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***Twombly, After Two Years:* The Procedural Revolution in Antitrust That Wasn't**

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I. INTRODUCTION

Without question, *Bell Atlantic v. Twombly*² ranks as one of the most controversial decisions of the United States Supreme Court in recent years.³ Its importance stems from the simple reason that it lies at the crossroads of antitrust and civil procedure, with vast potential implications for both fields. As a matter of antitrust law it raises the possibility that a large number of complex cases will be dismissed prior to discovery. As a matter of civil procedure, the decision offers the most systematic examination of the pleadings standards in federal cases since the bellwether case of *Conley v. Gibson*,⁴ decided one-half century earlier. Neither of these revolutions will come to pass. On the substantive side, only cases for which there are strong theoretical reasons to doubt the plaintiff's case will be dismissed under *Twombly*. On the procedural side, *Twombly* will not be read to undo the usual rules of notice pleading except in rare cases. It will amount to a subtle but useful recalibration of existing doctrine. It will not become, nor should it become, a transformative case.

To establish these claims, I shall proceed as follows. Part II compares the rule in *Conley* with the rule in *Twombly* in light of their very different factual patterns. Part III then looks at subsequent decisions under *Twombly*, first in the Supreme Court, where there are no new antitrust cases, and then in the lower federal courts, where the decision has been subject to extensive discussion both in general law and antitrust areas. These cases show an incremental movement in the law that will, in general, follow the older practice of using pleadings for notice purposes, and discovery for fact-finding purposes.

To this general rule there are two exceptions. The first, like *Twombly*, are cases where the theoretical case against the plaintiff is so strong that the judgment on the pleadings functions, as I have previously argued, not as a judgment on the sufficiency of

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² 550 U.S. 544 (2007).

³ See e.g., Robert Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009); Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431 (2008) (urging states whose law of civil procedure is patterned on the federal rules not to deviate from *Conley* solely in the interest of uniformity).

⁴ 355 U.S. 41 (1957)

the pleadings, but a disguised summary judgment on the facts.⁵ Quite simply, the court concludes that there is no reason to incur the heavy costs of discovery when there are good theoretical reasons to believe that it will turn up empty. The second exception is more tenuous, but it appears that courts in complex litigation will require the plaintiff to make some independent investigation of claims from public sources of information so that the complaint can limit discovery to narrow grounds.

But where there are plausible reasons to think that the defendant has engaged in serious misbehavior for which there is no public evidence, the older regime of *Conley* will continue to apply. *Twombly* will have more restrained influence, especially in garden-variety price-fixing cases. Judgments on the pleadings will be rare, and summary judgment practice will be governed by the ordinary standards of rule 56, which allows it only when the record reveals that there is no “genuine issue of fact” on which a jury can agree. So long as cartel members do not memorialize their agreement for the benefit of public enforcement authorities, discovery will be allowed. In contrast, cases involving monopolization or predation will be routinely thrown out in the absence of the exceptional circumstances needed to allow such cases to go to the jury.

II. CONLEY AND TWOMBLY

A. *The Rise (and Fall?) of Notice Pleading*

Until the decision in *Twombly*, the basic rules on pleading under the Federal rules were set out in *Conley v. Gibson*. That case stands for this simple proposition:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule 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.⁶

Accordingly, the plaintiff need not “set out in detail the facts on which he bases a claim,” so long as his complaint gives the defendant “fair notice of its basis.”⁷ Thereafter, discovery is always available to probe the truth of the claim and to set up the possibility of summary judgment for the defendant if the case calls for it.

⁵ Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61 (2007). [hereinafter Epstein, *Disguised Summary Judgments*].

⁶ *Id.* at 45-46.

⁷ *Id.* at 47-48. The discussion continued as follows:

The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” (Footnotes omitted).

In the subsequent 50 years, the Conley rule has routinely allowed the plaintiff to conduct discovery before the defendant is able to move for summary judgment.⁸ Against this backdrop it was something of a surprise to see the about-face in *Twombly*, so that now the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.”⁹ Quite out of the blue, Justice Souter hammered away at *Conley*’s “no set of facts” language by impatiently insisting that it “has been questioned, criticized, and explained away long enough.”¹⁰ The upshot was supposed to be that “[t]he phrase 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.”¹¹

Twombly does not purport to be just about pleading in antitrust cases. It offers a manual on how to plead all cases. But two years later that promise disappoints: the vast mass of decided cases suggests that *Twombly* will eventually coexist with *Conley*, not displace it. Time will assimilate *Twombly* into the general fabric of civil procedure. *Conley* will set the dominant mood. *Twombly* will provide some needed caution. In general, we should welcome this development. Paradoxically, *Twombly* was rightly decided on its unique merits, but for the wrong reason. Its peculiar facts called for prompt judicial intervention that is not normally warranted in other cases. In order to understand the evolution of the law of pleadings, it is critical to take a look at the different fact settings found in *Conley* and *Twombly*.

B. Conley and Twombly

The plaintiffs in *Conley* were African-American union members who sued their union leaders under the Railway Labor Act.¹² The Court had to decide whether the defendant representatives of the Local 28 of the Brotherhood of Railway and Steamship clerks had violated the duty of fair representation owed these workers under the 1944 case of *Steele v. Louisville & Nashville Railroad Co.*¹³ The Court held that the Brotherhood had a duty “in collective bargaining and in making contracts with the carrier, to represent non-union or minority unions of the craft without hostile discrimination, fairly, impartially, and in good faith.”¹⁴ The particular allegations in *Conley* charged the white union leadership with removing blacks from favorable jobs which it then gave to

⁸ See, e.g., *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-169 (1993) (“In the absence of [an amendment to Rule 9(b)], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.” Cited in the *Twombly* dissent of Justice Stevens, 550 U.S. at 584; *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 534 (2002), rejecting need to plead “specific facts.”

⁹ *Twombly* at 570.

¹⁰ *Id.* at 562.

¹¹ *Id.* at 563.

¹² 45 U.S.C. § 151 et seq.

¹³ 323 U.S. 192 (1944)

¹⁴ *Id.* at 204.

its white members. The list of who lost and who gained jobs was a matter of public record in both *Steele* and *Conley*.

As a doctrinal matter, *Steele* is an antitrust case of sorts, in which the union's statutory monopoly under the RLA was offset by a nondiscrimination obligation that ran in favor of minority workers. *Conley* took *Steele* as settled law. In this context its strong reluctance to grant a defendant a judgment on the pleadings, prior to discovery, made good sense. The union leaders who flaunted their racial preferences in *Steele* when favoritism was legal had every incentive to conceal their racial animus once those preferences were made illegal. They were not likely to leave any public trail of evidence that revealed their suspect motivations. Yet in light of the public record of dismissals and hirings, the plaintiffs needed discovery of documents and depositions of key witnesses to prove their case about the motivations of the key defendants. The potential returns from discovery were high, which is why Justice Black (who was from Alabama) refused to grant summary judgment because the plaintiffs were not in a position to otherwise provide any particulars about who practiced what forms of discrimination.

Twombly involved a different type of monopolization claim: Did the defendants, communications carriers, engage in efforts to cartelize key portions of the telecommunications market by dividing territories among themselves? As a pleading matter, the plaintiff's complaint gave the defendants notice of the charges against them. It indicated the parties to the conspiracy, its temporal start and end points, and pinpointed the nature of its illegal practices under the antitrust laws. Consistent with *Conley*, it did not state the particulars of its case. The payoff from these skeletal allegations was substantial: the plaintiff offered a well-pleaded case of a *per se* antitrust violation of territorial division. Most defendants would go to great lengths to conceal that kind of conspiracy.

Nonetheless, *Twombly's* peculiar institutional context tells a very different story. All of the defendants in *Twombly* were local exchange carriers ("LECs") whose monopoly position in their own territory was regulated by the Federal Communications Commission ("FCC") on key matters of interconnection and the sharing of key network elements under the Telecommunications Act of 1996.¹⁵ That law only entitled an LEC to start long distance service in its own territory after it had established, to the satisfaction of the FCC, that it had opened its own network up to competition to all other carriers.¹⁶ These potential entrants into each local market included the other LECs outside of their home base, and, more critically, a huge number of competitive local exchange carriers ("CLECs") that started business after the 1996 Act broke down the statutory monopoly

¹⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified throughout Title 47 of the United States Code ('47 U.S.C.') (2007)).

¹⁶ *Id.* § 271.

that each LEC (as a Regional Bell Operating Company) had received under the 1982 AT&T Consent Decree orchestrated by Judge Harold Greene.¹⁷

The *Twombly* plaintiffs claimed that all the LECs had agreed not to compete in each other's territory in order to preserve exclusive service in each one's own original area. A Department of Justice ("DOJ") investigation turned up nothing to support these claims. So it was hardly likely that some missing witness or document could reveal this supposed conspiracy. In addition, the public information that the plaintiff added into the complaint was easily explained away by other public information. It is not credible, for example, that the head of a major LEC would announce his participation in a major conspiracy in an interview for a newspaper story, which, when read in full, suggests only his (justified) frustration with the pricing rules for interconnection and sharing network elements.¹⁸ This combination of government investigation and public evidence suggests that any conspiracy was, at best, a low probability event in this institutional context.

Most critically, this evidence did not stand in splendid isolation, for the plaintiff's underlying conspiracy theory made no sense as a matter of economic theory. Quite simply, each LEC has good and sufficient reason to resist new entry into its home territory wholly apart from any common plan. After all, preserving the remnants of a statutory monopoly is something a firm wants to do for its own sake. Nor do these LECs have to act in concert to conclude that it is foolhardy to seek to break into the long-distance market of other LECs. They know that the incumbent LEC will seek to preserve its dominant position as long as possible. Resistance therefore is a certainty, with or without agreement. Worse still, the CLECs, which have no home base, have to compete in someone's home market. Why fight with them when they were each trying to undercut the other? It makes perfectly good sense, unilaterally, for each LEC to act defensively in its own territory and to concentrate on developing new lines of business, such as cell phone coverage, that don't require them to negotiate this regulatory thicket.

Twombly, then, is far removed from the ordinary territorial division case because the key players lack any coordinated means to raise prices or exclude others from their own territory. These facts were not lost on Judge Lynch, who tried the case in the District Court. After an exhaustive review of the situation, he granted a judgment on the pleadings to the defendant and thus forestalled huge rounds of extensive discovery.¹⁹

¹⁷ United States v. AT&T, 552 F. Supp. 131 (1982).

¹⁸ The offending passage by Richard Notebaert, then CEO of Qwest, one of the alleged conspirators, observed that entering the territory of another bell company "might be a good way to turn a quick dollar, but that doesn't make it right." See Amended Complaint at ¶ 42, *Twombly I*, 313 F. Supp. 2d 174 (No. 02 CIV. 10220) (quoting from Jon Van, *Ameritech Customers Off Limits: Notebaert*, CHI. TRIB., Oct. 31, 2002, at Business p.1.) Epstein, *Disguised Summary Judgment*, at 90.

¹⁹ *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003).

His decision was in turn reversed, albeit with reservations, in the Second Circuit under a *Conley* banner.²⁰

The Supreme Court's decision in *Twombly* is best understood when juxtaposed with *Matsushita v. Zenith Corp.*²¹ In *Matsushita* the Court sustained a decision to dismiss the plaintiff's predatory pricing on summary judgment, but only after reams of discovery produced enough documents to fill a small warehouse. The *Matsushita* analytical approach asked whether the plaintiff had presented evidence that "tends to exclude" the possibility that the defendants were acting in concert in violation of Section 1 of the Sherman Act. Justice Powell reviewed the economics of predation and held that it was simply implausible to think that the Japanese defendants could conspire to lower prices in the United States cooperatively in order to drive American firms out of the market, when none of them had any conceivable way to recoup their huge initial losses if their plan succeeded.

The most telling point about Justice Powell's opinion is that nowhere did it make even one reference to the warehouses of material that had been accumulated through discovery. Instead, he relied exclusively on the academic literature that explains why predation won't work either for a single dominant seller or a group of sellers acting in concert with each other.²² Every argument made on the difficulty of recoupment, and the danger of stifling efficient competitors, derived from the general theory. *Matsushita* would have, and should have, come out exactly the same way, even without discovery. Stated otherwise, the cost of the discovery was huge. Its benefit was zero.

At this point, therefore, the *Conley* synthesis breaks down. It made no sense in *Matsushita* to address fact questions through discovery. In contrast, *Conley* rightly assumed that no public information could resolve whether the defendants had practiced favoritism on the sly. Now the conclusion seems inescapable. In the distinctive context of *Twombly*, a territorial division case bore no relationship to the *per se* violations under Section 1, where it is easy to explain the economic logic behind a successful territorial division. Rather, in light of its peculiar institutional setting, *Twombly* looked very much like the predation case in *Matsushita*.

It is easy to conclude, therefore, that the defendants in *Twombly* should be spared the full weight of discovery. The strongest counterargument against issuing the final judgment at the pleading stage is that *Twombly* goes a bridge too far. All that is needed is for experienced trial judges to take context into account by fashioning a slimmed-down

²⁰ *Twombly v. Bell Atlantic Corp. (Twombly II)*, 425 F.3d 99 (2d Cir. 2005).

²¹ 475 U.S. 574 (1986).

²² For notable contributions to that literature, see Robert H. Bork, *The ANTITRUST PARADOX* 149-155 (1978); Philip Areeda & Donald Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 699 (1975); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263 (1981). Koller, *The Myth of Predatory Pricing-An Empirical Study*, 4 ANTITRUST LAW & ECON. REV. 105 (1971); McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. Law & Econ. 137 (1958), cited in *Matsushita*, 475 U.S. at 589-590.

discovery order whose initial phase limits the plaintiff to taking depositions from a few key witnesses. Yet this option also has its difficulties. Discovery orders are only reviewed for an abuse of discretion, so the plaintiffs who find a sympathetic judge can have a field day before any appellate court looks at the matter.

In my view, therefore, it is defensible, even preferable, to impose a *per se* no discovery order in *Twombly* on the simple ground that discovery has no conceivable value. But note that this view neither requires nor justifies Justice Souter's frontal assault on *Conley*, which should remain the dominant rule, subject to a narrow exception for extraordinary circumstances like those in *Twombly*. *Conley* may not be universally true, but it is far from being universally false. As becomes clear, the cases after *Twombly* revert back to type, both in the antitrust area and beyond it. The next section explains how this transformation took place, and the pitfalls along the way.

III. AFTER TWOMBLY

A. In the Supreme Court

The difficulties in Justice Souter's broad *Twombly* formulation did not take long to surface. Later in the same term, the Supreme Court returned to the pleading issue in *Erickson v. Pardus*,²³ only now the subtext was different. *Erickson* involved a civil rights action brought by a pro se prisoner litigant who claimed that the prison's program physician had improperly removed him from a one-year treatment program for Hepatitis C, thereby putting his life in danger. There is no economic theorem that shows that rational prison doctors never misbehave. It seems therefore easy to conclude that the potential gains from discovery far exceed its cost, so the *Conley* synthesis holds. Accordingly a *per curiam* decision did just that when it reverted to the notice rationale of *Conley*: Federal rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' 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.'"²⁴

Yet this rickety, if doctrinal, rationale should have made it clear that this uneasy consensus could not last, and it did not. This past term the Court fractured in *Ashcroft v. Iqbal*.²⁵ There, the plaintiffs alleged that the Attorney General, John Ashcroft, and the Director of the FBI, Robert Mueller, had conspired illegally to detain Arab-Americans after the 9/11 bombings, by confining them under harsh conditions because of their race and national origin. More concretely, it alleged that Ashcroft was the "principal architect" of the plan, and that Mueller played an "instrumental" role in its implementation. No particulars of their behaviors were offered.

²³ 527 U.S. 89 (2007).

²⁴ *Id.* at 89, citing *Twombly*, quoting *Conley*.

²⁵ 129 S.Ct. 1937 (2009)

These skeletal allegations gave sufficient notice to the defendants of the nature of the charges against them, which means that they should survive under *Conley*, but not necessarily under *Twombly*. The additional difficulty in *Iqbal* was that both Ashcroft and Mueller were entitled to qualified immunity for acting in their official capacity. That doctrine requires that the plaintiff prove some reckless or conscious disregard of the law, for otherwise government officials would be subject to an endless series of suits. Accordingly, their liability ultimately turned on whether they acted “with deliberate indifference” to illegal actions of their subordinates of whose misconduct they had “actual knowledge.” Both sides agreed that the plaintiffs could not prevail on a theory of vicarious liability for the acts of inferior officers, under which the defendants’ own knowledge of their subordinates’ behavior would be irrelevant for any acts they did within the scope of their employment.

By a five-to-four vote, a divided Supreme Court sustained the government’s contention that *Iqbal* should be dismissed without discovery. The Court broke on the familiar liberal/conservative line. Justice Kennedy concluded for a majority of Roberts, Scalia, Thomas, and Alito that *Twombly* was not limited to antitrust cases and, further, that the plaintiffs failed because their conclusory allegations did not meet the applicable pleading standard of “facial plausibility” which is satisfied only “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”²⁶ Justice Souter (who authored *Twombly*) switched to the dissent, by reading *Twombly* as if it were fully consistent with *Conley*: “Taking the complaint as a whole, it gives Ashcroft and Mueller ‘fair notice of what the . . . claim is and the grounds upon which it rests.’ ”²⁷

This close division fairly reflects the difficulty of the case. Unfortunately, neither side sees why this case falls midway between *Conley* and *Twombly*. Like *Conley*, *Iqbal* contains key allegations of discrimination, which is as hard to prove in the one case as it is in the other. So as a first cut, it looks as though *Iqbal* has said enough to advance to at least one round of discovery. But the institutional context reveals a different texture. *Conley* arose in a context in which private individuals with a strong racist background had every incentive to conceal their discrimination, free of any institutional constraints. In light of that past history, the odds were exceedingly high that they breached their duty of fair representation under the RLA. But that sad state of affairs does not describe the DOJ and the FBI, which are subject to huge internal reviews administered by public officials, most of whom are strongly committed to discharging their constitutional obligations.

As Justice Kennedy also suggested in his opinion, the events of 9/11 place the case in a stark light. “All [the complaint] plausibly suggests is that the Nation’s top law

²⁶ *Id.* at 1949.

²⁷ *Id.* at 1961, citing *Twombly*, quoting *Conley*.

enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."²⁸ There is absolutely nothing in the complaint which points to any improper motivation in a setting where proper motives were obviously present. So at this point, the true bias of the majority's decision is that it would be imprudent to allow nonstop discovery to disrupt the operation of the government services, without some concrete evidence to support a damning allegation.

On balance, I agree with the majority's conclusion, but only with an acute awareness that *Iqbal* is a lot closer to the line than *Twombly*. The great beauty of *Twombly* was that general economic principles showed why the plaintiff's case was a nonstarter. No comparable theory helps any government official, when we know that public officials always face temptations to disregard the law. So the compromise position is to demand specific allegations of who met with whom on what date and in what place. Let this case be so pled, and the narrowing of issue could allow a trial judge to grant an initial round of discovery that is hemmed in by those allegations. If those inquiries turned up evidence of merit, a fresh round of discovery could be ordered. If not, the case could be dismissed with prejudice. There are always some error costs of truncating discovery, but if probability error is small, when a full scale discovery blitz could take years, discovery should end.

Against this unsettled background, the majority did not enter a final judgment against the defendant. Instead the majority took an intermediate path by remanding the case to the Court of Appeals to see whether the plaintiff should be given an opportunity to replead.²⁹ In part this disposition depended on a realization that *Iqbal* was a transitional case. Plaintiffs originally filed when *Conley* was the law. Repleading allows them to see if they meet the somewhat more exacting standards of *Twombly*.

The key issue is whether the plaintiffs can obtain information outside of discovery to help shape their complaint. Documents obtained under the Freedom of Information Act might turn up useful information. A Congressional investigation might supply a valuable clue. Some investigative reporter may have interviewed individuals whose testimony could shed light on the issue. No one can say for sure that these sources of inquiry will prove fruitful. But by the same token, no one can claim that they will all lead to dead ends. So long, however, as the question here is error minimization in the face of uncertainty, the correct response would be to dismiss the case prior to discovery if some specific information of this sort is not available. In the end, of course, the trial judge must always retain some discretion on discovery matters. And ironically, the more the plaintiff limits and shapes his case, the more reluctant trial judges should be to dismiss these cases prior to discovery.

²⁸ *Id.* at 1952.

²⁹ *Id.* at 1941.

B. Lower Courts After Twombly

Twombly has generated a huge amount of litigation in lower federal courts, both generally and in the antitrust area. It is not possible to summarize all these developments here, but it is useful to discuss a few mileposts along the way, if only to show the equivocation between *Conley* and *Twombly*, so evident in the Supreme Court, is also found in lower court cases. As before, the great tension stems from the unwillingness to deal candidly with the disguised summary judgment issue, which best explains the case outcomes. Let me look first at some general cases and then turn to the antitrust area.

1. *Twombly* Generally

In *National Business Development Services, Inc. v. American Credit Education and Consulting, Inc.*,³⁰ the plaintiff brought a garden-variety action for copyright infringement against its former employees. The court held that *Twombly*, not *Conley*, set the right standard, so that the plaintiff had to make specific reference to the works that were infringed and to the actions that infringed them. On the view taken here, that result is surely correct. Copyright infringement is necessarily a public act that can be identified prior to discovery. Once that identification is made, discovery could be used to flesh out key elements of the claims. Judge Merritt therefore reached the right result when he concluded: “Copyright infringement, like anti-trust actions, lends itself readily to abusive litigation, since the high cost of trying such a case can force a defendant who might otherwise be successful in trial to settle in order to avoid the time and expenditure of a resource intensive case.”³¹ Quite simply, this was a disguised summary judgment.

Twombly also controlled in *Limestone Development Corp. v. Village of Lemont, Ill.*³² There the plaintiffs were private owners of land who alleged a RICO violation against the defendant Village and various co-conspirators who frustrated their development plans. Judge Posner invoked *Twombly* to dismiss the complaint on the most sensible of grounds: “a defendant should not be forced to undergo costly discovery unless the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case.”³³ And that burden was not met by the “threadbare” complaint. The antitrust analogy is close at hand because Posner found the plaintiff’s conspiracy claims especially weak because they made “no reference to a system of governance, an administrative hierarchy, a joint planning committee, a board, a manager, a staff, headquarters, personnel having differential functions, a budget, records, or any other indicator of a legal or illegal enterprise.”³⁴ Once again in dealing with public bodies, the

³⁰ 299 Fed. Appx. 509 (6th Cir. 2008).

³¹ *Id.* at 512.

³² 520 F.3d 797 (7th Cir. 2008).

³³ *Id.* at 802-803.

³⁴ *Id.* at 804.

plaintiffs are asked to make some investigation prior to the filing if only to narrow down the set of issues on which discovery should be required. It is good advice, usually taken, in antitrust cases.

Last, it is worth a brief reference to *Giarratano v. Johnson*,³⁵ another prisoner's case with, however a decidedly different twist from *Erickson*. In this case the sole allegation was that Virginia's Freedom of Information Act violated the equal protection clause of the Fourteenth Amendment because it excepted prisoners from making requests. "Giarrantano's conclusory allegation about the lack of a rational relationship between VFOIA's [Virginia Freedom of Information Act] prisoner exclusion and any legitimate state interest is insufficient to plausibly state a claim for relief in light of the strong presumption in favor of the legislation,"³⁶ which in fact requires the plaintiff to "negate every basis that might support the legislation."³⁷ One could quarrel as a matter of first principle with this stand, but not in this context. Once the law is fixed, its extra high standard of proof seems clearly to require great levels of specificity, which should be attainable given that the gist of this complaint relates to matters that are largely in the public domain. The situation is not remotely similar to the withdrawal of treatment for Hepatitis C in *Erickson*.

The seeds of a procedural revolution are not here. I would decide all of these cases the same way even if *Twombly* had been decided the opposite way.

2. Antitrust Cases in the Lower Courts

The antitrust cases in the lower courts reveal much the same picture. None has the complex overlay of direct regulation found in *Twombly*. Each of them contains garden-variety price-fixing claims that are *per se* actionable under the Sherman Act. Even under *Conley*, a plaintiff could not make it into court with an allegation that the defendants in some industry had colluded to raise prices to the detriment of the plaintiff, without making some particular allegations on time, place, and parties. But in these cases, the tipping point is more difficult to locate because there is nothing that is remotely implausible about price-fixing claims generally. To allege, of course, only that the parties charged the same prices is insufficient under any view of the law because the prices converge under competition as they do in cartels, so the identity of prices, or other forms of parallel conduct, among defendants does nothing to exclude the possibility that these prices or practices were adopted independently. Once again we have a theoretical point that does not depend on the peculiarities of individual cases, which makes it subject to the kind of global judgment that animated *Twombly*. Indeed, even in concentrated industries, a simple allegation of parallelism will not carry the day unless

³⁵ 521 F.3d 298 (4th Cir. 2008).

³⁶ *Id.* at 304.

³⁷ *Id.* at 303.

and until the plaintiff can offer some story of coordination between the parties, perhaps through a form of pricing signaling.³⁸

This overview predicts that *Twombly* will not be broadly transformative in antitrust cases. Mere parallelism is bad under *Conley*, so nothing changes with *Twombly*. In the end, therefore, the question is whether the plaintiff can point to some particulars that get over the conceptual hump. Often they can. For example, *Ross v. Bank of America, N.A.*³⁹ involved a Section 1 claim under the Sherman Act, which accused the defendant banks of forcing all banks to require their customers to accept mandatory arbitration provisions. *Ross* did not deal explicitly with the antitrust issue. Instead, it correctly overturned the District court decision that had held that the plaintiff lacked standing under Article III of the Constitution because their clauses had yet to be invoked against any class member.⁴⁰ But owing to the certainty of their future use, there is no good reason to postpone litigation of the case. Even though the Second Circuit punted on the *Twombly* question,⁴¹ it would be wholly improper to grant the defendants judgment on the pleadings when the complaint makes explicit references to extensive meetings and communications of an “Arbitration Coalition” whose express purpose was to recruit other credit card issuers to stand behind their mandatory arbitration provisions. The roadmap for discovery is found in the strictures of the complaint.

The antitrust issues were closer to the center in *In re Static Random Access Memory Antitrust Litigation*,⁴² in which the plaintiffs alleged that the defendants formed an organization to raise the price of SRAM chips that are used to interface with central processing units, often at speeds more rapid than those obtained by Dynamic Random Access Memory chips (“DRAMs”). The private action was initiated in 2006 on the heels of a criminal investigation that the Department of Justice has launched against these companies. That case was fortified by emails among the defendants that appeared to ask for help in setting out “roadmaps” for cooperative marketing efforts among the defendants in marketing SRAM chips, a quantum leap beyond the useless plus-factors (the Notebaert newspaper story) alleged in *Twombly*. The exchange of price information can also raise inferences of collusion, even if they are unadorned by further discussion.⁴³ For these purposes it does not matter whether these information exchanges create *per se* liability under the antitrust laws. The point of discovery is to assemble the facts to amplify the context surrounding these exchanges. An easy case: motion for disguised summary judgment is denied.

³⁸ *In Re Petroleum Antitrust Litigation*, 906 F.2d 432 (9th Cir. 1990)(Nelson, J.)

³⁹ 524 F.3d 217 (2nd Cir. 2008).

⁴⁰ *Ross v. Bank of America, N.A.*, 2006 WL 2685082.

⁴¹ *Id.* at 225.

⁴² 580 F. Supp. 2d 896 (N.D. Calif. 2008).

⁴³ *See, e.g. United States v. Container Corp. of America*, 393 U.S. 333, 335 (1969), cited in *SRAM* at 902.

The same conclusion applies to the follow-on decision in *In re Flash Memory Antitrust Litigation*.⁴⁴ Flash memory chips have the advantage of storing information in “non-volatile” form even without using an external source of power.⁴⁵ *Flash* also exhibits structural features—concentrated industries with high cost barriers to entry—that help make an antitrust claim plausible on its face,⁴⁶ even if they do not in and of themselves overcome the *Twombly* barrier. But, more importantly, it just has to count that two defendants, Hynix and Samsung, pleaded guilty to price fixing charges in the DRAM market, for which they paid hefty fines of \$300 million and \$185 million respectively. The differences between *Flash* and *Twombly* scream out. It is therefore of no surprise that the District Court did not bother to opine the differences between *Twombly* and *Erickson*. On either standard, the case goes forward.

Nonetheless, once the institutional structure becomes more complex, the inferences of collusive conduct become, as in *Twombly*, more difficult to draw. In *Shames v. The Hertz Corporation*,⁴⁷ the plaintiffs alleged that the defendants had conspired to raise rental car rates uniformly to take into account a change in California law that allowed a 2.5 percent surcharge and a 9 percent airport concession fee to be separately stated on a customer’s bill. The theory here was that the newly unbundled elements were added to the bill while the base rate remained the same. There is, of course, no doubt that price-fixing charges lie against effort to fix only some portion of the price, so that in principle these claims could be true.

Yet once again the institutional arrangements matter. In particular, the named defendants in this case included the California Travel and Tourism Commission (“CTTC”), and its executive director, Caroline Beteta, as well as the various rental car companies. The position of these parties clearly differs. The Executive Director gets no obvious gain from joining this conspiracy. And she is necessarily required to be in constant contact with all members of her trade association. Proof of constant contact thus does not support any inference that she participated in a price-fixing conspiracy from which she derived no apparent gain. Given her marginal position, the Court was right to dismiss the complaint against her under *Twombly* for its feeble expression of particulars. Nothing in the evidence excluded, under the *Matsushita* test, independent explanations for her observed actions. A similar line of argumentation applies to a CTTC that likewise is designed to facilitate communication among its members. But again the plaintiffs averted to no sensible plus-factor.

So the strongest case is against the rental car companies, who were said to raise rates once the California statute allowed them to unbundle the concession and airport fees. The case is tricky because nothing required the defendants to raise these prices

⁴⁴ 2009 WL 1096602 (N.D. Cal.).

⁴⁵ *Id.* at 1.

⁴⁶ *Id.* at 1.

⁴⁷ 2008 WL 4370007 (S.D. Cal.).

once the rates were unbundled. But so long as these rates are publicly observable, it is sensible to require some showing that, corrected for other factors, the total rates the defendants charged spiked upward after the unbundling went into effect. That evidence would then complement the view that the unbundling left the defendants with the opportunity to establish a focal point equilibrium based on the previous price structure. Yet so long as that public information on price movements is not added, *Twombly* seems to apply.

IV. CONCLUSION

The question of pleading is a vital issue both generally and in antitrust. There is little doubt that the original conception behind the 1938 Federal Rules of Civil Procedure strongly favored the adoption of notice pleading—a reaction to the somewhat technical pleading requirements that existed under the earlier systems of Code Pleading that were passed in response to the highly formal pleading rules that dominated at common law. The key choice of that system was to minimize the stress at the pleading stage in order to resolve most matters of fact and law only after the full factual record had been obtained on discovery. As a general matter, this method works well for the simple common law claims that animate that position. It is not difficult to plead a case for nonpayment of a debt or an intersection collision. Indeed, in these cases the plaintiff per force has to engage in some investigation prior to filing the suit if only to determine who did not pay the money or who inflicted the physical injury. But once these are established, the sequencing question does not present enormous difficulties.

All this changes with complex litigation in areas like antitrust where law suits that are not dismissed early on are simply too expensive for a defendant to try. Before *Twombly*, antitrust was an area rife with extensive litigation on summary judgment, which courts looked on with some sympathy given the costs of trial. Yet cases like *Matsushita* show that the pretrial costs in discovery are often quite prohibitive, which in turn led to the step taken in *Twombly*, which is to take the theoretical implausibility of the plaintiff's case as a reason to choke off litigation before discovery. Whether this is a better approach than a reform of discovery rules is a hotly debated topic, on which my view is that both approaches should be used in tandem. In cases like *Twombly*, use the disguised summary judgment and, in others, allow the case to go forward with limited discovery, closely supervised by the District of Magistrate court judges.

In this world, the stronger the theoretical implausibility of the plaintiff's claim, the better the case for using *Twombly*. But even where that is not warranted, courts should still be aware of allowing skeletal pleadings that only track the language of the statute without giving some particulars to indicate that further inquiry into the facts is worthwhile. The simple point here is that in huge cases it is not too much to ask that the plaintiff do some investigation prior to filing suit, by relying on public sources

(including criminal prosecutions) that help shape litigation. The current cases seem to have converged about this basic position. My prediction is that the basic soundness of the current structure only two years after *Twombly* will resist major judicial revision, not only in antitrust cases, but in all areas of complex business and commercial litigation. Now that the courts have groped their way to a sensible set of outcomes, it will, and should, take seismic forces to undo the current status quo.