

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES

An incisivemedia publication

Pleading in the Post-*Twombly* Era: What Is Really Required?

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Special to the Legal

Since the U.S. Supreme Court in May 2007 issued its decision in *Bell Atlantic Corp. v. Twombly* — a case involving antitrust claims — complaints, antitrust and otherwise, filed in the federal courts have increasingly been met by motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Generally, these motions to dismiss cite *Twombly* in support of the assertion that a heightened pleading standard was established by that decision and has not been satisfied by the plaintiff. The 3rd U.S. Circuit Court of Appeals, in its decision in *Phillips v. County of Allegheny*, discussed *Twombly* and explained its impact on cases outside the antitrust context in which *Twombly* was decided. The district courts in the 3rd Circuit, following *Phillips'* extension of *Twombly*, have applied *Twombly* in ruling on Rule 12(b)(6) motions to dismiss complaints asserting all types of claims. Based on these decisions, claimants are now required to plead enough factual allegations to establish “a reasonable expectation” that discovery will reveal evidence of each of the claim’s elements.

In *Twombly*, the Supreme Court only addressed the pleading standard for plaintiffs asserting an antitrust conspiracy theory based on alleged parallel conduct on the part of defendants. The court concluded that an antitrust conspiracy theory based solely on allegations of parallel conduct was appropriately dismissed by the district court for failure to state a claim. Justice David Souter, delivering the opinion of the court,

found that such limited allegations “gets the complaint close to stating a claim, but without some further factual enhancement, it stops short of the line between possibility and plausibility of ‘entitle[ment] to relief.’” Further, the court stated that “labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”

Rather, “[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaints’ allegations are true (even if doubtful in fact).” The Supreme Court was, however, careful to note that, “we do not apply any ‘heightened’ pleading standard.”

In reaching its decision, the Supreme Court rejected the language in *Conley v. Gibson*, a decision issued by the court in 1957 and written by Justice Hugo Black, that a motion to dismiss for failure to state a claim should be denied “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.” The court found in *Twombly* that if this language in *Conley* is read literally, “a wholly conclusory statement of claim would 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.” The court, concluding that such a result was wholly improper, stated that the language in *Conley* “is best forgotten as incomplete, negative gloss on an accepted pleading standard.”

Mere days after *Twombly* was decided, the Supreme Court cited *Twombly* and applied only the fair notice standard of Rule 8 in a non-antitrust case. In *Erickson v.*



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Pardus, the court said “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.’”

The 3rd Circuit in *Phillips* addressed the impact of *Twombly* on motions to dismiss claims unrelated to antitrust law. Cautioning that “[f]ew issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts,” the 3rd Circuit concluded that *Twombly*, with its “new ‘plausibility’ paradigm for evaluating the sufficiency of complaints,” applied outside the antitrust

context. However, the 3rd Circuit significantly found that the *Twombly* standard does not require “detailed factual allegations” or pleading with particularity, as many had argued. Rather, the 3rd Circuit said, *Twombly* “requires only 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.” In other words, a blanket assertion of an entitlement to relief, which would have previously satisfied *Conley*’s “no set of facts” language, will not satisfy the requirement that a claimant provide fair notice and grounds on which the claims of the complaint rest.

However, Judge Richard Nygaard further stated in *Phillips* that *Twombly* left intact the concept that any reasonable inference that may be drawn from the complaint must be viewed in the light most favorable to the plaintiff. In that regard, the 3rd Circuit summed up the *Twombly* formulation of the pleading standard applicable to all types of claimants: “stating ... a claim requires a complaint with enough factual matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element[s].”

Following the direction of the 3rd Circuit in *Phillips*, the district courts have subsequently applied the *Twombly* standard in various cases outside the antitrust context where a motion to dismiss for failure to state a claim has been presented. Two weeks ago, in *In re Pressure Sensitive Labelstock Antitrust*

Litigation, this standard was interpreted by Judge Thomas Vanaskie of the Middle District of Pennsylvania as announcing three principles: “the pleading must be considered in its entirety; the claims presented need not be alleged with particularity, but there must be sufficient factual averments that place the defendants on notice of the bases for the claims; and plaintiff’s entitlement to relief on the bases for the claims presented against a particular defendant must be plausible.” Further, Vanaskie noted, as had Nygaard, that “*Twombly* disavowed the creation of a ‘heightened’ pleading standard” and “affirmed the general rule that pleading in federal court need only comply with Rule 8(a)(2).”

In *Sheller Ludwig & Sheller P.C. v. Equitrac*, Judge William Yohn of the Eastern District of Pennsylvania, applying the standard enunciated in *Twombly*, granted the defendant’s motion to dismiss a claim for breach of contract because the plaintiff failed “to provide supporting factual allegations above the speculative level.” Yohn noted in so holding, however, that the 3rd Circuit determined [that] *Twombly* did not provide for a ‘plausibility’ standard but rather reiterated that Federal Rule of Civil Procedure 8 requires a notice pleading standard. Additionally, in *Hiltabidel v. Herald Standard Newspaper*, Judge Terrence McVerry of the Western District of Pennsylvania applied the *Twombly* standard to a hostile work environment case. Ultimately, McVerry denied the motion to dismiss because the allegations of the complaint rendered the claims “plausible.”

These cases illustrate the broad extension of *Twombly* to non-antitrust cases. Judge Nora Barry Fischer of the Western District

of Pennsylvania in *J.C. v. Ambridge Area School District* also recognized that the 3rd Circuit in *Phillips* “interpreted *Twombly* as a reaffirmation of both the notice pleading standard under Federal Rule of Civil Procedure 8 and the general standard in a Rule 12(b)(6) motion.”

As these district court decisions make clear, the post-*Twombly* era has only just begun to take form and will require further clarification and guidance from the 3rd Circuit. Indeed, the 3rd Circuit acknowledged in *Phillips*, “[t]he issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come.” This will undoubtedly be true for cases falling within or outside the antitrust context. The bottom line is that in light of the decisions by the Supreme Court, 3rd Circuit and district courts, more investigation, thought and preparation will be demanded upon all types of claimants and their lawyers in the post-*Twombly* era.

In the 3rd Circuit, a complaint will no longer survive a motion to dismiss merely because “the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.” Rather, claimants before the district courts within the 3rd Circuit, as demonstrated by the aforementioned cases, will be required to plead factual allegations that establish “a reasonable expectation that discovery will reveal evidence of the necessary element[s].” This, of course, is easier said than done when hard evidence of, for example, conspiratorial conduct in the antitrust context, is usually in the hands of the defendants. Courts will still need to balance this reality in the face of *Twombly*. •