

## Antitrust Alert

### Pleading Factual Specificity: The Evolving Implications of *Twombly* in Moving to Dismiss Section 1 Antitrust Claims

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#### Introduction

Pleading an antitrust claim, especially one alleging a conspiracy, has become more challenging. Since the Supreme Court's 2007 decision *Bell Atlantic Corp. v. Twombly*,<sup>1</sup> which addressed the Federal Rules notice pleading requirements, district courts have been empowered to dismiss antitrust cases. And while the Supreme Court expressly rejected the notion that it was imposing a heightened pleading standard, the actual evolution of the pleading standard in federal district and appellate courts demonstrates that most courts are interpreting *Twombly* broadly.

This alert focuses on one aspect of the post-*Twombly* development of antitrust pleading standards: factual specificity. While *Twombly* arguably only requires that a claim be "plausible" based upon the allegations made, *Twombly* can and has been interpreted also to require detailed factual pleadings. By requiring fact-specific pleading on each of these issues, courts, in effect, have created new elements in stating a conspiracy-based antitrust cause of action.

#### The Heightened Pleading Standard of Footnote 10

The issue presented in *Twombly* was whether the notice pleading requirements of Federal Rule of Civil Procedure 8 allow dismissal of a claim only if there is "no set of facts" that supports a plaintiff's allegations of an antitrust conspiracy. Rejecting prior precedent, the Court held that a claim must have plausible grounds, that is, enough factual matter (taken as true) to suggest an agreement was made. The Court reinforced this message in *Ashcroft v. Iqbal* two years later.<sup>2</sup> In sum, Supreme Court precedent now fairly requires "some specificity" in order to meet the pleading requirements of the Federal Rules.

But numerous federal courts have seized the Court's obiter dictum in footnote 10 of the *Twombly* decision to require plaintiffs to plead specific facts regarding the who, when, where, what, why and how of a conspiracy.<sup>3</sup> Specifically, the Supreme Court commented, with respect to allegations of a direct conspiracy, that "the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies."<sup>4</sup> The Court "doubted" that the complaint's references to a direct agreement were, therefore, sufficient and noted that "a defendant seeking to respond to plaintiffs' conclusory allegations in the §1 context would have little idea where to begin."<sup>5</sup>

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<sup>1</sup> 550 U.S. 544 (2007).

<sup>2</sup> 129 S. Ct. 1937 (2009) (broadening application of pleading standards from *Twombly* to all federal court actions).

<sup>3</sup> See, e.g., *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010); *Kendall v. VISA U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008); *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430 (6th Cir. 2008); *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007); *In re Florida Cement & Concrete Antitrust Litig.*, 2010 WL 4136306 (S.D. Fla. Oct. 12, 2010); *Superior Offshore Int'l, Inc. v. Bristow Group Inc.*, 2010 WL 3699923 (D. Del. Sept. 14, 2010); *Anderson New, LLC v. American Media, Inc.*, 2010 WL 3001756 (S.D.N.Y. Aug. 2, 2010); *LaFlamme v. Société Air France*, 702 F.Supp.2d 136 (E.D.N.Y. 2010); *In re Text Messaging Antitrust Litig.*, 2009 WL 5066652 (N.D. Ill. Dec. 10, 2009); *Solomon, et al. v. Blue Cross & Blue Shield Assoc.*, 574 F.Supp.2d 1288 (S.D. Fla. 2008).

<sup>4</sup> *Twombly*, 550 U.S. at 565, n.10.

<sup>5</sup> *Id.*



This dictum is becoming law. The Ninth Circuit, for example, has explained that a § 1 plaintiff “must plead not just ultimate facts (such as conspiracy), but *evidentiary* facts.”<sup>6</sup> If a complaint “does not answer the basic questions: who, did what, to whom (or with whom), where, and when,” it will be dismissed.<sup>7</sup>

## Federal Court Application

Under the evolving case law, each of these concepts, thus, can become a separate basis to dismiss a claim or defendant from an antitrust action:

*Who:* Not surprisingly, courts have required plaintiffs to identify the members of a supposed conspiracy. But courts have also gone a step further and required plaintiffs to identify specifically the role of each defendant in the conspiracy. Thus, even in matters in which a plaintiff has a solid factual foundation for stating an antitrust conspiracy claim, courts will dismiss defendants who cannot be tied factually to the conspiracy. Defendants who are simply named in a complaint, for example, should be able to gain easy dismissal in most cases.

*When:* Courts have mandated that plaintiffs set forth in detail the time period of a conspiracy, in terms of the length of the conspiracy, the dates on which parallel conduct occurred and the time(s) particular agreements came to pass. Courts have rejected broad time frames as too unspecified to plausibly infer an agreement and have likewise rejected multiyear time frames that provide no explanation of when unlawful agreements were made.

*What:* The “what” of a conspiracy claim is simply the agreement. *Twombly*, of course, holds that parallel action—for example, a uniform increase in industry prices—is not enough, by itself, to allege an agreement. While such facts are circumstantial evidence, they are not sufficient. But even in cases in which plaintiffs allege directly an agreement, some courts have required that plaintiffs identify the agreement with specificity, including the products or services subject to the agreement. Moreover, courts also have scrutinized other elements of the substance of other types of antitrust claims, such as allegations of relevant markets, under the *Twombly* specificity standard. As a result, there is now an additional level of technical complexity added to antitrust claims.

*Where:* Courts likewise are requiring, in conjunction with these other factors, some factual allegations about how an agreement came about, including the location(s) where the agreement was reached. Moreover, plaintiffs often allege opportunities to conspire, that is, events at which competitors meet, such as trade association meetings. Plaintiffs cite such events as inferential support for agreements. However, courts are uniformly rejecting such arguments, absent additional facts.

*How and Why:* Courts also reject claims where the theoretical underpinnings of the allegations themselves lack plausibility. For example, where the purported goal of the alleged conspiracy is facially implausible from a economic standpoint or where plaintiff’s theory of defendants’ motivation points more towards unilateral action than a conspiracy, courts will dismiss § 1 claims.

## Implications

In light of this federal court trend, antitrust defendants need to evaluate each of the “who, what, where, when, and why” aspects of a § 1 claim for plausibility, as discussed above, with an eye towards chipping away at the breadth and substance of conspiracy allegations and foreclosing the repleading of any claims that fail to meet the early sufficiency requirements of *Twombly* and its progeny.

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<sup>6</sup> *Kendall*, 518 F.3d at 1047 (emphasis added).

<sup>7</sup> *Id.* at 1028. See also cases cited in footnote 2, *supra*.