a strong reminder that for all its claim of evenhanded dispensation of "justice," the law is, at bottom, often called on to decide between competing social visions in a way that is far closer to political decision-making than the law. These kinds of decisions often turn on the decision-maker's ideology rather than legal principles, which seems to have happened in *Twombly.*

The surface choice in *Twombly* was the proper standard for deciding motions to dismiss.

The sub-surface agenda is revealed by the majority's language. It described the class of case with which it was concerned as those in which "largely groundless claims" are allowed to "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."

Of course, once that kind of rhetoric is used, the decision is self-fulfilling—rather than burden innocent defendants with the expenses of discovery, such "strike suits" should be able to be gotten rid of early in the process.

Understandable as the reaction may be, however, accepting the premise that there are many groundless claims that need to be gotten rid of before burdening defendants with factual discovery is contrary to the basic premise of the Federal Rules of Civil Procedure. The federal rules were intended to eliminate the idea of formal pleading requirements that meant cases

— continued on p. 28

MARK SAMSON practices in the Phoenix office of Keller Rohrback PLC, where he focuses in tort law, including medical negligence, products liability, and other significant personal injury cases.

were decided on legal grounds. Instead, cases were to be decided on their merits, not by arcane pleading rules or lawyerly debate. Indeed, the approach of the federal rules makes the early pleading stages of a suit almost unimportant: Nothing is to be decided until later, when the facts have been developed.

What Flows From *Twombly*

It is important to recognize that the effects of reading *Twombly* broadly will go far deeper than eliminating groundless suits.

Its apologists will say, "What's wrong with requiring more scrutiny of the pleadings and stronger teeth for motions to dismiss? If they don't have the facts, they shouldn't be making a claim anyway." That approach might make some sense if "the facts" were equally accessible to potential plaintiffs and defendants. In the real world, of course, they aren't—an unchanging truth that no doubt motivated the federal rules' approach of minimizing pleading and maximizing discovery to resolve cases on their merits. Where the facts are in the defendants' possession, requiring more facts from a plaintiff before discovery turns its back on the federal rules' basic intent, something the author of the main article seems to welcome:

> "[P]laintiffs should now expect their complaints to be subject to a fairly rigorous challenge. Is this what the drafters of the Federal [and Arizona] Rules had in mind? Probably not. But is requiring plaintiffs to present plausible grounds for relief before commencing discovery a good thing? Probably."[2]

Concluding that strengthening the use of motions to dismiss is a "good thing" requires one to assume that the effect will be limited to getting rid of "bad" cases. That assumption ignores the socioeconomic realities of litigation. As a group, civil defendants have more money than civil plaintiffs. Therefore, any increase in the legal complexity of a claim (with a corresponding increase in legal fees) is good for defendants and bad for plaintiffs. By making motions to dismiss more viable, defendants gain an additional position from which to fight a step-by-step withdrawal. In a war of attrition against a less well-funded opponent, that additional line of defense can make all the difference.

Moreover, because the new step comes before discovery, the defendant reaps a double harvest: Before a plaintiff can even bring a claim, they will have to spend more money (money they may not have) on factual investigation. And, because the defendant may often have control of many (if not all) of the liability facts until forced to share them through the disclosure and discovery process, spending that money may not yield enough information to proceed.

The ability to increase plaintiffs' expenses in *all* cases, good or bad, and the resulting "chilling" of plaintiffs is the most pernicious effect of *Twombly,* and the biggest reason why the Arizona Supreme court should not adopt its reasoning.

If it rejects *Twombly,* the Arizona Supreme Court can rest that refusal on several important differences between the two systems:

- The Arizona Court's strong historical commitment to "notice pleading."[3]
- The existing break with federal law over disclosure rules and Arizona's even stronger commitment to full factual disclosure without "games." Beginning with the Zlaket rules, Arizona has committed more fully than the federal courts to ensuring equal access to the facts underlying a case, basing that commitment specifically on the goal of allowing cases to be decided on their factual merits, not legal gamesmanship. Reinvigorating the process-based resolution of motions to dismiss is utterly inconsistent with those principles.
- As a court of general jurisdiction, state courts have fewer of the technical specialty areas (copyright and patent practice, for example) that had led commentators, even before *Twombly,* to remark on how abandonment of notice pleading in numerous subject areas of federal practice had made it the exception rather than the rule in federal court.[4]
- Although touted as a way to save judicial resources by earlier determination of cases, the more likely effect in courts of general jurisdiction like the state courts is the opposite: Unless one wants to dispense with merit-based decision altogether, far more motions to dismiss will be filed than will be granted (most deficient claims will still be "fixed" via amendment). The net effect of that on the court system is that there is *more* work for the judges as each defendant takes its shot at ending the case, fails and then goes on through discovery.

It would be a mistaken departure for the Arizona Supreme Court to follow the lead of the *Twombly* Court. Influenced perhaps by the setting of a huge antitrust case in which the burden of discovery might well have been significant even to the corporate giants involved, the United States Supreme Court gave in to a result-oriented approach and turned its back on the Federal Rules by dismissing the case. In his dissent, Justice John Paul Stevens identified the folly of that approach, citing the wisdom of Judge Charles E. Clark, the principal draftsman and standard bearer of the adoption of the Federal Rules of Civil Procedure:

> I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings, *i.e.,* the formalistic claims of the parties. Experience has found no quick and easy short cut for trials in cases generally and antitrust cases in particular.[5]

The last thing Arizona needs is more motions to dismiss with the burden of briefing, arguing and follow-up (through amendment) that each requires. Overall, the Arizona courts will function more smoothly, more efficiently and more fairly if the thought processes behind the *Twombly* decision are left as solely a matter of federal antitrust law.

— ENDNOTES on p. 59

CON

endnotes

—continued from p. 28

1. ___ U.S. ___, 127 S. Ct. 1955 (2007).
2. Richard A. Halloran, *A Return to Fact Pleading? Viable Complaints After* Twombly, this issue, at 20, 24.
3. *See, e.g., State ex rel. Corbin v. Pickrell,* 667 P.2d 1304, 1309 (Ariz. 1983) (stating in a complex antitrust case, "Motions to dismiss for failure to state a claim are not favored in Arizona law").
4. *See, e.g.,* Christopher M. Fairman, *The Myth of Notice Pleading,* 45 ARIZ. L. REV. 987 (2003).
5. *Twombly,* 550 U.S. at 18 (Stevens, J., dissenting).