LexisNexis® Emerging Issues Analysis

Dennis D. Palmer and Adam K. Fuemmeler on

"Motions to Dismiss in Parallel Conduct and Plus Factors Antitrust Cases After Twombly and Iqbal." [Part I]

2012 Emerging Issues 6240

Click here for more Emerging Issues Analyses related to this Area of Law.

I. Introduction

In a ground breaking decision in 2007, the U.S. Supreme Court in *Bell Atlantic Corporation v. Twombly* tightened up the standards for pleading the element of conspiracy that is necessary to establish a violation of Section 1 of the Sherman Act.[1] The Complaint in *Twombly* alleged that Incumbent Local Exchange Carriers ("ILECs" also known as "baby Bells") agreed to a nationwide market-division agreement to avoid competing with each other by not expanding into contiguous territories.[2] *Twombly* held that the Complaint failed to state a claim for relief under Rule 12(b)(6) Fed. R. Civ. Proc. because it lacked sufficient "factual matter" to allege an anticompetitive conspiracy that is plausible.[3] Two years later in *Ashcroft v. Iqbal*, the U.S. Supreme Court applied the pleading standards in *Twombly* to all civil complaints.[4]

Commentators have criticized *Twombly* and *Iqbal* on various grounds, including the fact that the Court failed to enumerate the facts that must be alleged to plead conspiracy in antitrust cases where direct evidence of an anticompetitive agreement is kept secret and thus unavailable.[5] Complaints based on antitrust conspiracies often do not involve explicit agreements. By its nature parties to a conspiracy want to keep them secret. Thus, direct evidence of an agreement is many times lacking. In cases involving parallel conduct, meaning that one or more companies intentionally adopt the practices of some competing company, proof of conspiracy to violate Section 1 of the Sherman Act requires additional evidence of assent by the defendants to participate in collusive conduct. These additional facts to prove collusion among conspirators are commonly referred to as "plus factors."[6]

---

1 550 U.S. 544 (2007).
2 *Id.* at 551 (noting the allegations of an agreement to allocate the local telephone and internet service markets).
3 *Id.* at 556.
4 129 S. Ct. 1937 (2009).
5 *See, e.g.,* Herbert J. Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 Iowa Law Bulletin 55, 58-60 (December 2010), available at http://ssrn.com/abstract=1508511; Luke Meier, *Why Twombly is Good Law (But Poorly Drafted) and Iqbal Will be Overturned*, (January 4, 2011), available at http:ssrn.com/abstract=1734791.
6 Proof of antitrust conspiracy using "plus factors" is discussed in: Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶1434 (3d ed. Supp. 2010); *see, also, Merck-Medco Managed Care v. Rite Aid Corp.*, No. 98-2847, 1999 WL691840, at *9 (4th Cir. Sept. 7, 1999) (The court stated:

TOTAL SOLUTIONS
Legal Academic Risk & Information Analytics Corporate & Professional Government
LexisNexis®
LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

Prior to *Twombly* and *Iqbal*, courts frequently permitted the inference of antitrust conspiracies at the pleading stage from allegations falling short of explicit communications of an anticompetitive agreement.[7] After *Twombly and Iqbal*, bare allegations of a conspiracy and parallel conduct will not suffice without more specific allegations of an anticompetitive agreement by defendants. This article discusses the new pleading standards required by *Twombly* and *Iqbal*. It examines several post *Twombly* and *Iqbal* antitrust cases involving parallel conduct and plus factors to determine what allegations are sufficient to state a claim of anticompetitive conspiracy. It also suggests some allegations that plaintiffs should make in conscious parallel antitrust cases to satisfy the pleading standards of *Twombly* and *Iqbal*. Finally, it suggests some actions that defendants should take and not engage in to improve their chances of succeeding in motions to dismiss under *Twombly* and *Iqbal* or avoid conscious parallelism claims.

II. *Twombly* and *Iqbal* Decisions

Twombly involved a class action Section I Sherman Act claim that was brought by subscribers of local telephone and high speed internet services. Twombly alleged that the four ILECs, which were created as a result of the court ordered divestiture of the American Telephone and Telegraph Company, conspired to restrain trade in two ways.[8] First, they "engaged in parallel conduct" in their respective service areas to inhibit the growth of competitive local exchange carriers ("CLECs"). Second, they agreed to refrain from competing against each other.[9]

In particular, the complaint alleged that (1) the ILECs that control 90 percent or more of the local telephone service market in the 48 contiguous states did not expand into each

---

In order to infer a conspiracy, conscious parallelism must be accompanied by "plus factors". While the Supreme Court has not recounted a list of plus factors, numerous plus factors, such as "motive to conspire," "opportunity to conspire," "high level inter-firm communications," "irrational acts or acts contrary to a defendant's economic interest, but rational if the alleged agreement existed, and departure from normal business practices, have been considered by other circuits.)

7 *See, e.g.*, *In re Pressure Sensitive Labelstock Antitrust Litig.*, 356 F. Supp. 2d 484, 492 (M.D. Pa. 2005) (noting that "a plaintiff 'need not allege the existence of ... plus factors in order to plead an antitrust cause of action' " (quoting *Lum v. Bank of Am.*, 361 F.3d 217, 230 (3d Cir. 2004) and adding emphasis)); *N. Jackson Pharmacy, Inc. v. Express Scripts, Inc.*, 345 F. Supp. 2d 1279, 1286 (N.D. Ala. 2004) (noting that " 'plus factor' allegations serve to substantiate a plaintiff's conspiracy allegation; their purpose is not to clarify an otherwise incomprehensible claim," and that "[j]ust as an employment-discrimination plaintiff need not allege 'circumstances that support an inference of discrimination,' there is no need for an antitrust plaintiff to allege a 'plus factor [which] generates an inference of illegal price fixing.' " (citations omitted, second alteration in original)); *Nagler v. Admiral Corp.*, 248 F.2d 319, 325 (2d Cir. 1957) (suggesting that a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy).

8 *Twombly*, 550 U.S. at 550.

9 *Id.*

LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

others' geographic areas though they had the right to do so; (2) each ILEC made unfair agreements with competing telephone companies to restrict or exclude competition in their respective territories; and (3) the CEO of Qwest, one of the ILECs, had stated that competing in the territory of another ILEC "might be a good way to turn a quick dollar but that doesn't make it right."[10] The plaintiff also alleged that defendants entered into an explicit agreement to allocate territory among themselves.[11]

In *Twombly*, the Supreme Court retired *Conley v. Gibson*'s "no set of facts" test for determining if a complaint sufficiently pleads a claim.[12] *Twombly* stated that the facts alleged to state a claim for relief in a Section 1 case "must be enough to raise a right to relief above the speculative level."[13] Facts must be sufficient to "nudge [the plaintiff's] claims across the line from conceivable to plausible."[14] The plaintiff is required to allege "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[15]

Section 1 of the Sherman Act requires a showing of a tacit or express agreement to unreasonably restrain competition.[16] *Twombly* noted that in the context of antitrust claims, a complaint must set forth "enough factual matter (taken as true) to suggest that an agreement was made."[17] *Twombly* explained that "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.[18] A "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is unlikely and remote.'"[19]

Citing cases and commentators, *Twombly* stated that an allegation the defendants engaged in parallel conduct, in which they acted in a common manner in competing in the market, combined with a bare assertion of conspiracy "will not suffice" to state a

---

10 *Id.* at 550-51.
11 *Id.* at 551. Plaintiffs only pled that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent entry . . . and ha[d] agreed not to compete with one another."
12 *Id.* at 561-63 (the Supreme Court discussed its opinion in *Conley v. Gibson*, 355 U.S. 41 (1957) at length concluding that the "no set of facts" language "phase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 563).
13 *Id.* at 555.
14 *Id.*
15 *Id.*
16 *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.* 346 U.S. 537, 540 (1954).
17 *Id.* at 556.
18 *Id.*
19 *Id.*

LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

Section 1 claim.[20] Consequently, "allegations of parallel conduct must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."[21] The court provided in a footnote contextual settings in which parallel conduct would state an antitrust claim include parallel behavior that probably would not result from chance or independent conduct, or "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason."[22] The Supreme Court dismissed Twombly's complaint finding that the allegations of conspiracy were not "plausible on its face."[23]

In *Iqbal*, the Supreme Court extended *Twombly*'s pleading standards to federal civil complaints generally.[24] Plaintiff, a Muslim Pakistani pretrial detainee, was arrested on criminal charges after the September 11, 2001 terrorist attacks on the United States. Iqbal alleged he was detained because of his race, religion, or national origin in violation of his civil rights under 42 U.S.C. § 1983. But, he only alleged generalized claims against the U.S. Attorney General, John Ashcroft ("Ashcroft") and other government officials who were petitioners before the Supreme Court, that his detention was because of his race or religion, or that they had developed a policy of discrimination based on those factors and that Ashcroft was the "principal architect" of the policy.[25] Relying on the *Twombly* decision, *Iqbal* held that the "complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against Petitioners.[26]

In dismissing the complaint, the court in *Iqbal* noted that two working principles underlie the *Twombly* decision.[27] First, the tenet that a court must accept as true all of the allegations set out in the complaint does not apply to conclusions.[28] *Iqbal* noted that *Twombly* stated that for purposes of a motion to dismiss courts must take all of the factual allegations in the complaint as true, but "we are not bound to accept as true a legal conclusion couched as a factual allegation."[29] Further, *Iqbal* noted that "Rule 8 marks a notable and generous departure from the hyper-technical code pleading regime

---

20 *Id* at 556-57.
21 *Id* at 557.
22 *Id*. at 556.
23 *Id*. at 570.
24 *Iqbal*, 129 S.Ct. 1937.
25 *Id*. at 1951-52.
26 *Id.* at 1954.
27 *Id.* at 1949.
28 *Id*.
29 *Id*. at 1949-50.

LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[30]

Second, *Iqbal* amplified *Twombly's* requirement that the claim be plausible to survive a motion to dismiss. *Iqbal* stated that determining "whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experiences and common sense."[31] It went on to say that "where the well pleaded facts do not permit the court to infer more than mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – that the pleading is entitled to relief."[32]

III. Pleading Parallel Conduct after *Twombly* & *Iqbal*

Allegations of evidence of an actual agreement among competitors to engage in anticompetitive conduct under Section 1 of the Sherman Act are adequate to plead a conspiracy.[33] Proof of an actual agreement, however, is difficult to allege at the pleading stage without proof of a written agreement or a witness. On the other hand, parallel business conduct cases rely on inferences from circumstances, rather than direct evidence, to sufficiently allege the conspiracy element of an antitrust claim.[34] These cases require alleging of specific facts to plausibly support a claim that an agreement was made between the defendants.

After *Twombly* and *Iqbal*, courts have reached inconsistent and sometimes irreconcilable decisions on whether allegations of parallel conduct and various plus factors are sufficient to state a claim of anticompetitive conspiracy under Rule 12(b)(6). At least one Judge and former member of the Advisory Committee on Civil Rules, acknowledged that "many practitioners and judges share in the confusion resulting from *Iqbal*'s seemingly strong requirement of factual pleadings in the absence of any specific overruling of prior cases allowing traditional notice pleading."[35] The court concluded that "notice pleading is still the rule, because Rule 8 is still in effect, but that the concept

---

30 *Id*.
31 *Id*.
32 *Id*.
33 *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 100 (3d Cir. 2010) ("these allegations of direct evidence are sufficient to survive a motion to dismiss on the agreement element"); *In re Ins Brokerage Antitrust Litig.*, 618 F.3d 300, 323-24 (3d Cir. 2010) ("Allegations of direct evidence of an agreement, if sufficiently detailed, are independently adequate."); *Twombly,* 550 U.S. at 564 (distinguishing "independent allegation[s] of actual agreement" from "descriptions of parallel conduct")
34 *White v. R.M. Packer Co., Inc.*, No. 82-914, 2011 WL 565655, at *8 (1st Cir. February 18, 2011) ("circumstantial evidence can suffice to establish an antitrust conspiracy") (citations omitted).
35 *Shionogi Pharma, Inc. v. Mylan, Inc.*, No. 10-1077, 2011 U.S. Dist. LEXIS 58774, at *3 (D. Del. May 26, 2011) (citing *Phillips v, Cnty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008)).

TOTAL SOLUTIONS
Legal Academic Risk & Information Analytics Corporate & Professional Government
LexisNexis
LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

of notice pleading has changed and must be accompanied by either factual or legal assertions satisfying the elements of the claims made."[36]

A review of cases shows that courts have reached varying results in applying the *Twombly* standard to parallel conduct claims with similar facts, but their methodology of evaluating such claims remains relatively consistent. In considering motions to dismiss under *Twombly* and *Iqbal*, the first question courts generally address is whether the parties have actually and sufficiently alleged conduct that is in fact parallel.[37] Next, courts usually examine the pleadings for conclusory allegations. Courts recognize that allegations of conclusions may be considered to provide the framework of the conspiracy, but they are not entitled to be assessed as true for purposes of alleging whether an agreement exists.[38] Lastly, courts assess the nature of the remaining factual allegations to determine if the claim is plead with enough factual specificity to make the alleged conspiracy "plausible."

a. Pleading Parallel Conduct

The principal allegation in any parallel conduct claim is that the defendants acted in the same or similar manner. The failure to allege specific facts of parallel behavior alone will likely warrant the dismissal of the complaint.[39] Typically, courts have taken a liberal approach to pleading parallel conduct, finding, for example, that to properly allege parallel conduct, a party is not required to plead simultaneous price increases-or that the price increases were identical.[40] Moreover, courts have recognized that parallel pricing need not be uniform, may occur within an agreed upon range,[41] and that parties need not specify the price by which each product was increased at a particular time.[42] Despite their broad interpretation of conduct that qualifies as parallel behavior, courts usually closely evaluate if there are sufficient facts pled to determine if the alleged conspiracy is plausible.

---

36 *Id.*
37 *See*, *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 132 (3d Cir. 1999).
38 *Iqbal*, 129 S.Ct. at 1950 ("[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.")
39 *Anderson News, L.L.C. v. Am. Media, Inc.*, 732 F. Supp. 2d 389, 397 (S.D.N.Y. 2010) ("The dramatic differences among the Defendants' reactions undermine Anderson's theory of conscious parallel conduct.")
40 *In re Baby Food Antitrust Litig.*, 166 F.3d at 132; *see*, *also*, *City of Moundridge v. Exxon Mobil Corp.*, No. 04-CV-940, 2009 U.S. Dist. LEXIS 123954, at *5 (D.C. Cir. Sept. 30, 2009) ("Price-fixing can occur even though the price increases are not identical in absolute or relative terms.")
41 *In re Baby Food Antitrust Litig.*, 166 F.3d at 132.
42 *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, at 628 (E.D. Pa. Aug. 23, 2010).

TOTAL SOLUTIONS
Legal Academic Risk & Information Analytics Corporate & Professional Government
LexisNexis®
LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

b. Identifying Conclusory Statements

After determining that parallel conduct has been pleaded, courts often then proceed to identify the conclusory statements in the complaint. The identification of these allegations is critical as these they will not be given the presumption of truth. The *Iqbal* Court clarified the reasoning for this treatment, noting that "we do not reject these bald allegations on the ground that they are unrealistic or nonsensical ... It is the conclusory nature of [such] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."[43] Accordingly, any conclusory allegations, such as those alleging "a corrupt conspiracy," "an agreement," or "an understanding in place between the defendants" will not be considered, leaving only the specific factual assertions to assessed under the plausibility standard.[44]

c. Pleading "Plus Factors"

As the Court in *Twombly* directed, plaintiffs must establish that it is plausible that defendants are engaged in more than mere conscious parallelism, by pleading facts pointing toward conspiracy, sometimes referred to as "plus factors."[45] Although there is no finite set or exhaustive list of such criteria, the *Twombly* Court described examples of evidence that enables parallel conduct to be interpreted as collusive:

> Commentators have offered several examples of parallel conduct allegations that would state a [Sherman Act] § 1 claim under this standard ... [namely,] 'parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties' ...[;] 'conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement.' The parties in this case agree that 'complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason' would support a plausible inference of conspiracy.[46]

---

43 *Iqbal*, 129 S.Ct. at 1951.
44 *Great W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 178 (3d Cir. 2010).
45 *See Twombly*, 550 U.S. at 556 & n. 4 (requiring antitrust plaintiffs to plead behavior more consistent with agreement than with independence); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004) (explaining that "plus factors" are "proxies for direct evidence of an agreement").
46 *Twombly*, 550 U.S. at 557 n. 4 (citations omitted).

LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

One circuit has similarly recognized three "plus factors," including: (1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy.[47] It is the pleading of these facts in conscious parallel cases that is critical to pushing the conspiracy claim from speculative to plausible.

For Part II of this analysis on Motions to Dismiss in Parallel Conduct Antitrust Cases, see "Elements of Conspiracy," 2012 Emerging Issues 6241

Click here for more Emerging Issues Analyses related to this Area of Law.

About the Authors. Dennis D. Palmer is a shareholder at Polsinelli Shughart PC and his practice focuses on business litigation including antitrust. **Adam K. Fuemmeler** is an associate at Polsinelli Shughart PC and is practicing in business litigation.

Emerging Issues Analysis is the title of this LexisNexis® publication. All information provided in this publication is provided for educational purposes. For legal advice applicable to the facts of your particular situation, you should obtain the services of a qualified attorney licensed to practice law in your state.

47 *In re Flat Glass*, 385 F.3d at 360.

TOTAL SOLUTIONS

Legal Academic Risk & Information Analytics Corporate & Professional Government

LexisNexis

LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.

Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

LexisNexis® Emerging Issues Analysis

Dennis D. Palmer and Adam K. Fuemmeler on

[Part II] - "Motions to Dismiss in Parallel Conduct and Plus Factors Antitrust Cases After Twombly and Iqbal."

2012 Emerging Issues 6241

Click here for more Emerging Issues Analyses related to this Area of Law.

1. Recent Case Law: Applying *Twombly* To Parallel Conduct Cases

a. Cases In Which The Court Found The Alleged Conspiracy Plausible

Due likely to confusion regarding the plausibility standard set out in *Twombly* and *Iqbal*, courts have sought to interpret and clarify its meaning in conscious parallel cases. Several such cases ruled that the complaint contained sufficient additional facts to support a plausible claim of an agreement. For example, in *In re Text Messaging Antitrust Litigation*, the Seventh Circuit agreed to hear an interlocutory appeal of a district court's decision sustaining the sufficiency of a complaint alleging that leading telecommunications companies conspired to fix the prices for text messages in violation of Section 1 of the Sherman Act.[1] The court in a decision written by Judge Richard Posner, explored the meaning of the plausibility standard set forth in *Twombly*:

> The Court said in *Iqbal* that the "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." This is a little unclear because plausibility, probability, and possibility overlap. Probability runs the gamut from a zero likelihood to a certainty. What is impossible has a zero likelihood of occurring and what is plausible has a moderately high likelihood of occurring. The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as "preponderance of the evidence" connote.[2]

The *In re Text Messaging* court found that plaintiffs alleged a conspiracy with sufficient plausibility to satisfy the *Twombly* pleading standard, pointing to several allegations that were indicative, if true, of a plausibly asserted conspiracy rather than merely parallel conduct. The court referenced three alleged "plus factors" that led them to its decision:

---

1 630 F.3d 622, 629 (7th Cir. 2010).
2 *Id.* (quoting *Iqbal*, 129 S.Ct. at 1949).

TOTAL SOLUTIONS
Legal Academic Risk & Information Analytics Corporate & Professional Government
LexisNexis®
LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

(1) the defendants met in small groups and exchanged price information directly at trade association meetings; (2) the defendants allegedly increased prices just as costs were falling steeply; and (3) the defendants abruptly changed from complex and heterogeneous pricing structures to a uniform pricing structure at the same time that they raised prices significantly.[3] In arriving at its finding, the court recognized that while "[d]iscovery may reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability," that plaintiffs had sufficiently alleged a plausible conspiracy.[4]

Also, in *Starr v. Sony BMG Music Entertainment*, plaintiffs, who were purchasers of digital music, brought actions in several state and federal courts alleging that defendants had agreed to fix the price of digital music in violation of Section 1 of the Sherman Act.[5] The Second Circuit concluded that plaintiffs had sufficiently alleged Section 1 conspiracy against the defendants. In reaching its conclusion, the court held that the "present complaint succeeds where *Twombly*'s failed because the complaint alleges specific facts sufficient to plausibly suggest that the parallel conduct alleged was the result of an agreement among the defendants."[6] The court determined that the defendants parallel pricing conduct coupled the alleged plus factors, including that: (1) defendants held over 80 percent share of the market, (2) the act could not be profitable absent some agreement, (3) the CEO of one of the defendants suggested that the service his company participated in was formed for the purpose of stopping the "continuing devaluation of music," (4) defendants' attempted to hide their Most Favored Nation clauses because they knew they would attract antitrust scrutiny, (5) defendants charged a price much above that of its closest rival and (6) defendants price-fixing was the subject of a pending government investigation, were sufficient to allege a plausible conspiracy.[7]

In so deciding, the court noted that that the plaintiffs are not required to allege facts that tend to exclude independent self-interest conduct as an explanation for defendants' parallel behavior in a complaint. *Starr* acknowledged that *Twombly* required that such a standard applies to a summary judgment motion. For a motion to dismiss, plaintiffs need only plead "enough factual matter (taken as true) to suggest that an agreement was made."[8] Also, *Starr* rejected defendants' argument that a plaintiff must identify the

---

3 *Id.* at 628.
4 *Id.* at 629.
5 592 F.3d 314, 319 (2d Cir. 2010).
6 *Id.* at 323.
7 *Id.*
8 *Id.* at 325 (citing *Twombly*, 550 U.S. at 556).

LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

specific time, place or person involved in each conspiracy allegation. The second circuit found that the *Twombly* court meant for that requirement to apply only when the claim of agreement did not rest on parallel behavior.[9]

District courts have also continued to try to clarify the pleading standard put forth in *Twombly*. In *In re Packaged Ice Antitrust Litigation*, the plaintiffs alleged that several high-level executives of sellers and manufacturers of packaged ice agreed to stay out of each other's territories and markets for ice and to allocate customers in each market in an unlawful conspiracy in violation of § 1 of Sherman Act.[10] The court ruled that the defendants' parallel conduct coupled with such factors as: (1) government investigations, (2) guilty pleas of number of sellers and manufacturers of packaged ice and their corporate executives (3) expected incriminating testimony from former employees, (4) the structure of the packaged ice industry, and (5) alleged opportunities to collude at association meeting plausibly supported a nationwide conspiracy among ice sellers and manufacturers to impermissibly allocate markets in violation of § 1 of Sherman Act.[11]

More recently, in *In re Transpacific Passenger Air Transp. Antitrust Litigation*, plaintiffs alleged that 26 airlines engaged in a ten year international conspiracy to fix the prices of transpacific air passenger travel, in violation of § 1 of the Sherman Act.[12] Thirteen defendants thereafter moved to dismiss the consolidated amended complaint for multiple reasons, including that plaintiffs had failed to allege a plausible conspiracy under *Iqbal*.[13] The court ultimately found that plaintiffs allegations were sufficient to state a claim under 12(b)(6). The court reasoned that in addition to allegations of parallel conduct, including contentions that the defendants charged identical fuel surcharges and base fare rates, the defendants also pleaded "additional facts that are enough to nudge their claims across the line from conceivable to plausible."[14] In so finding, the court pointed to those additional facts, including that (1) defendants participated in industry meetings and meetings hosted by regional trade associations in which anticompetitive conduct was encouraged and/or tolerated, (2) the Department of Justice, the European Commission, the Australian Competition & Consumer Commission, and other "competition authorities," conducted investigations into price-

9 *Id.* at 325.
10 723 F. Supp. 2d 987 (E.D. Mich. 2010).
11 *Id.* at 1008-10; *but see*, *In re Ready Mix Concrete Antitrust Litig.*, No. 10-4038-MWB, 2011 U.S. Dist. LEXIS 130180 (N.D. Iowa March 8, 2011).
12 No. C 07-05634 CRB, 2011 U.S. Dist. LEXIS 49853, at *1 (N.D. Cal., May 9, 2011).
13 *Id.* at *1-2.
14 *Id.* at *14 (internal quotations and citations omitted).

TOTAL SOLUTIONS
Legal Academic Risk & Information Analytics Corporate & Professional Government
LexisNexis
LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

fixing of passenger and cargo fares, and (3) numerous defendants entered into guilty pleas with the Department of Justice for related conduct.[15]

b. Cases in Which Courts Have Found That Plaintiffs Have Failed To Adequately Allege A Conspiracy

After *Twombly* and *Iqbal*, courts have often dismissed parallel conduct antitrust claims because they found the allegations of additional circumstances beyond the alleged parallel conduct of defendants were insufficient to imply that a conspiracy was plausible. Because the reviewing court decides what is a plausible claim, the ruling on a motion to dismiss depends on the view of the particular court as to whether the facts support an inference that an anticompetitive agreement is plausible.[16]

The Eleventh Circuit decision in *Jacobs v. Tempur-Pedic Intern., Inc.* exemplifies a case in which the court found that the complaint did not satisfy the plausibility standard.[17] In *Jacobs*, a plaintiff consumer who purchased a foam mattress brought a class action price-fixing antitrust action against mattress manufacturer Tempur-Pedic and its distributors. Jacobs's allegations included:

> "TPX has entered into agreements with its distributors that allow TPX to set the prices at which a distributor ... must sell Tempur-Pedic mattresses .... These agreements between TPX and its distributors result in there being virtually no price competition among retailers and dealers in the sales of Tempur-Pedic mattresses." Further, TPX "sells its mattresses directly to consumers, and sells them at the same prices at which it has agreed with its distributors to charge."[18]

In contrast to the standard used to decide if a conspiracy was plausible in *Starr*, *Jacobs* stated that "Jacobs had the burden to present allegations showing why it is more plausible that TPX and its distributors … would enter into an illegal price-fixing agreement … to reach the same result realized by purely rational profit-maximizing behavior."[19] Finding that Jacobs failed to sufficiently allege a horizontal conspiracy, the court stated that "[h]ere, like the *Twombly* Court, we fail to find in the complaint 'facts

---

15 *Id.* at *11-15.
16 *See*, Arthur R. Miller, *From Conley to Iqbal: A Double Play of the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 30 (2010) ("[I]nconsistent rulings on virtually identical complaints may well be based on individual judges having quite different subjective views of what allegations are plausible.")
17 626 F.3d 1327, 1343 (11th Cir. 2010).
18 *Id.* at 1341.
19 *Id.* at 1342.

TOTAL SOLUTIONS
Legal Academic Risk & Information Analytics Corporate & Professional Government
LexisNexis®
LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

that are suggestive enough to render a § 1 conspiracy plausible,' when the inference of conspiracy is juxtaposed with the inference of independent economic self-interest."[20]

In addition, in *In re Insurance Brokerage Antitrust Litigation*, purchasers of commercial and employee benefit insurance brought an action against insurers and insurance brokers, alleging, among other things, a Section 1 conspiracy to allocate purchasers among particular groups of insurers.[21] The plaintiffs in the consolidated action alleged both broker-centered conspiracies between each broker and the insurance companies as well as a global conspiracy involving all the brokers and insurance companies.[22]

The Third Circuit Court explored in depth the required standard set forth in *Twombly*, and found that "*Twombly* makes clear that a claim of conspiracy predicated on parallel conduct should be dismissed if 'common economic experience,' or the facts alleged in the complaint itself, show that independent self-interest is an 'obvious alternative explanation' for defendants' common behavior."[23]

The third circuit affirmed the federal district court's dismissal of the Section 1 global conspiracy claim ruling that plaintiffs' allegations of parallel conduct were not sufficiently supported by additional plus factor evidence.[24] *In re Insurance Brokerage* rejected plaintiffs' argument that defendants' parallel conduct coupled with membership in a common trade group plausibly suggested conspiracy.[25] In support of its ruling, the court reasoned that while "these allegations indicate that the brokers had an opportunity to conspire, they do not plausibly imply that each broker acted other than independently … "[26] The court concluded that, while "Plaintiffs present facts to support the possibility of inadequate disclosures by the brokers to the insureds, the Complaints are bereft of allegations to demonstrate that this was more than brokers adopting sub-par disclosure methods to protect their own, lucrative agreements."[27]

In *In re Iowa Ready-Mix Concrete Antitrust Litigation*, purchasers of ready-mix concrete brought a class-action lawsuit against producers and sellers of ready-mix concrete and certain others alleging an antitrust conspiracy to suppress and eliminate competition by

---

20 *Id.* at 1343 (quoting *Twombly*, 550 U.S. at 556).
21 618 F.3d 300, 308 (3d Cir. 2010).
22 *Id.* at 311-14.
23 *Id.* at 326.
24 *Id.* at 349.
25 *Id.* at 351.
26 *Id.* at 349 ("neither defendants' membership in the CIAB, nor their common adoption of the trade group's suggestions, plausibly suggest conspiracy").
27 *Id.* at 351. (quoting *In re Insurance Brokerage Antitrust Litig.*, No. 04-5184, 2007 U.S. Dist. LEXIS 64767, at *19 (D.N.J. Aug. 31, 2007)).

LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

fixing the price of ready-mix concrete.[28] While the plaintiffs sought to rely on the guilty pleas of some of the defendants' principals to establish a much broader conspiracy, the court ruled that the complaint failed to adequately allege a conspiracy for several reasons. First, plaintiffs only alleged evidence of direct agreement between some of the defendants, and they failed to adequately allege corresponding parallel conduct among all the defendants.[29] Second, plaintiffs offered only conclusory allegations to support their conspiracy claims.[30] Third, noting the absence of plus factors, the court found that there was "no 'further factual enhancement' in the Amended Consolidated Complaint to push the allegations of an antitrust conspiracy across the line between possible and plausible."[31] Plaintiffs were not permitted to rely exclusively on plea agreements between some of the defendants to establish a plausible conspiracy. Also, the court reasoned that the plaintiffs failed where the *In re Packaged Ice* plaintiffs succeeded, by providing a "'larger picture' from which inferences of a wider conspiracy can be drawn."[32]

More recently, in *Hinds County, Mississippi v. Wachovia Bank N.A.*, the plaintiff alleged federal and state antitrust violations arising out of an alleged unlawful conspiracy on the part of twenty-five corporate defendants and others to illegally rig bids, fix prices and manipulate the market for investment instruments known as municipal derivatives.[33] In response to seven of the defendants' motions to dismiss under 12(b)(6), the court granted five finding that the plaintiff had failed to state a plausible § 1 conspiracy.[34]

Despite the existence of at least one indictment against one non-moving defendant and multiple other indictments and guilty pleas of former employees of the other defendants, the court was not persuaded that plaintiff had stated a claim against these five specific defendants.[35] In so finding, the court reasoned that an allegation that defendants'

---

28 No. 10-4038-MWB, 2011 U.S. Dist. LEXIS 130180 (N.D. Iowa March 08, 2011).
29 *Id.* at *11.
30 *Id.* ("Here, as the defendants contend, the Amended Consolidated Complaint does not even allege parallel conduct, but skips straight to conclusory allegations of an agreement among the defendants.") ("Indeed, allegations that, for the purpose of forming and effectuating their combination and conspiracy, the defendants and their co-conspirators "did those things which they combined and conspired to do, including, among other things, discussing, forming and implementing agreements to raise and maintain at artificially high levels the prices for Ready-Mix Concrete," Amended Consolidated Complaint at ¶ 44, is, as the defendants contend, merely a tautology, not an allegation of additional facts. Even the plaintiffs' allegations that, throughout the class period, the defendants and their co-conspirators conspired to set and reached agreements to set agreed-upon prices, to set agreed-upon price increases, and to submit non-competitive and rigged bids for ready-mix concrete sold in the Northern District of Iowa and elsewhere, id. at ¶¶ 51-52, are merely conclusory allegations of an agreement, not allegations of facts from which an agreement can reasonably be inferred.")
31 *Id.*
32 *Id.*
33 790 F. Supp. 2d 106 at 106-109 (S.D.N.Y. April 29, 2011).
34 *Id.* at 117.
35 *Id.* at 112-116.

TOTAL SOLUTIONS
Legal Academic Risk & Information Analytics Corporate & Professional Government
LexisNexis
LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

conduct mimicked the actions of the indicted individuals alone was not sufficient because an "allegation, ascribing guilt based on association, cannot 'nudge [a plaintiff's] claims across the line from conceivable to plausible.'" [36] Moreover, the court reasoned that "had the Antitrust Division possessed evidence sufficient to connect its charged defendants and named co-conspirators to transactions and misdeeds other than those identified by the … indictments and criminal informations, it presumably would have done so."[37]

2. Suggestions for Pleading Antitrust Conspiracy In Conscious Parallel Conduct Cases

The issue in a motion to dismiss is whether the facts as alleged, disregarding conclusions, plausibly support a claim that a conspiracy exists among the defendants in violation of Section 1 of the Sherman Act. A review of cases that have applied the standard in *Twombly* and *Iqbal* suggests that complaints alleging an antitrust conspiracy based on conscious parallel conduct and inferences of an agreement from additional facts contain as many of the following type of allegations as possible to overcome a motion to dismiss.

a. Specific facts supporting inferences of an agreement. The complaint may set out conclusions as part of explaining the background of the case, but conclusions such as "the defendants engaged in a conspiracy" or "agreed" should be avoided and may not be relied on to state a claim for relief.

b. Allegations of market structure that support the contention that the alleged conspiracy was plausible. In *Starr*, the court noted that "Empirical studies . . . have suggested that noncompetitive pricing [that might have resulted from price coordination] is likely . . . when the four leading firms account for some 50 to 80 percent of the market."[38]

c. Allegations of fact from which courts can infer that the parallel conduct does not make economically rational sense, such as a price increase when costs are going down. As noted in *Starr*, "[s]imultaneous price

---

36 *Id.* at 112 (quoting *Twombly*, 127 S.Ct. at 1974).
37 *Id.* at 112.
38 *Starr*, 592 F.3d at 323-24 (quoting Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW, § 1431a (2d ed. 2003)).

LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

increases . . . unexplained by any increases in cost may therefore be good evidence of the initiation of a price-fixing scheme."[39]

d. Include facts that tend to exclude independent self-interested conduct as an explanation for defendants' parallel conduct. In other words, a single defendant would not have benefitted from the practice unless it was also adopted by the other defendants.

e. Allege facts showing that defendants met or had opportunity to meet to discuss the parallel conduct.

f. Include statements from defendants or others in the industry that support the allegation that defendants' conduct was not based on independent decision making and was not economically rational.

g. Allege facts of exchange of information or communications as a method for facilitating the conspiracy.

h. If applicable, allege government investigation into defendants' antitrust conspiracy.[40]

i. If it exists, cite to evidence of guilty pleas relating to conspiratorial and anticompetitive conduct of defendants.[41]

j. If available, criminal indictments for anticompetitive violations of antirust statutes or related laws should be cited.[42]

3. Defendants' Conduct To Prevail On Motions To Dismiss And Avoid Claims

Cases post-*Twombly* and *Iqbal* suggest that defendants should follow and avoid certain types of conduct to improve their chances of succeeding on a motion to dismiss. Those types of conduct include the following:

---

39 *Starr*, 592 F.3d at 324 (quoting Richard A. Posner, ANTITRUST LAW § 8 (2d ed. 2001)).
40 *Starr*, 592 F.3d at 324-25 (recognizing that investigations by New York State Attorney General and the Justice Department into defendants' price fixing support plausibility of a § 1 claim).
41 *In re Packaged Ice Antitrust Litig.*, *supra*, at 1011.
42 *Hinds Cnty.*, *supra*, at *5 (finding that in determining the plausibility of a conspiracy the persuasive weight to give to "allegations contained in outstanding criminal indictments should fall somewhere in between a government investigation and a guilty plea.")

LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

a. Businesses in highly concentrated industries should not engage in parallel conduct unless they have a solid economic basis for their actions that is consistent with independent self interest decision making.

b. Price increases should be supported by increased costs or increased value in the product.

c. Refrain from communicating with competitors, especially in highly concentrated industries, as this may be viewed as a means to facilitate a conspiracy.

d. If a party intends on entering into a joint venture, ascertain beforehand that real efficiencies will be achieved that are measured by increases in output or decreases in prices or other appropriate purposes.

e. Managers and executives should avoid making statements relating to joint actions or actions by competitor companies that may be misinterpreted as furthering cooperation with competitors.

4. Conclusion

After *Twombly* and *Iqbal*, motions to dismiss can be expected in virtually all cases involving conscious parallel conduct antitrust claims. The pleading standard requires plaintiffs in such cases to plead facts that plausibly support a claim of conspiracy between the defendants. To satisfy the standard, plaintiffs are advised to conduct a thorough investigation to gather facts from which a conspiracy can be plausibly inferred. In many cases, plaintiffs may find it necessary to retain economists as experts to assist them in developing facts about the market structure and defendants' behavior so sufficient facts to show a conspiracy can be alleged. On the other side, the pleading standard enables defendants to conduct activities in a manner to improve their chances of succeeding on motions to dismiss in such cases.

For an introduction on Motions to Dismiss in a Post Twombly world, see "Motion to Dismiss in Parallel Conduct and Plus Factors Antitrust Cases After Twombly and Iqbal," [Part I], 2012 Emerging Issues 6240

Click here for more Emerging Issues Analyses related to this Area of Law.

TOTAL SOLUTIONS

Legal Academic Risk & Information Analytics Corporate & Professional Government

LexisNexis

LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.
Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.

LexisNexis® Emerging Issues Analysis

Dennis D. Palmer and Adam K. Fuemmeler on

[Part II] - "Motions to Dismiss in Parallel Conduct and Plus Factors Antitrust Cases After Twombly and Iqbal."

About the Authors. Dennis D. Palmer is a shareholder at Polsinelli Shughart PC and his practice focuses on business litigation including antitrust. **Adam K. Fuemmeler** is an associate at Polsinelli Shughart PC and is practicing in business litigation.

Emerging Issues Analysis is the title of this LexisNexis® publication. All information provided in this publication is provided for educational purposes. For legal advice applicable to the facts of your particular situation, you should obtain the services of a qualified attorney licensed to practice law in your state.

TOTAL SOLUTIONS

Legal Academic Risk & Information Analytics Corporate & Professional Government

LexisNexis

LexisNexis, Lexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender is a registered trademark of Matthew Bender Properties Inc.

Copyright © 2012 Matthew Bender & Company, Inc., a member of the LexisNexis Group. All rights reserved.