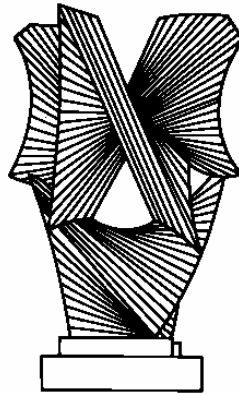


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Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgements

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Bell Atlantic v. Twombly:
How Motions to Dismiss Become
(Disguised) Summary Judgments[†]

Richard A. Epstein*

Abstract

The recent Supreme Court decision in *Bell Atlantic v. Twombly* stands at the crossroads of antitrust and civil procedure. As an antitrust case, *Twombly* makes sense on structural grounds. The FCC regulation of the telecommunications industry, and the many innocent explanations as to why each telecommunications company would stay out of its rival's territories obviated the need for further discovery. But in many other contexts, including *Conley v. Gibson*—a case involving potential breach of the duty of fair representation on matters of racial discrimination—discovery could flesh out the relevant factual issues. The Supreme Court's general disapproval of *Conley* sweeps far too wide. Discovery should only be denied when the plausible inferences that can be drawn from the complaint and publicly available evidence clearly imply further discovery is of little value. Accordingly, the Federal Rules of Civil procedure should explicitly acknowledge that in a small set of cases motions on the pleadings can properly function as truncated and disguised motions for summary judgment.

The present Federal Rules of Civil Procedure allow a plaintiff's case to be attacked either for its legal or factual sufficiency. The rules governing the former are in general adequate because judgments on the validity of claims do not require any discovery. Decisions before trial on factual matters are much more complex, especially in antitrust cases where discovery before a summary judgment motion can be highly expensive on open-ended claims of collusion over prices or territories. To counteract that risk, all courts today allow some judgments to be entered at the close of pleading and before discovery. The recent Supreme Court decision in *Bell Atlantic Corp. v. Twombly*,¹ reversing the Second Circuit decision in *Twombly v. Bell Atlantic Corp.*,² resolved the ongoing dispute by requiring that a complaint contain “enough facts to state a claim to relief

[†] This paper was prepared from a speech given at Washington University in St. Louis School of Law as part of the 2006–2007 Public Interest Law Speakers Series

* James Parker Hall Distinguished Service Professor of Law, The University of Chicago; Peter and Kirsten Bedford Senior Fellow, The Hoover Institution. . I would like to thank my colleagues at the University of Chicago work in progress for their helpful comments on earlier drafts of the paper. I would also like to thank Brad Grossman, University of Chicago Law School, Class of 2007 and Ramtin Terheri, University of Chicago Law School, Class of 2009 for their excellent research assistance. An early version of this Article, written before the Supreme Court's decision in *Bell Atlantic v. Twombly* was published by the AEI Brookings Joint Center. See AEI-Brookings Joint Center for Regulatory Studies, Epstein, *Motions to Dismiss Antitrust Cases: Separating Fact from Fantasy*, Related Publication 06–08, pp. 3–4 (2006). It contained a detailed analysis of the decisions by Judge Sack in the Second Circuit and Judge Lynch in the District Court. I have left much of that material in this Article because it sets the stage for what happened in the United States Supreme Court. Although I have worked as a consultant for Verizon on previous occasions, I have written this article without any assistance or financial support from it or any other defendant involved in this litigation.

1. *Bell Atlantic Corp. v. Twombly (Twombly III)*, 127 S. Ct. 1955 (2007), *rev'g Twombly v. Bell Atlantic Corp. (Twombly II)*, 425 F.3d 99 (2d Cir. 2005), *rev'g Twombly v. Bell Atlantic Corp. (Twombly I)*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003).

that is plausible on its face.” While the result of the decision is to be welcome, its analysis is flawed. In reality, *Twombly III* was a disguised motion for summary judgment that is best defended as properly balancing the relative error costs of stopping too soon or going too far. A close look at the record suggests that discovery would supply no new information of value, no matter how the case was pleaded. Therefore, the proper principle is that courts should be more willing to enter final judgments at the close of the pleadings, especially against plaintiffs whose claims are based solely on easily accessible public information which already have been rebutted by the same kinds of public evidence.

I. INTRODUCTION: LEGAL AND FACTUAL UNCERTAINTY UNDER THE FEDERAL RULES

The Federal Rules of Civil Procedure were adopted in 1938 with great fanfare. Their introduction was celebrated as an obvious advance over the earlier rules of procedure that were embodied in the standard codes.³ Key to that system were new rules that governed pleading and discovery prior to trial. These rules were drafted with reference to the litigation most common at the time, such as actions on promissory notes, negligence suits for traffic-intersection collisions, actions actions for money had and received and patent infringement cases.⁴ All of these are set out with model complaints that take a sentence or two to set out, and turn on one or two key facts: was the money owed, did the defendant run the traffic light, and so on. Like every procedural system, the modern rules of civil procedure had to make room for three sorts of attacks on the pleadings contained in a plaintiff’s complaint: the defendant had to be able to claim that the complaint did not state a cause of action on which relief could be granted; the defendant had to be able to deny the factual charges that were made; and the defendant had to be able to introduce new matter that would either justify or excuse the allegations in question.⁵

All three of these issues could arise in the full range of litigation. In automobile cases, the defendant could move to dismiss for failure to state a cause of action if the plaintiff does not allege negligence. Or the defendant could move to dismiss on summary judgment by proving that his car was not involved in the collision.⁶ Or the defendant could introduce an affirmative defense such as contributory negligence to bar or diminish the plaintiff’s claim. In dealing with these issues, the basic position was that all the legal questions going to the sufficiency of the complaint could be decided on a motion on the pleadings before discovery, but that motions to defeat the

2. *Twombly II*, 425 F.3d 99.

3. For a brief account and praise of the “liberal” elements of the Federal Rules, see, e.g., Fleming James, Jr., Geoffrey C. Hazard, Jr. & John Leubsdorf, *CIVIL PROCEDURE* § 1.7 (4th ed. 1992). For the liberal rules on pleading, see *id.* §§ 3.1, 3.6.

4. See FED. R. CIV. P. Forms 3 through 18.

5. See FED. R. CIV. P. 8(b), 8(c) (establishing standards for denials and affirmative defenses).

6. See FED. R. CIV. P. 56. Such motions are of course commonplace. See, e.g., *Illinois Central R. Co. v. Dupont*, 326 F.3d 665 (5th Cir. 2003) (granting summary judgment in favor of insurance company on grounds that the insurance policy only covered

claim on factual issues could be made only by a motion for summary judgment after discovery had been conducted, usually in a relatively compact time frame, given the nature of the underlying dispute.

There is little doubt that for much of its history, the Supreme Court has taken a position that is consistent with the view of notice pleading that animated the drafting of the Federal Rules. The most important landmark along the way is *Conley v. Gibson*,⁷ a staple among civil procedure cases, which contains the oft-quoted injunction “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.”⁸ The primary reason for this liberal rule of pleading was partly dependent on the specific context of the case in *Conley*. The plaintiffs in *Conley* were a group of black railroad workers who had complained of racial discrimination at the hands of their union, such that in 1955 the Court had strong motivation to allow the case to run its course. But it should not be supposed from this broad statement of the rule that the complaint itself was drafted in some inarticulate fashion, or that the rule announced in *Conley* had in fact received relentless criticism in the fifty plus years since its adoption. The Supreme Court in *Twombly III* held that the phrase “no set of facts” has been “questioned, criticized, and explained away long enough.”⁹ But on this matter Justice Stevens’s dissent surely has the better argument. *Conley* has long been treated as an authoritative statement of the law that has been followed uniformly in the Supreme Court and elsewhere,¹⁰ and the plaintiffs’ allegations are quite in the spirit of the Federal Rules. The *Conley* complaint is fact-free but gives notice of the basic elements of the claim.¹¹

Twombly III can not be defended if the only question is whether it captures the sense of notice pleading in earlier cases. Nonetheless, as a matter of principle, I think that the judgment is right for reasons that were not voiced in Justice Souter’s majority opinion, but which put the case on a

company truck, not employee’s personal vehicle).

7. 355 U.S. 41 (1957).

8. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

9. *Bell Atlantic Corp. v. Twombly (Twombly III)*, 127 S. Ct. 1955, 1969 (2007).

10. *Id.* at 1978 (Stevens, J., dissenting).

11. *Conley*, 355 U.S. at 43. The court described Plaintiff’s complaint as follows:

Petitioners were employees of the Texas and New Orleans Railroad at its Houston Freight House. Local 28 of the Brotherhood was the designated bargaining agents under the Railway Labor Act for the bargaining unit to which petitioners belonged. A contract existed between the Union and the Railroad which gave the employees in the bargaining unit certain protection from discharge and loss of seniority. In May 1954, the Railroad purported to abolish 45 jobs held by petitioners or other Negroes all of whom were either discharged or demoted. In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority. Despite repeated pleas by petitioners, the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees. The complaint then went on to allege that the Union had failed in general to represent Negro employees equally and in good faith. It charged that such discrimination constituted a violation of petitioners’ right under the Railway Labor Act to fair representation from their bargaining agent. And it concluded by asking for relief in the nature of declaratory judgment, injunction and damages.

firmer ground, and give a far clearer indication of why the case came out how it did and how far its scope will extend. As matters now stand, it looks as though the decision has made a general transformation in pleading rules in all cases, not just within the antitrust area, although only the future will show for sure. There is no reason to confine the logic of the decision to antitrust cases—which makes it all the more critical that the Supreme Court adopt the proper rationale on the question.¹² The nub of the difficulty is that the notice pleading regime of 1938 performs erratically in the context of modern complex litigation.¹³

The fact/law distinction that organizes civil procedure does not work as well in the context of modern litigation as it does in the simpler cases that originally animated the Federal Rules. Looking at the antitrust laws under the Sherman Act, for example, there is a genuine difference of opinion as to whether certain types of behaviors are allowed.¹⁴ These cases ask such questions as whether it is unlawful for firms to lower prices below their marginal costs of production, to tie the sale of one good to the sale of another, or to impose territorial restrictions on their retailers.¹⁵ These issues are typically decided on motions to dismiss the complaint, or on motions to strike particular kinds of affirmative defenses from the responsive pleadings. The factual issues are usually stipulated because the challenged practices or contractual provisions are all public knowledge. Once the legal issues of principle are resolved one way or another, then a judgment on liability will usually follow. The concept of dismissal for failure to state a cause of action has little relevance in modern Section One Sherman Act cases dealing with price fixing or territorial division; every plaintiff knows how to draft a complaint that says that the named defendants

Id.

12. This includes suits brought against government officials for various constitutional violations, or suits brought against private defendants for violations of, for example, antidiscrimination laws, which turn on complex evidence of party motive on the one hand and industry structure on the other. On the latter, see the earlier Supreme Court decision in *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002).

13. In this Article, I will concentrate on antitrust cases, but the arguments made here apply to other forms of litigation.

14. The two sections read:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any such combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (2000).

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person, or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000 if a corporation, or if any other person, \$1,000,000, or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (2000).

15. In this recent term, for example, the Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) rejected the earlier decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which held that minimum price restraints that manufacturers impose on retailers should be a per se violation of § 1 of the Sherman Act. For my skeptical views on using antitrust liability against dominant firms in vertical situations, see Richard A. Epstein, *Monopoly Dominance or Level Playing Field? The New Antitrust Paradox*, 72 U. CHI. L. REV. 49 (2005); see also *California Dental Ass'n v. FTC*, 526 U.S. 756, 771–75 (1999); *LePage's Inc. v. 3M*, 324 F.3d 141 (3d. Cir. 2003).

agreed to collude with each other in setting prices or dividing markets within specified geographical and temporal limits.¹⁶

It is commonplace within the antitrust law to note that horizontal price-fixing and territorial divisions are subject to a *per se* rule of liability—or, more accurately, often require very specific justifications before they may be held legal. In most litigated cases, these justifications are far from the scene, so the only question is whether the events in question have occurred. The hard legal question concerns what types of rules should be used to decide whether these claims of price-fixing or territorial division should progress to the next stage.

As a matter of first principle, that question involves some estimation of whether the strength of the plaintiff's case is strong enough at each decision point to warrant a further investment of social resources, and a further strain on the defendant's resources in dealing with these matters. My basic thesis is that the 1938 Federal Rules of Civil Procedure are not well suited to the complexities of modern litigation, especially in antitrust law, and arguably in other areas as well. Although courts have recognized the need to make some limited review of the factual underpinnings of a case, they have not attempted to make any systematic cost benefit analysis of going forward with litigation through discovery. In general, as the costs of discovery mount, the case for terminating litigation earlier in the cycle gets ever stronger, and should be realized, especially in those cases where the plaintiff relies on public information, easily assembled and widely available, that can be effectively rebutted by other public evidence.

The stakes are enormous in antitrust cases where the underlying wrongs are often confused with perfectly legal conduct. It is accepted on all sides that simple parallel conduct among defendant firms in the same industry is not, without more, evidence of any form of collusion, because such behavior is what is expected in all markets, regardless of structure. Quite simply, the unilateral actions of buyers searching for the lowest price will bring prices into equilibrium regardless of collusion or market structure, so that identity of price is consistent with both monopoly and competition, and hence not evidence of the former.¹⁷ It is vital *not* to draw negative inferences from mere parallel behavior in an antitrust context. Any such legal rule would impose direct costs on business firms as management fights the major distractions of litigation,

16. In this paper, I shall not discuss any cases that raise these substantive questions. Instead I shall turn my attention to the contexts of price-fixing and territorial division in which there is no dispute over the legality of certain types of practice, but genuine uncertainty as to whether these actions have taken place at all.

17.

The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. See, *e.g.*, AEI-Brookings Joint Center for Regulatory Studies, Epstein, *Motions to Dismiss Antitrust Cases: Separating Fact from Fantasy*, Related Publication 06-08, pp. 3–4 (2006) (discussing problem of “false positives” in § 1 suits).

Bell Atlantic Corp. v. Twombly (*Twombly III*), 127 S. Ct. 1955, 1965 (2007). And so this Article, from an earlier incarnation,

and impose dead-weight costs on the economy by soaking up resources in rent-seeking litigation. More significantly, entry, pricing, marketing and other business decisions would be colored by a non-dismissal rule that opens all American businesses to unsubstantiated allegations of conspiracy to restrain trade. Parallel behavior is part of the dynamic competitive market processes. It is far more likely to be the consequence of sound unilateral business judgments than any supposed conspiracy. The prospect that the pro-competitive actions of competitors could support class-action treble damage antitrust litigation in many contexts would discourage sellers from responding to market signals.¹⁸ In any dynamic market, we want firms to mimic the rational conduct of rivals, which they are less likely to do if they fear endless vistas of antitrust liability. Yet those very risks and more emerge when the Federal Rules allow a fundamental lack of significant, coherent evidence to override what all parties in antitrust cases concede to be the valid rule: mere parallel conduct in no way raises any antitrust implications.¹⁹

In dealing with this problem of proof, the law will only be able to achieve its appropriate ends if it develops reliable and efficient evidentiary rules and standards to distinguish between competitive and anticompetitive behaviors. In setting out these rules, it is necessary to remain cognizant of the brute reality that the legal system must always deal with two kinds of error. The first type, aptly named false positive, wrongly brands firms that are in fact in competition with each other as collusive. The second type allows firms that engage in collusive practices to escape detection. In any sensible view, both types of errors matter, and the Federal Rules must take great care in finding the best way to discriminate between the two types of market practices.

In making these calculations, however, it is incorrect to assign equal weight to the two kinds of error. Efforts of collusion are often unstable, and are frequently susceptible to correction by new entry. This disintegration happens when firms in a cartel cheat by establishing a collusive price, or when new firms enter the market under an umbrella created by the high cartel prices. In contrast, competitive practices that are wrongly condemned as collusive are not subject to the same measure of self-correction. If subjected to an antitrust ordeal, these firms—even if they prevail after expensive litigation—are punished for doing exactly what the law wants to encourage. No amount of private entry, moreover, will be able to mitigate the damages that the legal system can cause by allowing litigation to disrupt the operation of a competitive market. Accordingly, there is very good reason to be careful of any lax system of pleading or proof that invites a high rate of false positives.

becomes an authority for itself.

18. This concern was voiced by the Supreme Court in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S. Ct. 1069, 1075 (2007), as well.

19. *Twombly III*, 127 S. Ct. at 1964.

Unfortunately, the basic thrust of the Federal Rules is against this point of view because it requires only “very spare” allegations to meet the pleading burdens.²⁰ The nub of the problem stems from needing to decide what must be established at each stage of a case in order to warrant its dismissal with prejudice—a decision that the original Federal Rules made with respect to the limited menu of cases that was foremost in the minds of the drafters. In approaching this structural question with a fresh eye, it is essential to examine the roles of two key provisions of the Federal Rules. One key provision is Rule 8(a), which provides simply that the “[g]eneral [r]ules of [p]leading” require “(2) a short and plain statement of the claim showing that the pleader is entitled to relief.”²¹ Note that this rule, as drafted, is intended to set up an inquiry of the legal sufficiency of the complaint, not its factual adequacy. Indeed, the articulation of the rule does not even use the word “facts” or mention anything about the specificity of the facts so required. Rule 8(e)(1) adds to the mix by stating that “[e]ach averment of a pleading shall be simple, concise, and direct.”²² Once again there is no requirement for any degree of factual precision as to time, place, persons or events. There is only one provision in the Federal Rules—Rule 9(b), dealing with fraud, mistake and condition of the mind—which requires a plaintiff to state the circumstances of the allegation with particularity.²³ Why specificity is expressly required in this case, and no other, is never made clear. The probable negative inference from this proposition is that cases involving none of the above, including all complex antitrust litigation, do not require that specificity.

The argument in support of the basic outlook in the federal rules is that the pleadings serve only to give “fair notice”²⁴ to the defendant that certain charges are against it so that it can prepare for trial. The bulk of the action lies in discovery and pretrial motions.²⁵ The common view is that the specifics should come out in an open-ended discovery process that allows both interrogatories and depositions, which may be directed toward “any matter”²⁶ relevant to the case. Note that the relevant information, broadly defined, “need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”²⁷ The scope of the discovery is shaped therefore by the ambition of the pleadings.

At the end of the pre-trial process, the basic structure of the Federal Rules does allow for a

20. James et al., *supra* note 3, at 145.

21. FED. R. CIV. P. 8(a).

22. FED. R. CIV. P. 8(e)(1).

23. FED. R. CIV. P. 9(b) (“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”).

24. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). The term “fair notice” does not actually appear in the Federal Rules of Civil Procedure.

25. James et al., *supra* note 3, at 137–38; The flexibility of these procedures is stressed in Justice Stevens’s dissent, *Bell Atlantic Corp. v. Twombly (Twombly III)*, 127 S. Ct. at 1988; *See also Twombly v. Bell Atlantic Corp., (Twombly II)*, 425 F.3d 99, 116 (2d Cir. 2005) (Sacks, J., making the same point).

26. FED. R. CIV. P. 26(b)(1).

dismissal of the case on the facts before trial under Rule 56. These motions can be made at any time, but they result in success for the moving party only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”²⁸ That last phrase does not refer to the sufficiency of the claim as a matter of legal theory, but only is intended to make clear that the standard for summary judgment is such that no reasonable jury could find against the moving party. More importantly, the motion for summary judgment will be routinely defeated if made before the plaintiff has an opportunity to conduct depositions and serve interrogatories upon the defendant. In the routine automobile accident, this delay may well make sense. In the context of vast antitrust litigation, the toll from discovery in all its forms can be great, so the pressure is clearly on to see if there is some way to obtain a final judgment before the discovery process begins in at least some cases. The same rules of discovery that generate one or two days worth of litigation in simple contract disputes open up just about every record of huge national companies over years if not decades. It is therefore no accident that Justice Souter in upholding the motion to dismiss stressed the simple but critical point that a summary judgment motion will do nothing to curb the abuses in discovery that occurred prior to the time that it was granted.²⁹ The soundness of any regime that governs the relationship between pleading and discovery is highly sensitive to matters of scale and scope. This issue is not confined to antitrust. The same concerns have been raised in connection with suits against local governments, where the prospect of discovery before summary judgment has also been the source of much concern.³⁰ I see no reason why the same concern does not arise in connection with suits against large firms that are subject to multiple suits by huge numbers of persons that dwarf the exposure of local governments answerable only to their own citizens. In both sets of cases the obvious shortfall of the Federal Rules is that they are drafted in ways that wholly ignore these considerations.

The inefficiency built into the basic design of the Federal Rules has provoked some judicial response by courts that seek to redress this critical imbalance. The doctrinal tools available to deal with this issue are as limited as the problem is serious. The effort to handle the problem of too

27. *Id.*

28. FED. R. CIV. P. 56(c).

29. “And it is self-evident that the problem of discovery abuse cannot be solved by ‘careful scrutiny of evidence at the summary judgment stage,’ much less ‘lucid instructions to juries;’ the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.” *Twombly III*, 127 S. Ct. at 1967 (citing Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989)).

30. Thus the Court in *Twombly III*, citing *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002), notes the possibility of similar abuses in connection with cases under Title VII of the Civil Rights Act. *Twombly III*, 127 S. Ct. at 1973–74; see also *Futernick v. Sumpter Township*, 78 F.3d 1051, 1058–59 (6th Cir. 1996) (dealing with possible suits for selective prosecution against local landowners). “Determining ‘all relevant aspects’ of similar situations usually depends on too many facts (and too much discovery) to allow dismissal on a Rule 12(b)(6) motion. If we require defendants to wait until summary judgment, we burden local and state

much discovery boils down in practice to the delicate issue of whether Rule 8, which is directed toward securing the sufficiency of the pleadings, can be brought to bear in cases where the challenge is to the adequacy of the underlying facts. Read literally, Rule 8 does not leave *any* avenue open for a defendant to have a case dismissed on the ground that it lacks any credible factual evidence to support it.³¹ In principle, therefore, it looks as though Rule 56 is the only route for pretrial dismissal for want of proof. The great drawback of that procedure is that it allows the plaintiff to extort a positive settlement in a worthless case, by inaugurating extensive discovery proceedings.

II. THE CHALLENGE OF *TWOMBLY III*

When this critical question of dismissal procedure reached the Supreme Court, it resolved the major tension among the lower courts that have addressed the issue. The one common thread in those decisions is that virtually all lower courts, regardless of the disagreements among them as to the proper standard, found wholly unappetizing the rigid division between fact and law that looks to be built into the Federal Rules. Hence, prior to the Supreme Court's decision in *Twombly III*, the formal distinction between summary judgment and motions to dismiss on the pleadings had been eroded. Notwithstanding the liberal pleading requirements of the Federal Rules, an extensive and confusing body of case law has developed as to when a case can be dismissed on the strength of the record as it stands before any discovery begins.³²

The *Twombly* case brought this matter to a head. The case is an antitrust suit that tests the relationship between the Telecommunications Act of 1996³³ and the Sherman Act.³⁴ Some background information helps to place the matter in context. Twenty-five years ago the American Telephone and Telegraph Company ("AT&T") operated as a unified telephone system that enjoyed a statutory monopoly within the United States. In consequence of litigation that the Department of Justice brought against AT&T, a judicially ratified settlement broke AT&T into seven local operating companies, each of which was given exclusive right to supply local phone service within its designated territory.³⁵ In addition, a competitive long-line industry developed alongside, or on top of, these local phone companies, in order to complete the telephone grid.

officials with the regular prospect of 'fishing expeditions' and meritless suits." *Id.*

31. See FED. R. CIV. P. 8(b) ("A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies.").

32. See *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002).

33. 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)).

34. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-7 (2007)).

35. *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

This combined system was not easy to regulate, and was subject to extensive legal disputes dealing with the scope of the initial consent decree and the various rates for interconnection between the various elements of the system.³⁶ In addition, Congress and the public became progressively disenchanted with the rigid monopolies at the local exchange level, and both desired to open up to competition.

In response to the perceived rigidities of this system, the 1996 Telecommunications Act brought about a major restructuring of the industry which was intended to introduce competition at the local exchange level by encouraging new Competitive Local Exchange Carriers (CLECs) to enter into competition with the incumbent carriers (ILECs), either through interconnection, resale or the purchase of unbundled network elements.³⁷ The FCC was given extensive power to implement the 1996 Act both by drafting regulations and through direct administrative oversight.³⁸ The 1996 Act also preserved private rights of action under the antitrust laws,³⁹ without addressing the question of how those antitrust actions should be modified to take into account the extensive level of oversight offered by the FCC and the state public utility commissions.

The plaintiff class in *Twombly I* sought to take advantage of the antitrust laws by claiming that the four major local exchange carriers—Bell Atlantic (now Verizon), Bell South (now being acquired by SBC turned AT&T), Qwest Communications International, and SBC (instantly rechristened AT&T after the merger), colluded to block competitive entry within the industry.⁴⁰ The two key paragraphs in the plaintiffs' complaint read as follows:

Beginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of Section 1 of the Sherman Act.

In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract,

36. See, e.g., *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd* 460 U.S. 1001 (1983) (dealing with the original breakup); *United States v. Western Electric Co.*, 569 F. Supp. 1057, 1123–24 (1983) (implementing the breakup); *United States v. Western Electric Co.*, 908 F.2d 283 (D.C. Cir. 1990) (interpreting line of business restrictions).

37. 47 U.S.C. §§ 251–52 (2000).

38. *Id.*

39. Telecommunications Act of 1996, Pub. L. 104-104, § 601(b)(1), 110 Stat. 143 (dealing with private rights of action). That provision is not codified in the United States Code, except in the notes to 47 U.S.C. § 152.

40. Amended Complaint at ¶ 64, *Twombly v. Bell Atlantic Corp.* (*Twombly I*), 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 CIV. 10220).

combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.⁴¹

The gist of these allegations is as follows: the ILECs have conspired together to block any CLEC from entering any of their respective territories.⁴² Its second allegation is that all the defendants have agreed not to enter into each other's territory as CLECs, in order to preserve each other's monopoly, and to signal to potential CLEC entrants that it would be unwise for them to try to break up the ILEC monopoly position anywhere in the system.⁴³ The alleged conspiracy is said to have started in February, 1996 with the passage of the 1996 Act. The plaintiff class, however, alleged no direct evidence of agreement, save arguably one isolated public comment six years later, but pointed instead to public, inherently innocent facts such as their contiguous territory and the clear advantage that each side is said to gain from having as little competition as possible.⁴⁴

In one sense, it seems clear that these allegations meet the requirements of Rule 8 insofar as they put the defendant on notice of the nature of the claim and the time and place of the challenged conduct. But at the same time the thinness of the evidence led Judge Lynch in the District Court to grant the motion to dismiss on the ground that these bare-bones allegations contained no specifics as to when the conspiracy was formed, or how it operated, even under the liberal pleading rules of Rule 8.⁴⁵ In so doing, the District Court was sensitive to the dangers of inferring conspiracy from parallel conduct.

This inquiry [into parallel behavior] is admittedly difficult to distinguish from the factual analysis that is more appropriate to summary judgment, as is evidenced by the fact that cases involving motions to dismiss often cite summary judgment cases in support of their conclusions that plaintiffs have not alleged sufficient facts.⁴⁶

It then held that the plaintiff "must allege facts to support claims of conspiracy, even in light of Rule 8."⁴⁷ The fact requirement that had been written out of Rule 8 was in effect read back in.

That decision was in turn reversed unanimously in the Second Circuit, yet not on the ground that all questions of fact necessarily had to be raised only at the summary judgment stage. Rather, one circuit court too thought that it was proper for questions of fact to creep back in at the motion to dismiss stage, but changed the standard by which that was to be judged, going to a minimalist standard such that "[t]he factual predicate that is pleaded does need to include conspiracy among

41. *Id.* ¶ 51.

42. *Id.* ¶ 50.

43. *Id.* ¶¶ 40–41.

44. *Twombly I*, 313 F. Supp. 2d at 178.

45. *Id.* at 187–89.

46. *Id.* at 182.

47. *Id.* at 181.

the realm of plausible possibilities.”⁴⁸ The Second Circuit did not rule out the possibility that a summary judgment motion could have proved relevant, after discovery.⁴⁹ Nonetheless, Judge Sack, writing in the Second Circuit, was far from confident that he had done the right thing, given the uncertain state of the law, for he wrote:

We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted. If that balance is to be recalibrated, however, it is Congress or the Supreme Court that must do so.⁵⁰

The Supreme Court, of course, accepted this invitation. Its opinion, as noted, spent a good deal of time addressing the potential abuses of discovery. But those observations were in the nature of asides, for they did not represent the holding of the case, which went off on highly formalist grounds and ended up with this proposition:

We do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.⁵¹

There are multiple doctrinal grounds on which this decision can be criticized. The most obvious of these is that the level of pleading specificity in *Twombly III* is scarcely distinguishable from those which were adopted in the examples given in the Federal Rules. Under the regnant standard of notice pleading, the defendants knew the time and place of all the charges against them, and had some notice of the nature of the antitrust claim. If the question were only whether this information could prepare them for the discovery that normally followed, the answer is of course an unequivocal yes. Second, the ostensible distinction between “conceivable” to “plausible” looks to be fuzzy at birth, and bears no particular relationship to any of the specific language that is found in Rule 8. Surely, a horizontal arrangement to restrict entry or divide territories has to count as plausible if the only question that were asked is whether the kind of conduct charged is the kind of conduct that happens. I see nothing in the tortured application of words like these which explains why this decision is right. The truth of the matter, quite simply, is that the Supreme Court looked over the allegations in the complaint, thought of all the reasons why they did not make any sense in the context of this regulated industry, and then refused to

48. *Twombly v. Bell Atlantic Corp. (Twombly II)*, 425 F.3d 99, 111 (2d Cir. 2005).

49. *Id.* at 114.

50. *Id.* at 117.

51. *Bell Atlantic Corp. v. Twombly (Twombly III)*, 127 S. Ct. 1955, 1974 (2007).

allow discovery to go forward because it had no confidence that thousands of hours of work would dredge up any new information that would alter its priors.

In making this analysis, it becomes critical for the court to see the interconnection between *Twombly III*, and the most important case of when and why summary judgment, *after discovery*, is granted in antitrust cases. On this matter the key test for summary judgment motions was articulated in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*⁵²:

To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 [of the Sherman Act] must present evidence “that tends to exclude the possibility” that the alleged conspirators acted independently. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.⁵³

As stated, this test requires the plaintiff to present evidence “that tends to exclude”—not “necessarily exclude”—the possibility of lawful conduct. In stating this test for summary judgment, the Court in *Matsushita* extended its role beyond the simple question of whether certain basic facts were either true or false. The appropriate analogy is a decision of a judge to grant a defendant a summary judgment in a negligence case, not because some basic fact was true or false, but because the sum of facts that were alleged could not on any reasonable interpretation be said to “amount to” the negligence that is required in cases of this sort.⁵⁴ These intermediate or mixed propositions of fact and law are ones in which the judge has to make a considered judgment about how the evidence fits together against some kind of general theory. The issue is one on which there has been a lot of skepticism,⁵⁵ much of which contributed to the adoption of the Federal Rules of Civil Procedure. I think that these worries are overwrought.⁵⁶ To be sure, the hybrid nature of the question means that summary judgment is not the ideal vehicle for doing this, but then neither is a judgment as a matter of law, which also requires a court to make the same kind of inferential calculation. Be that as it may, no one doubts that this inferential process from basic facts to ultimate facts is a proper function for review, and it was just that assignment that the Court undertook in *Matsushita*.⁵⁷ There the plaintiffs did not allege the usual form of price-

52. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

53. *Id.* at 588.

54. *See, e.g.*, *Baltimore & Ohio R.R. Co. v. Goodman*, 275 U.S. 66 (1927) (holding that a question may be withheld from a jury when a clear standard of conduct has been determined by the courts); *Pokora v. Wabash Ry. Co.*, 292 U.S. 98 (1934) (holding that jury should be able to judge whether defendant was negligent, even if there was already a default standard); *Metropolitan Railway Co. v. Jackson*, (1877) 3 App. Cas. 193, 197 (U.K.) (“The Judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred.”).

55. *See Cook, Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 417 (1921) (“[T]here is no logical distinction between statements which are grouped by the courts under the phrases ‘statements of fact’ and ‘conclusions of law.’”).

56. FED. R. CIV. P. 50.

57. I have long been partial to the distinction, *see, e.g.*, Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556, 563–64 (1973). For general discussion, *see James et al., supra* note 3, §§ 2.1–2.2.

fixing, whereby the defendants obtain an immediate gain from high prices. Rather, they alleged a predation case in which the defendants sought to lower prices today in order to reap higher profits tomorrow.⁵⁸ But the pitfalls of those allegations were explored in great depth at the summary judgment stage. In this setting, the Court stressed that the lower prices that were charged by the defendants, unaccompanied by other evidence, did not tend to exclude the possibility of lawful competition, since firms in an industry always have an economic incentive to lower their prices if they think that they can thereby gain market share. In order to make good on this challenge, *Matsushita* and its progeny have required plaintiffs to introduce some “plus factors” to pick out those cases that survive a motion for summary judgment from those that do not. A plus factor is any form of evidence that tends to exclude the possibility that individuals work independently.⁵⁹ It could, for example, be in ordinary price-fixing cases evidence that representatives of the defendant all converged on some out of the way location for a secret meeting; or it could be an econometric study which indicated that the prices in an industry took an unexpected jolt upward that could not be explained by any unilateral decisions of firms within the industry to reduce their own individual capacity in the face of a supply overhang in the market.

The conceptual challenge in *Twombly III* is whether the tend-to-exclude standard can be carried over from the summary judgment stage to the earlier motion to dismiss stage under Rule 8 for exactly the same reason: the basic facts alleged in the complaint cannot amount to a credible case of the ultimate fact of an unlawful territorial division. In tackling that question, it is instructive to look at the extent to which information gained in the exhaustive discovery process in *Matsushita* influenced the analysis of the Supreme Court. The short and decisive answer to that question is: not at all. Although the Court reports that reams of information were collected, at no point did its overall analysis cite to or rely on any of the material that was collected in discovery.⁶⁰ Indeed, the only argument that the plaintiff mentioned to indicate a conspiracy to depress prices was that the defendants had, with the blessing of the Japanese government, entered into a cartel to raise prices in Japan, which hardly goes to show that they would collude in order to enter into a money-losing venture in the United States.⁶¹ Yet all that information was well

58. Epstein, *supra* note 57, at 577–78.

59. On plus factors, *see, e.g.*, Apex Oil Co. v. DiMauro, 822 F.2d 246, 253–54 (2d Cir. 1987), *cert. denied*, 484 U.S. 977 (1987).

60. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 576 (1986). Justice Powell leads off his opinion explaining:

Stating the facts of this case is a daunting task. The opinion of the Court of Appeals for the Third Circuit runs to 69 pages; the primary opinion of the District Court is more than three times as long. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *rev'ing* 513 F. Supp. 1100 (E.D. Pa. 1981). Two respected District Judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a 40-volume appendix in this Court that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions.

Id.

61. *Id.* at 583.

known before the discovery process began. Instead the Court relied heavily on the *generic* critiques of the success of predation tactics more generally, none of which depended on the specifics found in this particular record.⁶²

On this point there had been a vital division of opinion in the courts below. Before it was reversed, the District Court had been prepared to take the plunge in order to make some factual review of the case to see just how far the plaintiffs' allegations took the case toward the ultimate question of market division. "While the Second Circuit's case law on parallel conduct conspiracies has developed mainly in the context of summary judgment, district courts have required that plaintiffs allege plus factors in order to withstand motions to dismiss as well."⁶³ The Second Circuit did not disagree with that assumption:

We acknowledge that district courts have occasionally elided the distinction between the standard applicable to Rule 12(b)(6) and Rule 56 motions on the basis of a well-founded concern that to do otherwise would be to condemn defendants to potentially limitless "fishing expeditions"—discovery pursued just "in case anything turns up"—in hopes, perhaps, of a favorable settlement in any event.⁶⁴

Nonetheless, it refused to allow the blurring of the older pleading lines.⁶⁵ The Supreme Court clearly was influenced by the District Court, and cited its opinion on matters of evidence at several key points. Yet it did not make the leap to ask this one question: what, if anything, could be gained by going through discovery in this case? A fuller analysis of the various plus factors shows why *Twombly III* should be framed as a mini-summary judgment case, conducted at the close of the pleadings, and not as a pointless verbal disquisition on the contested meanings of "plausible" and "conceivable."

III. A DECISION THEORETICAL APPROACH

In grappling with this issue, it is useful to think of it as a decision theory question.⁶⁶ Once a complaint is filed, a district court must make some decision as to whether to stop the case or allow it to go forward. On that issue, the Second Circuit, with its stress on "fair notice" of the claim, in effect allowed discovery to commence in the absence of evidence of any particulars. After all, the defendants have some notice of what to expect from a claim that states baldly: "All defendants in the telephone industry have divided territories and fixed prices since February 8, 1996." A more responsible approach, which seeks to both give notice and weed out groundless

62. *Id.* at 588–94. All the relevant factual information in this case comes from the various complaints. *See, e.g., id.* at 591 nn.13 & 14.

63. *Twombly v. Bell Atlantic Corp. (Twombly I)*, 313 F. Supp. 2d 174, 179–80 (S.D.N.Y. 2003) (citing *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 255–56 (S.D.N.Y. 1995), and *Levitch v. Columbia Broadcasting System, Inc.*, 495 F. Supp. 649, 675 (S.D.N.Y. 1980)).

64. *Twombly v. Bell Atlantic Corp. (Twombly II)*, 425 F.3d 99, 115 (2d Cir. 2005) (citations omitted).

65. *Id.* at 111 n.5.

claims, also requires the procedural system to make some critical assessment of the costs and benefits of stopping litigation at the pleading stage, and for any reason, relative to those of going forward with discovery. On this matter, standard expected utility calculations suggest that litigation should be allowed to go forward only when the likelihood of a positive case is high enough to justify what both the Court of Appeals (which allowed the case to go forward) and the Supreme Court (which did not) recognized as the enormous costs of discovery in class action antitrust suits.

I think that one useful line for approaching this question works as follows: in those cases in which the plaintiff has alleged only public sources for making out its claim of collusion, the defendant should be able to avoid discovery and obtain a judgment on the pleadings by using the same documents or the same kind of evidence to show that there is no genuine issue of fact left to be decided on the case. In effect, therefore, discovery is appropriate only when there is some evidence from some nonpublic source that justifies the greater expense of the discovery on the case. Although the District Court in *Twombly I* did not articulate this test, nor even cite the *Matsushita* decision that gives it some credibility, that is exactly what it did. Thus Judge Lynch wrote: “When deciding such a motion [to dismiss on the pleadings], the Court may consider documents attached to the complaint as exhibits or incorporated in it by reference, and such facts as are suitable for judicial notice pursuant to Fed. R. Evid. 201.”⁶⁷ This logic was precisely repeated by the Supreme Court, down to the reference to the Federal Rules of Evidence.⁶⁸

Accordingly, both the Supreme Court and the District Court treated the defendant’s motion to dismiss as though it set up a “mini-summary judgment” that is available solely when the plaintiff relies on public information and its ostensible economic implications. In these circumstances the defendant cannot defeat the claim for summary judgment prior to discovery if that defense relies on private information that should be vetted through discovery. But so long as it relies on what we may term evidence of “like kind” with what the plaintiff presents, the motion to dismiss, in line with the undercurrent in the earlier precedents, should be squared with the emerging case law in both antitrust law and beyond.

The point here has special relevance in *Twombly III* because the most likely outcome of any discovery will be to leave this case exactly where it is at present. As is discussed in the next section, all of the plaintiff class’s factual allegations are true (if vacuous). Sadly, exhaustive discovery will not advance the substantive inquiry into illegal practices. After all, if these statements are sufficient to support the inference of conspiracy, what kind of denials are so strong

66. Sven Ove Hansson, *Decision Theory: A Brief Introduction*, available at <http://www.infra.kth.se/~soh/decisiontheory.pdf>.

67. *Twombly I*, 313 F. Supp. 2d at 179.

68. *Bell Atlantic Corp. v. Twombly (Twombly III)*, 127 S. Ct. 1955, 1972 (2007).

to lead to the conclusion that the case presents no genuine issue of fact? Is this the kind of boilerplate case that should survive a summary judgment motion? I see no real benefit in allowing a case this weak to go forward to either discovery or trial on the strength of what, as becomes evident in the next section, are such weak allegations.

The Second Circuit, and Justice Stevens's dissent⁶⁹ did not follow Judge Lynch's lead, but played a very different game: they allowed the plaintiff to rely on the public information to move the case forward to the second stage, but did not allow the defendants to answer the factual allegations of the case on the strength of "like kind" evidence.

A. The Twombly Particulars

The strength of Court's approach is indicated by his examination of the case. As noted above, the key allegation in the case is that the four defendants, each regional bell operating companies, entered into a long-standing conspiracy to divide territories, which is a per se offense under § 1 of the Sherman Act. On the question of law, I have no objection to the per se rule of illegality for territorial division. But on the proof side, the plaintiff class relied only on three types of circumstantial evidence.⁷⁰ First, all the firms are in the same regulated industry and hence have frequent opportunities on which they could choose to collude. Second, the territorial contiguity of the various defendants makes it easy for each to enter each other's territories. Third, a newspaper story contained a quote by Richard Notebaert, an officer of one member of the alleged conspiracy, observing 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."⁷¹

The Federal Rules were of course not designed with these modern regulatory disputes in mind, and notwithstanding their constant revision on matters of detail, the basic provisions at issue in *Twombly III* have remained essentially unchanged since 1938. Judge Clark and the other drafters of the Federal Rules did not fashion the standards for motions on the pleadings in light of the complex institutional setting in which modern high-stakes litigation is brought. They did not have any awareness that in markets such as telecommunications, firms are vulnerable to extensive and constant government regulation. Once the plaintiff alleges the potential gain from staying out of rival territories, the question is whether a trial court should put on its thinking cap to ask whether the publicly available information militates against that possibility. On this question, it takes little ingenuity to come up with the conclusion that Judge Lynch pointed the Supreme Court in the right direction: none of these bits of evidence raises a reasonable inference of collusion when

69. *Id.* at 1985–86.

70. *Twombly I*, 313 F. Supp. 2d 174, 178 (S.D.N.Y. 2003).

71. *See* Amended Complaint at ¶ 42, *Twombly I*, 313 F. Supp. 2d 174 (No. 02 CIV. 10220) (quoting from Jon Van, *Ameritech*

taken in light of other relevant public evidence. Look at each of the points in sequence.

B. The Opportunity to Collude

In most antitrust cases, there is good reason to allow a plaintiff some latitude on dealing with matters of discovery, because conspirators know that their actions are subject to heavy penalties, including criminal sanctions and treble damages, and therefore take major steps to conceal them. As a general matter, therefore, Justice Stevens is sure to adhere to the general rule that “in antitrust cases, where ‘the proof is largely in the hands of the alleged conspirators,’ . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.”⁷² But this situation is not just any conspiracy to which this general rule applies. The plaintiffs allege that the defendant firms have extensive opportunities to collude with each other because they are drawn together under a common scheme of regulation. The point of this supposed evidence, which is easily available against all regulated industries, is that the proof of opportunity to collude counts as a plus factor on the matter of collusion.⁷³ Yet this notion of the opportunity to collude represents only part of the story. It is equally evident, and thus subject to judicial notice, that the telecommunications industry is a network industry in which all of its participants also have at the very least a duty to interconnect with each other.⁷⁴ It is quite inconceivable for any firm to engage in the cooperative aspects of its private business unless it can speak to others on an extensive and ongoing basis. This problem with network industries has long been recognized in setting a qualification to the usual per se rule on horizontal contacts. Elsewhere, for example, the Supreme Court has taken the position that communication among banks involved in check-clearing operations cannot give rise to an inference of collusion.⁷⁵ What has to be shown is some evidence of communication that sought to rig prices, divide territories or restrict output. Mere communication in this context has no tendency to exclude legal forms of behavior.

Nor is this rule in the slightest bit irrational. The ability to communicate freely is, and has to be, a regular part of the business for firms subject to constant administrative oversight by state and federal commissions. The point has indeed already come up in connection with the telecommunications industry in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,⁷⁶ where the Supreme Court reversed a Second Circuit decision on motion to dismiss an antitrust claim (coincidentally written by Judge Sack). The Supreme Court reversed in large measure because FCC oversight of the various carriers is so great as to render it likely that any

Customers Off Limits: Notebaert, CHI. TRIB., Oct. 31, 2002, at Business p.1.)

72. *Twombly III*, 127 S. Ct. at 1983 (quoting *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976)).

73. *Twombly v. Bell Atlantic Corp. (Twombly II)*, 425 F.3d at 118.

74. *See, e.g.*, 47 U.S.C. §§ 251–52 (2000).

75. *United States v. Citizens and S. Nat. Bank*, 422 U.S. 86, 116 (1975).

antitrust action would create endless mischief in areas that were under the direct oversight of the FCC. *Verizon* was, to be sure, a peculiar variant on the typical federal preemption cases because one federal system was thought to displace another. But the basic point carries over here. There is little reason to think that mere opportunity to speak raises the risk of collusion when there is a duty to speak that is subject to extensive independent regulatory control. The ostensible plus factor of communication is thus fully neutralized when that fact is set into its larger, public context.

C. The Conspiracy to Exclude Third Parties from all Local Territories

The plaintiff class also alleged that the defendants have conspired to keep all CLECs out of their respective territories. Yet on this point, the Supreme Court was right to follow Judge Lynch's lead that, as a matter of sound economic theory, the evidence is worthless.⁷⁷ Tested against the "tend to exclude" standard of *Matsushita*, even at the pleadings stage, it is clear that neither the plaintiff class in its complaint, nor the Second Circuit in its review of the complaint, has supplied any answer to the devastating critique first penned by the District Court. The public evidence used to buttress any inference of collusive behavior is negated by the public evidence that each defendant has a powerful private incentive to keep all other companies out of its own territory. Aggressive defensive behavior is therefore perfectly consistent with unilateral behavior.

Indeed, this conclusion is not one of mere possibility but of historical certainty. Vast portions of the 1996 Telecommunications Act are directed toward the way in which the CLECs may take advantage of the interconnection, resale and unbundled network rules in order to facilitate competition. Once again direct administrative oversight, not antitrust law, offers the best way to deal with that issue. The plaintiff class offers no explanation whatsoever as to why defendants would ever risk any collusive behavior that carries with it exposure to treble damage actions when each knows that all others labor under the same incentive to exclude for their own territories. The plaintiff class offers the exotic theory that the ILECs have incentive to conspire because if a CLEC succeeds in one territory there is no reason why it could not succeed in another.⁷⁸ But the complaint offers no explanation as to what forms of collective behavior would even make sense. There is nothing in this record that detracts from the District Court's initial conclusion: "Given that each ILEC has reason to want to avoid dealing with CLECs and having to 'subsidize' their entry into the market, each ILEC would attempt to keep CLECs out,

76. 540 U.S. 398 (2004).

77. *Twombly III*, 127 S. Ct. at 1971.

78. *Twombly v. Bell Atlantic Corp. (Twombly I)*, 313 F. Supp. 2d 174, 184 (S.D.N.Y. 2003).

regardless of the actions of the other ILECs.”⁷⁹ Here is a perfect application of *Matsushita*’s “tend to exclude” test based on public information only.

The plaintiff class does not fare any better in positing that it was in the separate interest of each ILEC to enter as a CLEC the long-distance markets in the home territories of its rivals.⁸⁰ The first point to note is that any assessment on a motion to dismiss should take into account the risks and costs associated with the alleged form of anti-competitive conduct. In the standard price-fixing case, it takes no fresh investment in new territories to make the decision to raise prices and to lower output. The firm continues in the same market in much the same way as it has operated before. The loss in revenues from reduced sales is more than offset by the increase in revenue from higher prices. If the cartel unravels because other members cheat, then the firm can return to the same competitive strategy that it had adopted prior to its participation in the illegal conspiracy. There is little economic downside apart from getting caught in the usual price-fixing arrangement, which is why the antitrust law intervenes. Under these circumstances, a trial judge should show under *Matsushita* greater receptivity to a claim of this sort.

Twombly involves territories, not prices. On the factual side these cases are always more complex because the antitrust law does not impose on any firm a duty to enter the territory of a neighbor.⁸¹ Firms work in many regions and in many lines of business, and they are constantly having to decide where to invest their capital and where not. As a matter of basic economic theory, there are all sorts of reasons not to enter into a new territory that do not raise any hint of collusion. In this regard it is instructive to compare these territorial decisions with the cases of collusive predation that did not survive summary judgment in *Matsushita* and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,⁸² to which we can now add as the third in the series the predatory bidding decision in *Weyerhaeuser v. Ross Simmons Hard-Wood*.⁸³

The customary account of predation rests on the sensible notion that it is highly unlikely that any firm will invest (current) dollars to drive out other firms in the hopes that it will obtain some monopoly position in the future during which time it will be able to recoup its losses in (discounted) dollars.⁸⁴ The first obstacle to predation is that the lower prices of the firm will expand the demand for its products, thereby increasing its short-term losses. Yet in the future, when the firm raises prices, it has no way to ward off new entrants into its markets, which could

79. *Id.*

80. *Id.*

81. *See* *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Technologies*, 123 F.3d 1107, 1112 (8th Cir. 1997) (“The operators’ practice of staying within their well-established service routes did not evidence an agreement to allocate territories.”).

82. 509 U.S. 209 (1993).

83. 127 S. Ct. 1069 (2007).

84. For the basic critique, *see* Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981), *as discussed in Matsushita*, 475 U.S. 574, 588–98 (1986).

include the firms that exited the market on a short-term basis during the attempted period of predation. Absent truly extraordinary circumstances, there is no way that predation makes sense for the single firm. And there is no way that predation makes sense for a group of firms who have to share the losses among them. Indeed, if the group of firms did have a monopoly power, the better strategy would generally be to raise prices, not to lower them. It was in this context that the “tend to exclude” test showed its power on summary judgment.⁸⁵ The parallel arguments work with the predatory bidding cases. There are all sorts of reasons for firms to want to warehouse inventory, including the desire to buffer themselves against anticipated higher prices. When they do so, however, they take the risk that the market will turn against them, at which point they may well have to sell off some portion of their stock at prices below its cost of acquisition, to which must be added the interim carrying costs. In addition, it is hard to see how these excessive accumulations could lead to predation unless the defendant eventually sold its paper products at less than cost, as in the typical predation cases. Once again the rule in *Weyerhaeuser* is not one of per se legality, but it is not easy to think of most ordinary markets (that is those with multiple players, standard goods and long time horizons) in which this ostensible strategy for driving out rivals could work. Here too in my view, the plaintiff has to come up with some striking innovation early on in the course of litigation to make good on the case; otherwise there is no more reason to hold off dismissal until the completion of discovery in these predatory bidding cases than there is in the predatory pricing cases under *Matsushita*.

The factual setting in *Twombly* is still more complex by far than predation. The first point here is that each ILEC knows in advance that its fellow ILECs are geared up to fight the new entrant. Each ILEC also knows that entry into this market is not simply a matter of offering goods or services for sale at some predetermined price. At the very least, long-term success requires extensive capital investments in one or more locations to be made in the teeth of resistance from the ILEC whose turf is invaded, and competition from many CLECs who seek to enter into the same space. There are all sorts of independent reasons why a firm faced with many opportunities and pitfalls would choose not to invade the territory of another firm. The point was made repeatedly by the District Court, and it was echoed in the Supreme Court.⁸⁶ But that analysis did not register with Justice Stevens, nor with the Second Circuit, neither of which paid much attention to the underlying economics.⁸⁷

In response to these points, the plaintiff class has noted that the peculiar pricing system under

85. *Bell Atlantic Corp. v. Twombly* (*Twombly III*), 127 S. Ct. 1955, 1964 (2007).

86. *See, e.g., Twombly v. Bell Atlantic Corp.* (*Twombly I*), 313 F. Supp. 2d 174, 185 (S.D.N.Y. 2003); *Twombly III*, 127 S. Ct. at 1972–73.

87. *Twombly v. Bell Atlantic Corp.* (*Twombly II*), 425 F.3d 99, 118 (2d Cir. 2005); *Twombly III*, 127 S. Ct. at 1985–86 (2007).

the 1996 Telecommunications Act allows any CLEC to purchase unbundled network elements at favorable prices. It then insists, as a matter of basic economic theory, that there is no rational reason why an ILEC would be prepared to leave money on the table, except through an illicit agreement to divide territories.⁸⁸ As a matter of economic theory, this argument is flatly wrong once the full context, easily accessible from public sources, is taken into account. First, as the plaintiff class itself alleged, all ILECs worked over time to keep new entrants from their territory. That alone is a reason to be cautious about going in. In addition, the District Court did not note what is also true economically: the extensive subsidies that were created under the 1996 Act were not uniquely appropriable by any one firm. Any CLEC that entered the market would get the same deal as any other. It follows that the entire statutory arrangement had two unwise economic consequences. The first is that the greater the entry, the greater the cash bleed for the ILEC— itself a good reason not to become a CLEC in another area. The second is that the ILEC turned CLEC does not get a competitive advantage over any other CLEC, all of which are entitled to the same preferential treatment. Competition dissipates the subsidy.

In addition, no ILEC is able to garner any special gains by taking on the role of a CLEC outside its home territory. The District Court correctly saw that no ILEC could use the dominance in its own territory to gain some cost advantage when it competed elsewhere. “Since being a CLEC is a different business than being an ILEC, expanding into a new area is not simply a question of expanding one’s infrastructure, or using the existing infrastructure to provide the same services in a new location.”⁸⁹ In addition, no ILEC could even start long-distance service in its home territory until it met a check list of conditions (pertaining to showing competitive conditions in its own territory).⁹⁰ It is also worth noting that any subsidy would be competed away by other CLECs.⁹¹ The entire situation during the relevant period created a perfect storm for telecommunications. The ILECs were bled by immense subsidies from which the CLECs did not prosper. It takes little imagination to find independent reasons why no ILEC would undertake this venture. Any analysis of the situation from publicly available information thus shows that the plaintiff class has advanced no reason that tends to exclude independent explanations for the conduct of each named ILEC.

88. *Twombly I*, 313 F. Supp. 2d at 184; *Twombly III*, 127 S. Ct. at 1962–63.

89. *Twombly I*, 313 F. Supp. 2d at 186.

90. 47 U.S.C. §§ 271–72 (2000).

91. For discussion, see Richard A. Epstein, *Takings, Commons, and Associations: Why the Telecommunications Act of 1996 Misfired*, 22 YALE J. ON REG. 315, 340 (2005).

D. The Notebaert Newspaper Interview

The next additional fact offered by the plaintiffs to explain why *Twombly* was not just a case of innocent parallel conduct was an interview that Mr. Notebaert, as President of Qwest, gave to the Chicago Tribune. The plaintiff class seized in its pleadings on one indiscreet sentence from that interview—that an ILEC’s entry into another territory “might be a good way to turn a quick dollar, but that doesn’t make it right”—to carry the burden of an entire case. First, territorial agreements, like price-fixing arrangements, are done in secret, so that it defies common sense to think that any participant would announce its illegal behavior to a newspaper reporter. Second, the statement does not identify who the parties of any supposed conspiracy are, when they got together, or how long the conspiracy lasted. One remark made in 2002 does not tend to show behavior that was alleged to take place some six years before. Third, any shred of conspiracy theory is rebutted by other quotations from the same document—public information of which the plaintiff class surely had notice.⁹² Mr. Notebaert rightly notes that the entire pricing structure for unbundled network elements was “nuts,” and that it was not sustainable, which it wasn’t. Thus in speaking of the resale of UNEs, Mr. Notebaert commented, “I don’t think it’s a sustainable economic model. . . . It’s just a nuts pricing model.”⁹³

Justice Stevens took issue with this view of the world, and thought that discovery would be appropriate to explore exactly what else Notebaert had said at that interview that had not made it into the story, which might reveal some information that placed the entire episode in a more sinister light. “One possible (indeed plausible) inference is that he meant that while it would be in his company’s economic self-interest to compete with its brethren, he had agreed with his competitors not to do so.”⁹⁴ What this analysis fails to do is to play the game out one more level. Suppose that this deposition takes place, and Notebaert said that he did not refer to any hidden conspiracy. At this point, the evidence does not change, but the question becomes what should be done once the defendant moves for a summary judgment. If in fact the initial inference was plausible, then Notebaert’s denial does not put the matter to rest but raises an issue of credibility that has to be faced head on—before a jury. It is again the same story as before. Discovery cannot conclusively resolve the matter, so the case has to go before a jury, at which point the pressure for settling even worthless claims becomes overwhelming. No large company can reduce the risk of an adverse verdict by more than eighty percent, which when trebled yields sixty percent of a very large supposed figure for actual damages. The invocation of the standard model of the Federal

92. See *Twombly III*, 127 S. Ct. at 1972 n.13 (2007); *Twombly II*, 313 F. Supp. 2d at 188–89 (S.D.N.Y. 2003).

93. Jon Van, *Ameritech Customers Off Limits: Notebaert*, CHI. TRIB., Oct. 31, 2002, at Business p. 1.

94. *Twombly III*, 127 S. Ct. at 1981.

Rules thus authorizes large expenditures in order to increase the likelihood of an erroneous verdict based on dubious inferences for admitted facts.

Indeed, in this context, Notebaert was proved correct by the course of events. The entire pricing model that he rightly deprecated was thrown out shortly after his remarks by the Court of Appeals for the District of Columbia on the grounds that it did not identify the circumstances in which the CLEC was entitled as of right to purchase a UNE at below market prices.⁹⁵ Thus *United States Telecom Association v. F.C.C.* (USTA I),⁹⁶ invalidated a first such effort that previous May, and *United States Telecom Association v. F.C.C.* (USTA II),⁹⁷ ended the epic process less than two years later in March, 2004. Notebaert's full comments in this article are consistent with the view that he thought that the entire rate structure was sufficiently mispriced and transient that it would be unwise, especially for a company that had lost \$219 million, to try to reestablish its financial position by going against stronger ILECs in their home turf. And surely, it has to make sense, even at the pleading stage, to read the entire article, not just some fraction of it.

E. Calls for Congressional Investigation

Finally, it seems odd to place any weight on the calls that various members of Congress make for investigations of the ILECs for leaving money on the table.⁹⁸ These obvious political gestures are simple conclusions by individual politicians who have their own complex agendas. In and of themselves, they offer no new private information that would allow for a finding that such a combination was sensible enough to seduce any ILEC to participate. To afford these propositions, any weight is to invite well-connected lawyers to implore their political allies in Congress to call hearings in order to gin up some record of antitrust misfeasance. The safe rule in these cases is to disregard all political statements, except to the extent that they are subject to independent verification, but not one need rely on this general proposition, because public information is available which shows unmistakably that the Department of Justice, with its vast power to investigate all forms of collusive behavior, thought that there was no merit to these allegations.⁹⁹

The point here has additional salience once it is recalled that in large antitrust cases pre-trial discovery is not the only means available for the plaintiff to gather information that could lead to filing a successful suit. Thus, it is common for private antitrust suits to piggy-back on government

95. See 47 U.S.C. § 251(c)(3), (d)(2)(A)–(B) (1997).

96. 290 F.3d 415 (D.C. Cir. 2002).

97. 359 F.3d 554 (D.C. Cir. 2004).

98. See, e.g., *Twombly v. Bell Atlantic Corp.* (*Twombly I*), 313 F. Supp. 2d at 178 (referencing statements of Congressman John Conyers).

99. *Antitrust Enforcement Agencies—The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission: Hearing Before the Task Force on Antitrust of the House Comm. on the Judiciary*, 108th Cong., 1st Sess.

investments that establish some form of price-fixing so private plaintiffs typically have to deal only with the damage portion of the cases. Furthermore, in many regulated industries, such as securities or telecommunications, all sorts of regulatory proceedings that can sniff out signs of antitrust violations. Indeed, one reason why the Supreme Court was surely correct in its *Credit Suisse Securities (USA) v. Billing*¹⁰⁰ decision this past term was that the SEC has all sorts of ways to superintend the operation of underwriting firms, making it highly unlikely that the addition of a private antitrust lawsuit will improve overall enforcement. Put otherwise, in *Twombly*, we are not faced with a situation where the plaintiff class seeks to maintain a law suit in the face of some mysterious price movements that are not easily explained by competition pressures. Rather, the question here is, given all that we know about the background logic of the case, and the results of the DOJ investigation, should we incur the real potential abuses from what promises to be very small gains? In other cases, it may well be that the proposals of the dissenting justices for staged discovery could prove correct, even if difficult to administer. But in this case, the prospecting looks like it has no chance of striking gold.

In sum, the Supreme Court was right to follow the District Court in dismissing the plaintiff class at the pleading stage¹⁰¹ One could assume that all the plaintiff class's public evidence was true, and still be unable to draw any sound inference of a conspiracy, given that a full account of all public information negates an inference that the evidence presented tended to exclude any form of legal conduct. The *Matsushita* standard, which was crafted in the context of summary judgment, easily carries over to the pleading stage given that all the plaintiff class's circumstantial evidence proves worthless when placed in context. At no time, moreover, have the plaintiffs offered any direct evidence on conspiracy, so that the entire case should be thrown out for the failure to mount any kind, let alone any plausible kind, of proof. Proceeding to summary judgment requires an immense expenditure of resources, but promises to supply *no* new information that improves decisionmaking in this case.

E. Circuit Conflicts

The Supreme Court was right in *Twombly III* for yet another reason: it helped overcome the strongly different approaches to summary judgment that have emerged in the circuit courts. The last time that the Supreme Court took a look at the summary judgment standards was arguably fourteen years ago in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,¹⁰² which itself

77, 79 (July 24, 2003) (testimony of Assistant Attorney General R. Hewitt Pate).

100. 127 S. Ct. 2383 (2007).

101. *Twombly I*, 313 F. Supp. 2d at 180–81.

102. 509 U.S. 209 (1993).

only applied the basic orientation previously set out in *Matsushita*¹⁰³ and the subsequent case *Eastman Kodak Co. v. Image Technical Services, Inc.*¹⁰⁴ which only raised issues of the legality of public contractual practices. In the years after these cases, the lower courts have diverged among themselves in setting the standard by which cases could be dismissed both on the pleadings before discovery has been undertaken and on summary judgment after discovery. Some circuits have been too strict in their requirements for circumstantial evidence,¹⁰⁵ while others have been far too lax.¹⁰⁶ The differential standard leads to skewed results as plaintiffs, who enjoy a first mover advantage, systematically bring their cases in those circuits that are most willing to allow cases to go to trial. This long-standing confusion leads to certain unfortunate dynamic consequences that undermine the effectiveness of the antitrust laws. The plaintiffs' lawyers will in many cases be able to fashion their complaint to avoid those circuits (like the Eighth) which have artificially high standards for summary judgment. Yet they will flock to other circuits, like the Second, whose standards for judgment on the pleadings and summary judgment are far too permissive.

The effects of these two errors are therefore not identical, as the former will bite only in those cases where antitrust plaintiffs have no choice of circuit, while the latter will bite in nationwide suits where the plaintiffs have the choice of venue. This form of strategic behavior suggests that any circuit which is an outlier on the plaintiff side will have disproportionate influence over the entire process. Most antitrust cases involve charges of conduct that takes place on a nationwide scale so that jurisdiction can be laid in the district courts of any federal circuit. Skilled plaintiffs' lawyers armed with a potent first mover advantage can pick the circuits most favorable to their position. It follows therefore that those circuits in which the bar for summary judgment is set too high will see few if any cases brought within them, while those circuits, like the Second, which set the bar too low will attract numerous cases, so the two kinds of error will not be of equal severity. Setting the bar too high has minor social costs, chiefly from creating maldistribution of work across the circuits. Setting the bar too low, even in one circuit, raises the direct prospect of opening a set of floodgates that should be tightly fastened.

The structural problem lies not solely in the fact that the test of the Second Circuit is too lax. It also lies in the use of standards that are too high. One instance (in which I was the losing counsel for the plaintiffs) that shows this tendency is *Blomkest Fertilizer, Inc. v. Potash Corp. of*

103. 475 U.S. 574 (1986).

104. 504 U.S. 451 (1992).

105. *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir. 2000); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, (11th Cir. 1991); *Russ v. Int'l Paper Co.*, 943 F.2d 589 (5th Cir. 1991).

106. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018 (9th Cir. 2006) (holding that a plaintiff relying on circumstantial evidence does not have to produce more or better evidence than one relying on direct evidence to withstand summary judgment); *Todd v. Exxon Corp.*, 275 F.3d 191 (2d Cir. 2001).

Saskatchewan,¹⁰⁷ in which the Eighth Circuit sustained a summary judgment against the plaintiffs who alleged a price-fixing conspiracy among the six major Canadian producers of potash.¹⁰⁸ The particular evidence presented in that case included much specific documentary evidence about future price raises for all members of the group, correspondence and exchanges among high-level officials of the various companies complaining about price movements and threatening retaliation, and a detailed econometric study that controlled for unilateral changes in output in order to show that sharp spikes in prices could only be attributable to coordinated action.¹⁰⁹ One piece of evidence in this case was a memo from the Canadian Potash Export (“Canpotex”), which reads in full:

FYI Canadian potash producers have reached agreement with the United States Department of Commerce and all dumping action has been suspended for minimum 5 years. It is rumoured that the USD per metric ton increase posted by Canadian producers in 1987 to cover possible tariff payments to the U.S. Govt will be refunded in full or part. *In the meantime new price lists are being issued on Monday Jan. 11 at: Standard Grade USD 80.00; Coarse Grade USD 84.00; Granular Grade USD 86.00.*¹¹⁰

Canpotex is a cartel organized to sell Canadian potash for export on a joint basis. Its directors are senior executives of the Canadian potash producers. It is precluded by law from involvement in the sale of potash to the United States, and there is no valid reason for its members to discuss the subject of American prices. Every one of the defendants had representatives at Canpotex meetings. It would have been easy for them to retire to a separate room and set prices off the record for the American market. In fact, these price increases were implemented by all Canadian producers into the American market, just as stated in the memo. The evidence not only tends to exclude the possibility of mere independent behavior, but it tends to establish collusion by direct evidence. Nonetheless, the Eighth Circuit, over a powerful dissent,¹¹¹ held that neither the memo, nor the constant backbiting between the firms over the period of raised prices, nor the econometric study, either alone or in combination, raised a triable issue of fact.¹¹² The net effect of this decision was, without exaggeration, to require a plaintiff to prove its case beyond a reasonable doubt to a judge in order to have the opportunity to prove it by a preponderance of evidence before a jury. That decision stands in notable contrast, for example, to the Seventh Circuit’s decision in *High Fructose Corn Syrup (HFCS) Antitrust Litigation*,¹¹³ which quite emphatically rejected the proposition that “if no single item of evidence presented by the plaintiff

107. 203 F.3d 1028 (8th Cir. 2000). For a justly negative assessment of the weak opinion, see Herbert Hovenkamp, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION*, 134–35 (2005), which tracks the analysis in the text.

108. *Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.*, 203 F.3d 1028, 1032.

109. *Id.* at 1033–39.

110. *Id.* at 1035 (emphasis added).

111. *Id.* at 1039.

112. *Id.* at 1033–34, 1038.

points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment,”¹¹⁴ only to allow the case to reach a jury on evidence that was far weaker than that in *Blomkest*, albeit far stronger than the evidence produced in *Twombly*. These two cases are both summary judgment cases, after discovery, which means that they raise the same issue as *Twombly* but at a later stage of inquiry.

No matter what stage the litigation, the key issue is only whether the evidence presented up to the time of the defendant’s motion has any tendency to support the allegations in question. In most instances, the pleadings are a bad time to make that call. In *Twombly*, it was not. Both lower courts that decided *Twombly* understood that the plaintiff was seeking to win on a hopeless antitrust case. Fortunately, the Supreme Court followed Judge Lynch when it sustained the motion to dismiss at the close of the pleading stage.

IV. CONCLUSION

Twombly is of course only one case. But the larger message, which covers the vast amount of complex litigation that takes place daily in federal court, should also be clear. The current provisions of the Federal Rules of Civil Procedure were designed in an earlier era for litigation that on average has been far simpler than litigation today. The Rules operated on an assumption that the greater risks in civil litigation came from the premature dismissal of meritorious cases brought by ordinary people of little means or sophistication. The large modern business dispute or class action does not fit into that template at all, for both sides are represented by sophisticated attorneys who are able to take strategic advantage of the various options given to them under the law. In this environment, the balance of convenience has changed. Now there is a far greater peril of allowing frivolous litigation to go on too long as well as a risk of cutting short meritorious litigation. The cases on motions to dismiss and summary judgment are in shambles because weak cases are allowed to trudge on through the system while stronger ones are knocked out. Some calibration of the scales of error is needed to remedy this situation.

The basic logic of decision theory is that going forward in litigation has real costs that should be justified only if there is some confidence that the investment in process improves the overall decision-making procedures. In dealing with large suits against institutional defendants, the risk is not only of a single action, but of copycat suits which raise the same issues in a slightly different fashion in other courts or against other defendants. It is of course clear that government abuse is a

113. 295 F.3d 651 (7th Cir. 2002).

114. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002).

serious matter that cannot be lightly dismissed. So too, without question, cartels do present serious risks, so these antitrust cases should normally be allowed to go forward. But in a world in which context is key, a general proposition is not a uniform truth. Decisions like *Matsushita*, *Brooke*, and *Twombly III* all deviate from the Federal Rules for the same reason. The facts that are evident in the complaint are better explained in ways that tend to exclude the conspiracy in question. At this point, allowing the case to go forward increases both the costs of error and the costs of administration; a double loss.

Twombly III takes that logic one step further. There is no inherent reason why conspiracies to divide territories should collapse of their own weight—at least in an unregulated market. But once the full institutional setting is taken into account, the factual allegations don't begin to justify the futile discovery that would follow if the motion to dismiss were denied. There are two kinds of error in all cases, and so long as the plaintiff relies solely on public evidence that is refuted or explained away by the same type of evidence (often evidence in the same documents), then the balance of error has clearly shifted. I do not believe that plaintiffs are entitled to make blank charges devoid of all factual content just to gain access to the discovery system. That same logic, in antitrust cases and beyond, should lead to a dismissal at the close of pleadings in any case where the defendant has negated all inferences of culpability by using the same kinds of public evidence that the plaintiff has used to establish a factual underpinning to the underlying complaint. In one sense this particular understanding of the case is a change in degree and not one in kind. Both Justice Stevens and the Second Circuit admitted that some “facts” had to be pleaded, but thought that the plaintiff had met that burden. In cases where public facts do not negate the thrust of the plaintiff's case, there is every reason to follow the older rules, both in antitrust cases and beyond. But when the full record at the time of the motion to dismiss does not support any plausible factual inference of guilt, then it is time to invoke a mini-summary judgment under the guise of a motion to dismiss.

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