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Plausibility in the Eye of the Beholder: Circuits Address How to Read *Twombly*

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A DECADE AGO THE U.S. SUPREME Court handed down its blockbuster ruling in *Bell Atlantic Corp. v. Twombly*.[1] This decision, together with *Ashcroft v. Iqbal*,[2] revamped the pleading standards for federal complaints and dramatically altered the practice for motions to dismiss those complaints.

Twombly has had an enormous impact on federal litigation. Indeed, as of the date of this writing, *Twombly* has been cited in over 175,000 cases.[3] *Twombly* even prompted an attempt at legislative reversal, though that effort was ultimately unsuccessful.[4]

Perhaps one of the most significant aspects of *Twombly*—and one that distinguishes it from other high-profile Supreme Court cases—is its practical effect on litigants. No responsible plaintiff's attorney can draft a federal complaint without at least some consideration of *Twombly*'s pleading standard. Similarly, the resolution of numerous motions to dismiss in federal court now turns on whether a complaint's allegations meet *Twombly*'s "plausibility" standard.

Not surprisingly, lower courts have frequently disagreed about how to interpret *Twombly*. Federal courts have offered differing interpretations of the meaning and scope of *Twombly*—an issue with both academic interest and practical relevance. As the leading appellate cases demonstrate, there are notable differences in how the circuits apply *Twombly*. Moreover, those cases have left unresolved an important question: whether *Twombly* applies to affirmative defenses as well as complaints.

The *Twombly* Standard

Twombly arose from the 1984 divestiture of AT&T's local telephone business, which left a system of regional service monopolies (ILECs or Incumbent Local Exchange Carriers) that were excluded from the long-distance market. The Telecommunications Act of 1996 changed that by withdrawing approval of the ILECs' monopolies and subjecting them to a host of duties intended to facilitate market entry (including obligations to share their regional networks with competitive local exchange carriers), but permitting the ILECs to enter the long-distance market.[5] In 2002, a group of subscribers to local telephone and Internet services filed a class action complaint in the Southern District of New York, alleging that ILECs had conspired to preclude competition in violation of Section 1[6] of the Sherman Act.[7]

The district court dismissed the plaintiffs' complaint, holding that its allegations of parallel conduct, without more, failed to state a claim under Section 1.[8] Rather, the district court ruled, "plaintiffs must allege additional facts tending to exclude independent self-interested conduct as an explanation for the parallel actions."[9] On appeal, the Second Circuit reversed, holding that the plaintiffs' parallel conduct allegations were sufficient to survive dismissal and that plaintiffs need not allege "plus factors" because the ILECs had failed to show that no set of facts existed that would permit the plaintiffs to demonstrate that the alleged parallelism was the product of collusion and not coincidence.[10]

The Supreme Court granted certiorari and reversed, acknowledging that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[11] Nevertheless, the Court held that a "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[12] In the context of a Section 1 claim, a complaint must include "enough factual matter (taken as true) to suggest that an agreement was made."[13] In other words, the complaint must "plausibly suggest[]" an improper agreement and not be "merely consistent with" such an agreement.[14]

In so holding the Supreme Court rejected language in its prior decision, *Conley v. Gibson*,[15] which suggested that a complaint should not be dismissed unless a plaintiff could prove "no set of facts" in support of its claim, at least if interpreted literally.[16] Applying the plausibility standard to the *Twombly* complaint, the Court reinstated the district

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court's grant of the motion to dismiss because plaintiffs had not "nudged their claims across the line from conceivable to plausible . . . ."[17]

The Response to *Twombly*

The American legal community greeted *Twombly* with much surprise and not a small amount of confusion.[18] Among the many questions with which lower courts and litigators wrestled was whether *Twombly* applied only to antitrust claims or whether it established a general standard applicable to all complaints. Just two years later, in *Ashcroft v. Iqbal*, the Supreme Court confirmed that *Twombly*'s "plausibility" analysis applies to all complaints, not just those with antitrust allegations.[19] *Iqbal* held that the plaintiff's allegations of alleged unconstitutional treatment based upon religious and national origin discrimination under 42 U.S.C. § 1983 failed to nudge his claims "across the line from conceivable to plausible."[20]

Leading Appellate Decisions Interpreting *Twombly* in Antitrust Cases

Twombly made clear that a Section 1 complaint cannot survive unless it pleads a "plausible" conspiracy. Lower courts have grappled with questions, such as what exactly a plaintiff must plead to survive a motion to dismiss (in the antitrust context as well as more generally) and how *Twombly* should be read in light of previous Supreme Court decisions on pleading standards. Different circuits have approached *Twombly*'s plausibility standard differently and, in some instances, have diverged on what is required under it. This divergence has been particularly evident in Section 1 cases applying *Twombly*. This article focuses the discussion on key appellate decisions interpreting *Twombly* in antitrust cases from the First, Second, Third, Sixth, Seventh, and Ninth Circuits.[21]

First Circuit. One of the first and most prominent First Circuit opinions applying *Twombly* to claims of an antitrust conspiracy was *Evergreen Partnering Group, Inc. v. Pactiv Corp.*[22] The *Evergreen* complaint alleged a group boycott. The district court dismissed the complaint, finding that "there are legitimate business reasons that can as easily explain defendants' refusal to deal with [plaintiff] or to compete with one another for market share as can any insinuation of a conspiratorial agreement . . . ."[23]

On appeal, the First Circuit reversed the dismissal. Noting the difficulty of distinguishing between allegations of "merely parallel conduct" and allegations of a "plausible agreement,"[24] the First Circuit observed that "[t]he slow influx of unreasonably high pleading requirements at the earliest stages of antitrust litigation has in part resulted from citations to case law evaluating antitrust claims at the summary judgment and post-trial stages, as the district court has done here."[25] The First Circuit approvingly cited the Second Circuit's *Anderson News* opinion (discussed below),[26] particularly its holding that "[t]he question at the pleading stage is not whether there is a plausible *alternative* to the plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible . . . ."[27] The First Circuit then held that while "a complaint must at least allege the general contours of when an agreement was made, supporting those allegations with a context that tends to make said agreement plausible," an antitrust plaintiff was *not* required to plead "plus factors" at the motion to dismiss stage.[28] Applying this standard, the court held that the *Evergreen* plaintiff's allegations went "much further" than the allegations in *Twombly* and, as such, plausibly alleged a conspiracy.[29]

Second Circuit. Like the First Circuit, the Second Circuit is somewhat more plaintiff-friendly in its interpretation of *Twombly* than certain other circuits. For example, in *Starr v. Sony BMG Music Entertainment*,[30] the Second Circuit reversed the district court's dismissal of a class action complaint alleging that major record companies had conspired to fix the prices of music purchased on the Internet in violation of the antitrust laws. The *Starr* plaintiffs alleged that major record companies had launched two joint venture music services through which the companies had sold music directly to consumers over the Internet.[31] The plaintiffs alleged Section 1 violations, pointing to those joint ventures and instances of parallel conduct by the defendants (such as agreeing to raise prices).[32]

The district court granted the defendants' motion to dismiss, holding that the plaintiffs' "bald allegation that the joint ventures were shams is conclusory and implausible" because an illegal agreement could not be inferred from the operation of the joint ventures alone.[33] On appeal, the Second Circuit reversed, finding that "[t]he 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."[34] Specifically, the court held that *Twombly* requires merely that a plaintiff allege facts "to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement."[35] The Second Circuit concluded that the plaintiffs' allegations, taken as a whole, sufficiently suggested the existence of an agreement among defendants rather than independent action.[36]

The Second Circuit reached a similar conclusion in *Anderson News L.L.C. v. American Media, Inc.*[37] In *Anderson News*, the plaintiff alleged that its competitors had conspired to boycott it and drive it out of business. After the district court dismissed the complaint under *Twombly* on the grounds that the alleged conspiracy was facially implausible,[38] the Second Circuit reversed, finding that the plaintiffs had alleged an actual agreement, had identified the conspirators, and had pleaded details of conspiratorial meetings, sufficient to meet *Twombly*'s plausibility standard.[39] In its detailed discussion of the *Twombly* standard, the Second Circuit observed that the trial court had incorrectly focused on whether there was a plausible alternative explanation for the defendants' conduct.[40] The proper analysis under *Twombly* was whether the complaint alleges sufficient facts to make the *plaintiffs' claims* plausible. The court refused to apply a summary judgment

standard to a motion to dismiss, stating that "to present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages . . . ."[41] The Second Circuit has continued to apply the standards set forth in *Starr* and *Anderson News* to antitrust conspiracy claims.[42]

Third Circuit. *In re Insurance Brokerage Antitrust Litigation* was one of the first major Third Circuit decisions applying *Twombly*.[43] In that case, the Third Circuit examined the relationship between pleading and summary judgment standards in antitrust cases:

> *Twombly* aligns the pleading standard with the summary judgment standard in at least one important way: Plaintiffs relying on circumstantial evidence of an agreement must make a showing at both stages (with well-pled allegations and evidence of record, respectively) of "something more than merely parallel behavior," something "plausibly suggest[ive of] (not merely consistent with) agreement."[44]

The Third Circuit then held that, under *Twombly*, "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."[45] Moreover, according to the Third Circuit, an antitrust plaintiff alleging a conspiracy based on parallel conduct must plead "plus factors," such as "(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.'"[46] The Third Circuit ultimately held that the *Insurance Brokerage* plaintiffs had failed to plausibly allege a conspiracy and affirmed the district court's dismissal of the majority of the plaintiffs' antitrust claims.[47] *Insurance Brokerage* continues to be good law.[48]

Sixth Circuit. One of the first major Sixth Circuit decisions applying *Twombly* was *In re Travel Agent Commission Antitrust Litigation*.[49] In *Travel Agent*, the Sixth Circuit affirmed the district court's dismissal of the plaintiffs' antitrust complaint. In doing so, it stated that "[t]he *Twombly* decision provides an additional safeguard against the risk of 'false inferences from identical behavior' at an earlier stage of the trial sequence—the pleading stage"[50] and that "the plausibility of plaintiffs' conspiracy claim is inversely correlated to the magnitude of defendants' economic self-interest . . . ."[51] The Sixth Circuit held that the plaintiffs' allegations of conspiracy could just as easily be explained by rational economic action and lacked sufficient detail to "nudge" their claims from conceivable to plausible.[52]

The Sixth Circuit applied *Twombly* again in *Erie County, Ohio v. Morton Salt, Inc.*[53] Although it affirmed the complaint's dismissal, the Sixth Circuit cautioned that the standards applicable at the motion to dismiss stage and the summary judgment stage are different.[54] Notably, the court held that "at the pleading stage, the plaintiff is not required to allege facts showing that an unlawful agreement is more likely than lawful parallel conduct."[55] Indeed, the plaintiff is not required to "allege a fact pattern that 'tends to exclude the possibility' of lawful, independent conduct."[56] The court noted that the "tends to exclude" language is drawn from *Monsanto*'s[57] summary judgment standard, which does not extend to the pleading stage. Even though *Erie County* did not reverse the complaint's dismissal, the case suggests that the Sixth Circuit may apply *Twombly*'s standard less strictly than some other circuits, such as the Third and Ninth.[58]

Seventh Circuit. *In re Text Messaging Antitrust Litigation* was one of the first cases in which the Seventh Circuit had occasion to apply *Twombly* in the antitrust context.[59] In an opinion written by Judge Richard Posner, the Seventh Circuit affirmed the district court's denial of the defendants' motion to dismiss and explained its interpretation of the *Twombly* standard.[60] The court distinguished the terms "plausibility," "probability," and "possibility," stating:

> 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.[61]

Applying this standard, the Seventh Circuit held that the plaintiffs had plausibly alleged a conspiracy, in particular by alleging the combination of parallel behavior, industry structure details, and certain industry practices that all "facilitate collusion."[62] Although the plaintiffs' allegations provided only circumstantial evidence, the court emphasized that at the pleading stage the court "need not decide whether the circumstantial evidence . . . is sufficient to *compel* an inference of conspiracy; the case is just at the complaint stage and the test for whether to dismiss a case at that stage turns on the complaint's 'plausibility.'"[63]

Ninth Circuit. The Ninth Circuit appears to take a somewhat stricter view of *Twombly*'s plausibility standard (at least in the antitrust context) than do many of its sister circuits.[64] For example, in *name.space, Inc. v. Internet Corp. for Assigned Names and Numbers*, the Ninth Circuit affirmed the district court's dismissal of a complaint, holding that the defendant's "decision-making was fully consistent" with rational, lawful business behavior.[65] Notably, the court also held that "courts must consider obvious alternative explanations for a defendant's behavior when analyzing plausibility;"[66] and the court would not "infer an illegal agreement with outside interests simply because [the defendant]'s rational business decisions favor the status quo rather than [the plaintiff]'s untested alternative business model."[67] District courts in the Ninth Circuit have continued to apply this standard to antitrust conspiracy claims.[68]

Where Are We Now?

Ten years after *Twombly*, the appellate courts still grapple with the decision's impact and the proper application of its plausibility standard to pleadings.[69] Although the interpretive differences among the circuits are not clear-cut, certain general trends in antitrust cases are observable.

First, the appellate courts disagree on the issue of whether a court either can or should weigh inferences on a motion to dismiss (i.e., whether the "plausibility" standard applies only to plaintiff's allegations or whether a court should also consider the plausibility of alternative explanations suggested by defendants). On this issue, the First and Second Circuits hold that courts are not required to weigh inferences, while the Third and Ninth Circuits have permitted such weighing of inferences. The Sixth Circuit has been inconsistent on this point, while the Seventh Circuit's position appears to be closer to that of the First and Second Circuits.

Second, the circuits have reached differing conclusions regarding the necessity of pleading "plus factors" at the motion to dismiss stage. The clearest split on this issue is between the First and Third Circuits, with the First Circuit holding that pleading "plus factors" is not necessary at the preliminary stages of a lawsuit, and the Third Circuit requiring the pleading of at least one "plus factor," even at the motion to dismiss stage.[70]

Overall, the First and Second Circuits appear slightly more forgiving towards antitrust conspiracy plaintiffs than other circuits,[71] while the Third and Ninth Circuits take a stricter view of *Twombly*'s pleading requirements.[72] The Sixth and Seventh Circuits remain somewhere in the middle, depending on the specific allegations.[73]

Twombly and Affirmative Defenses

One of the most significant and enduring disagreements among federal courts interpreting *Twombly* is whether *Twombly*'s "plausibility" pleading standard also applies to affirmative defenses, a question left unanswered by the Supreme Court's decision.[74] Initially, the majority of federal courts addressing this issue held that *Twombly*'s plausibility standard applied to affirmative defenses as well as to a complaint's allegations.[75] That consensus appears to be changing, however, as an increasing number of federal courts have begun to conclude that *Twombly*'s standard should not apply to affirmative defenses.[76] Somewhat surprisingly, no federal court of appeals has explicitly ruled on the applicability of *Twombly* to affirmative defenses to date.[77]

Lower courts applying the *Twombly* standard to affirmative defenses have reasoned that applying this heightened standard would "weed out boilerplate list[s][] of affirmative defenses" and "further[] the underlying purpose of Rule 12(f), which is to avoid spending time and money litigating spurious issues."[78] For example, in *Dion v. Fulton Friedman & Gullace LLP*, the district court applied *Twombly*'s standard to affirmative defenses, holding that "[j]ust as a plaintiff's complaint must allege enough supporting facts to nudge a legal claim across the line separating plausibility from mere possibility . . . a defendant's pleading of affirmative defenses must put a plaintiff on notice of the underlying factual bases of the defense. Mere labels and conclusions do not suffice."[79]

As noted, however, an increasing number of district courts have rejected this analysis and held that "fair notice" is the applicable standard for affirmative defenses, even after *Twombly*.[80] For example, in *Bayer CropScience AG v. Dow AgroSciences LLC*, a court in the District of Delaware held that the *Twombly* standard did not apply to affirmative defenses.[81] The court offered nine separate reasons in support of that conclusion, including, most notably: (1) "textual differences" between Rule 8(a) and Rule 8(c) (which governs affirmative defenses); (2) limited discovery costs related to affirmative defenses; (3) the unfairness of applying the same pleading standard to a defendant with limited time to respond to a complaint; and (4) the "the low likelihood that motions to strike affirmative defenses would expedite the litigation."[82]

To date, the appellate courts have not directly dealt with the affirmative defense issue, perhaps because it tends to arise far less often than does the adequacy of a complaint's allegations. The closest a circuit has come to addressing this issue occurred in *Simmons*, where the Ninth Circuit continued to apply a "fair notice" standard after *Twombly*—but without analysis.[83] And although this decision appears consistent with the trend towards not applying *Twombly*'s standard to affirmative defenses, it remains an open question whether the other appellate courts (or even the Supreme Court) will agree.

Conclusion

Twombly's influence continues to be felt in courts throughout the country. Appellate courts and district courts have struggled to determine exactly what *Twombly*'s plausibility standard means and how it should be applied. Because appellate courts have not universally reached a single and uniform conclusion regarding the proper "*Twombly* standard," practitioners should be mindful of the specific interpretation applicable in their circuit.

In the case of affirmative defenses, the rulings of district courts have been particularly inconsistent, even within a single circuit. Practitioners must look to the specific district court in which the case is filed to determine whether *Twombly* applies to affirmative defenses.

Whether the appellate courts will gradually move toward more uniformity in their application of the *Twombly* standard to motions to dismiss, and whether the Supreme Court itself will weigh in again should the circuit differences materialize into clear splits, are still open questions. It is clear, however, that *Twombly* has focused the bench and bar on the need for tighter and more detailed pleading, both in the antitrust context and more broadly. ■

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1 550 U.S. 544 (2007).

2 556 U.S. 662 (2009).

[3] According to the electronic case database Lexis Advance.

[4] The proposed bill, the Notice Pleading Restoration Act of 2009, provided in relevant part that "Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)." S. 1504, 111th Cong. § 2 (2009). The bill failed to attract sufficient support and did not make it out of committee.

[5] *Twombly*, 550 U.S. at 548–49.

[6] 15 U.S.C. § 1.

[7] *Twombly*, 550 U.S. at 550–51.

[8] *See* Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003), *vacated and remanded*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 550 U.S. 544 (2007).

[9] *Twombly*, 313 F. Supp. 2d at 179.

[10] *See Twombly*, 425 F.3d at 114 ("But plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal.").

[11] *Twombly*, 550 U.S. at 555 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

[12] *Id.*

[13] *Id.* at 556. The Court also noted the practical significance of this pleading standard in light of the often exorbitant expense associated with discovery in antitrust actions. *See id.* at 557–60.

[14] *Id.* at 557.

[15] 355 U.S. 41 (1957).

[16] *Twombly*, 550 U.S. at 560–63.

[17] *Id.* at 570.

[18] *See, e.g.*, William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J. LEGAL STUD. 35, 42–43 (2013).

[19] 556 U.S. 662 (2009).

[20] *Id.* at 680 (citing *Twombly*, 544 U.S. at 569).

[21] Key post-*Twombly* antitrust conspiracy cases from other circuits include the Fourth Circuit case, *Loren Data Corp. v. GXS, Inc.*, 501 F. App'x 275 (4th Cir. 2012). In *Loren*, the Fourth Circuit affirmed the district court's dismissal of a Section 1 claim, holding that the plaintiff's allegations "must tend to exclude the possibility that the alleged co-conspirators acted independently, and the alleged conspiracy must make practical, economic sense." *Id.* at 281. The Fifth Circuit also addressed Twombly's standard in antitrust conspiracy cases in *Marucci Sports, L.L.C. v. National Collegiate Athletic Ass'n*, 751 F.3d 368 (5th Cir. 2014). Although its analysis was not extensive, the *Marucci* court found that the plaintiff did not "allege any specific facts demonstrating an intention on the part of [defendants] to engage in a conspiracy," and affirmed the district court's dismissal. *Id.* at 375. The later Fifth Circuit decision of *MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835 (5th Cir. 2015), was not a Rule 12 case (the court affirmed a jury verdict finding an antitrust conspiracy), but the court stated that "a plaintiff seeking to prove that a defendant joined an antitrust conspiracy without direct evidence of the conspiracy must present evidence 'that tends to exclude the possibility' of independent conduct." *Id.* at 843.

[22] 720 F.3d 33 (1st Cir. 2013).

[23] Evergreen Partnering Grp., Inc. v. Pactiv Corp., 865 F. Supp. 2d 133, 140 (D. Mass. 2012), *vacated and remanded*, 720 F.3d 33 (1st Cir. 2013).

[24] *Evergreen*, 720 F.3d at 43–44.

[25] *Id.* at 44.

[26] 680 F.3d 162 (2d Cir. 2012).

[27] *Evergreen*, 720 F.3d at 45 (quoting *Anderson News*, 680 F.3d at 189–90).

[28] *Id.* at 46–47 ("We are thus wary of placing too much significance on the presence or absence of 'plus factors' at the pleadings stage. While they are certainly helpful in guiding a court in its assessment of the plausibility of agreement in a § 1 case, other, more general allegations informing the context of an agreement may be sufficient. This is particularly true given the increasing complexity and expert nature of 'plus factor' evidence which would not likely be available at the beginning stages of litigation.").

[29] *Id.* at 47. Based upon a more complete record, the First Circuit subsequently affirmed the district court's grant of summary judgment to defendants in *Evergreen*. *See* Evergreen Partnering Grp., Inc. v. Pactiv Corp., 832 F.3d 1, 3 (1st Cir. 2016). In doing so, however, the court reaffirmed the correctness of the pleading standard articulated in the 2013 *Evergreen* decision reversing the trial court's dismissal. *See id.* at 7.

[30] 592 F.3d 314 (2d Cir. 2010).

[31] *Id.* at 318–19.

[32] *Id.*

[33] *Id.* at 320 (quoting *In re* Digital Music Antitrust Litig., 592 F. Supp. 2d 435, 442 (S.D.N.Y. 2008)).

[34] *Id.* at 323.

[35] *Id.* at 322 (quoting *Twombly*, 544 U.S. at 556).

[36] *Id.* at 327.

[37] 680 F.3d 162 (2d Cir. 2012).

[38] Anderson News, L.L.C. v. Am. Media, Inc., 732 F. Supp. 2d 389 (S.D.N.Y. 2010).

[39] *Anderson News*, 680 F.3d at 186–89.

[40] *Id.* at 189–90.

[41] *Id.* at 184.

[42] *See, e.g.*, Gelboim v. Bank of Am. Corp., 823 F.3d 759, 781 (2d Cir. 2016) (reversing district court's dismissal of antitrust conspiracy complaint and stating "[t]o survive dismissal, 'the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment, or a trial.'") (citing *Anderson News*, 680 F.3d at 184).

[43] 618 F.3d 300 (3d Cir. 2010).

[44] *Id.* at 322 (quoting *Twombly*, 550 U.S. at 557, 560).

[45] *Id.* at 326.

[46] *Id.* at 321–22. In contrast, as discussed above, the First Circuit has held that an antitrust plaintiff may, but is not required to, allege "plus factors" in order to survive a motion to dismiss. *See Evergreen*, 720 F.3d at 46–47.

[47] The *Insurance Brokerage* court found that the plaintiffs' bid-rigging claims survived the motion to dismiss because the "plaintiffs have set forth particularized allegations of unlawful bid-rigging." *Insurance Brokerage*, 618 F.3d at 338.

[48] *See, e.g.*, Havens v. Mobex Network Servs., Ltd. Liab. Co., 820 F.3d 80, 91 (3d Cir. 2016) (citing *Insurance Brokerage* and requiring the pleading of "plus factors" as circumstantial evidence of an antitrust conspiracy).

[49] 583 F.3d 896 (6th Cir. 2009).

[50] *Id.* at 904.

[51] *Id.* at 909.

[52] *Id*. at 909–11.

[53] 702 F.3d 860 (6th Cir. 2012).

[54] *Id.* at 868.

[55] *Id.* at 868–69.

[56] *Id.* at 869.

[57] Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

[58] The Sixth Circuit has acknowledged, however, that "there is no general agreement on the exact pleading standards to use when resolving antitrust cases" and that "antitrust cases in this circuit, and in others, apply various approaches to adjudicating antitrust claims." Food Lion, LLC v. Dean Foods Co. (*In re* Se. Milk Antitrust Litig.), 739 F.3d 262, 270 (6th Cir. 2014).

[59] 630 F.3d 622 (7th Cir. 2010).

[60] *Id.* at 627–29.

[61] *Id.* at 629.

[62] *Id.* at 627–28.

[63] *Id.* at 629. The Seventh Circuit revisited the case and subsequently granted summary judgment in favor of the defendants. *See In re* Text Messaging Antitrust Litig., 782 F.3d 867, 869 (7th Cir. 2015). In that 2015 decision, the Seventh Circuit noted that the standards set forth in its 2010 *Text Messaging* decision continue to apply at the motion to dismiss stage. *Id.* at 870.

[64] Indeed, in one of its first major decisions applying *Twombly*, the Ninth Circuit noted that the Supreme Court "made clear in *Twombly* that it was concerned that lenient pleading standards facilitated abusive antitrust litigation." Starr v. Baca, 652 F.3d 1202, 1213 (9th Cir. 2011).

[65] 795 F.3d 1124, 1130 (9th Cir. 2015). Although the suit was brought only against ICANN, the plaintiff brought a Section 1 claim alleging that ICANN conspired with its board members and other industry insiders to restrain trade in implementing rules and procedures related to an application bidding process.

[66] *Id.* (citing Eclectic Props. E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014)).

[67] *Id.* at 1131.

[68] *See, e.g.*, Bay Area Surgical Mgmt. LLC v. Aetna Life Ins. Co., No. 15-cv-01416-BLF, 2016 U.S. Dist. LEXIS 93263, at *25–26 (N.D. Cal. July 18, 2016) ("For a Section 1 antitrust claim, the complaint must allege facts 'plausibly suggesting (not merely consistent with) a conspiracy. It is not enough merely to include conclusory allegations that certain actions were the result of a conspiracy; the plaintiff must allege facts that make the conclusion plausible.' A court cannot 'infer an anticompetitive agreement when factual allegations just as easily suggest rational, legal business behavior.'") (quoting *name.space, Inc.*, 795 F.3d at 1129–30).

[69] Surprisingly, studies have found no conclusive empirical evidence that motions to dismiss are more likely to be granted post-*Twombly*. *See, e.g.*, Kendall W. Hannon, *Much Ado About* Twombly*—A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 Notre Dame L. Rev. 1811 (2008); William H.J. Hubbard, The Effects of *Twombly* and *Iqbal*, 14 J. Empirical Legal Stud. 474 (2017); Hubbard, *supra* note 18, at 42–43; Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(b)(6) Motions*, 46 U. Richmond L. Rev. 603 (2012); Patricia W. Hatamyar Moore, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 Am. U. L. Rev. 553 (2010).

[70] Other circuits appear to be closer to the Third Circuit with respect to the necessity of pleading "plus factors." *See, e.g.*, Vedder Software Grp. Ltd. v. Ins. Servs. Office, 545 F. App'x 30, 32 (2d Cir. 2013) (allegations of parallel conduct must be supported by "plus factors"); *Travel Agent*, 583 F.3d at 907 ("plus factors" are "important when evaluating circumstantial evidence of concerted action"); *In re* Musical Instrs. & Equip. Antitrust Litig., 798 F.3d 1186, 1194 (9th Cir. 2015) (affirming dismissal and stating that "The Ninth Circuit has distinguished permissible parallel conduct from impermissible conspiracy by looking for certain 'plus factors.'").

[71] *See, e.g.*, Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33 (1st Cir. 2013); Anderson News L.L.C. v. American Media, Inc., 680 F.3d 162 (2d. Cir. 2012).

[72] *See, e.g.*, *In re* Insurance Brokerage Antitrust Litig., 618 F.3d 300 (3d Cir. 2010); name.space, Inc. v. Internet Corp. for Assigned Names and Numbers, 795 F.3d 1124 (9th Cir. 2015).

[73] *See, e.g.*, *Travel Agent*, 583 F.3d 896; Erie County, Ohio v. Morton Salt, Inc., 702 F.3d 860 (6th Cir. 2012); Food Lion, LLC v. Dean Foods Co. (*In re* Se. Milk Antitrust Litig.), 739 F.3d 262, 270 (6th Cir. 2014); *In re* Text Messaging Antitrust Litig., 630 F.3d 622 (7th Cir. 2010).

[74] *See, e.g.*, Walker v. Charter Commc'ns Inc., No. 3:15-cv-00556-RCJ-VPC, 2016 U.S. Dist. LEXIS 84510, at *4 (D. Nev. June 29, 2016) ("The [Supreme] Court has not determined whether the *Iqbal* pleading standard also applies to Rule 12(f) motions seeking to strike affirmative defenses under Rule 8(c)(1), and the issue among district courts is unsettled."); Perez v. Gordon & Wong Law Grp., P.C., No. 11-CV-03323-LHK, 2012 U.S. Dist. LEXIS 41080, at *24 (N.D. Cal. Mar. 26, 2012) (noting that the Supreme Court has not answered this question); James V. Bilek, Twombly, Iqbal, *and Rule 8(c): Assessing the Proper Standard to Apply to Affirmative Defenses*, 15 Chap. L. Rev. 377, 378 (2011) ("Yet, while the Court may have announced the standard for complaints, it was silent as to what to do with affirmative defenses pled in an answer.").

[75] *See Perez*, 2012 U.S. Dist. LEXIS 41080, at *24 (stating that the "vast majority" of federal district courts presented with this issue have held that affirmative defenses are subject to *Twombly*'s plausibility standard); Justin Rand, Tightening *Twiqbal: Why Plausibility Must Be Confined to the Complaint*, 9 Fed. Cts. L. Rev. 79, 80–81 (2016) (citing Tiscareno v. Frasier, No. 2:07-CV-336, 2012 WL 1377886, at *17 n.4 (D. Utah Apr. 19, 2012) ("[T]he majority approach has been to apply the *Twombly/Iqbal* pleading standard to affirmative defenses . . . . [I]t is unclear whether that approach is still a majority position."), and Stephen Mayer, *Note, An Implausible Standard for Affirmative Defenses*, 112 Mich. L. Rev. 275, 285 (2013) ("[A]lthough a majority of early courts applied the heightened standard, [the *Conley* standard] is now the majority approach.")).

[76] *See id.*; *see also* Hansen v. R.I.'s Only 24 Hour Truck & Auto Plaza, Inc., 287 F.R.D. 119, 122 (D. Mass. 2012) (stating that most district courts initially applied *Twombly* plausibility to affirmative defenses but that "this is now the minority approach").

[77] *See* FTC v. AMG Servs., No. 2:12-cv-536-GMN-VCF, 2014 U.S. Dist. LEXIS 152864, at *7–8 (D. Nev. Oct. 27, 2014) ("No Circuit Court has addressed the question of whether *Twombly* and *Iqbal* or *Conley* governs a Rule 12(f) motion to strike an insufficient defense.") (citing 5 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1274 at p. 616 (3d ed. 2013)); Rand, *supra* note 75, at 80 (noting that "no federal appellate tribunal" has "provided guidance" on whether *Twombly* applies to affirmative defenses). The Ninth Circuit has addressed the standard for pleading affirmative defenses but has applied its pre-*Twombly* case law rather than directly addressing the *Twombly* standard. *See, e.g.*, Simmons v. Navajo Cty., 609 F.3d 1011, 1023 (9th Cir. 2010) (citing Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979)).

[78] *See* Dion v. Fulton Friedman & Gullace LLP, No. 11-2727 SC, 2012 U.S. Dist. LEXIS 5116, at *2–3 (N.D. Cal. Jan. 17, 2012) (quoting Barnes v. AT&T Pension Ben. Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1171 (N.D. Cal. 2010)). For other district courts applying *Twombly* to affirmative defenses, *see* Mayfield v. Cty. of Merced, No. 1:13-CV-1619-LJO-BAM, 2015 U.S. Dist. LEXIS 22760, at *3 (E.D. Cal. Feb. 25, 2015); Peterson v. Acumed, LLC, No. CV-10-586, 2010 U.S. Dist. LEXIS 132723, at *3 (D. Or. Dec. 14, 2010); Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 649–52 (D. Kan. 2009); Holtzman v. B/E Aerospace, Inc., No. 07-80551-CIV, 2008 U.S. Dist. LEXIS 42630, at *2 (S.D. Fla. May 29, 2008).

[79] 2012 U.S. Dist. LEXIS 5116, at *6 (citing *Twombly*, 550 U.S. at 555, 570; *Barnes*, 718 F. Supp. 2d at 1172–73).

[80] *See, e.g.*, Kohler v. Islands Restaurants, LP, 280 F.R.D. 560, 565–66 (S.D. Cal. 2012) ("Most significantly, the Ninth Circuit has continued to recognize the 'fair notice' standard of affirmative defense pleading even after *Twombly* and *Iqbal*."); Bayer CropScience AG v. Dow AgroSciences LLC, No. 10-1045 RMB/JS2011, U.S. Dist. LEXIS 149636, at *3–4 (D. Del. Dec. 30, 2011); Bank of Beaver City v. Sw. Feeders, L.L.C., No. 4:10-CV-3209, 2011 U.S. Dist. LEXIS 114724, at *5–6 (D. Neb. Oct. 4, 2011); Tyco Fire Prods. LP v. Victaulic Co., 777 F. Supp. 2d 893, 900 (E.D. Pa. 2011); Holdbrook v. SAIA Motor Freight Line, LLC, No. 09-CV-02870-LTB-BNB, 2010 U.S. Dist. LEXIS 29377, at *2 (D. Colo. Mar. 8, 2010); Romantine v. CH2M Hill Eng'rs, Inc., No. 09-973, 2009 U.S. Dist. LEXIS 98699, at *1 (W.D. Pa. Oct. 23, 2009); First Nat'l Ins. Co. of Am. v. Camps Servs., Ltd., No. 08-cv-12805, 2009 U.S. Dist. LEXIS 149, at *2 (E.D. Mich. Jan. 5, 2009).

[81] U.S. Dist. LEXIS 149636, at *3–4.

[82] *Id.* The additional reasons the *Bayer* court offered were: (1) a diminished concern that plaintiffs receive notice in light of their ability to obtain more information during discovery; (2) the absence of a concern that the defense is "unlocking the doors of discovery;" (3) the risk that a defendant will waive a defense at trial by failing to plead it at an early stage of the litigation; (4) the lack of detail in Form 30, which demonstrates the appropriate pleading of an affirmative defense; and (5) the fact that a heightened pleading requirement would produce more motions to strike, which are disfavored. *Id.*

[83] Simmons v. Navajo Cty., 609 F.3d 1011 (9th Cir. 2010).