

Justice Souter's Antitrust Legacy

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Justice Souter's record in antitrust cases over the past nineteen years belies the conventional wisdom about him as a consistent member of the Supreme Court's "liberal" wing.¹ It is true that he voted with the majority in *Eastman Kodak Co. v. Image Technical Services Inc.*² and with the dissenters in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,³ positions consistent with the liberal side of the antitrust world. More often, however, he joined the conservative side of the Court on outcomes that significantly narrowed the scope of antitrust law—including (a) cases with other dissenting voices, such as *City of Columbia v. Omni Outdoor Advertising, Inc.*, *Brooke Group v. Brown & Williamson Tobacco Corp.*, and *Credit Suisse Securites (USA) LLC v. Billing*;⁴ and (b) unanimous decisions as in *Spectrum Sports, Inc. v. McQuillan*, *State Oil Co. v. Khan*, *NYNEX Corp. v. Discon*, *Texaco Inc. v. Dagher*, *Illinois Tool Works Inc. v. Independent Ink*, and *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co.*⁵ In two other important 9–0 decisions, Justice Souter joined concurring opinions preferring narrower grounds for the decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP* and *Pacific Bell Telephone Co. v. LinkLine Communications*.⁶ Between 1993 and 2009, he supported six decisions that markedly limit the kinds of conduct or circumstances subject to monopolization or attempted monopolization claims under Section 2 of the Sherman Act.⁷

Two of the four antitrust opinions that Justice Souter authored within the past decade, *California Dental Association v. FTC* and *Bell Atlantic Corp. v. Twombly*,⁸ will determine his antitrust legacy.

¹ Justice Souter participated in twenty-two antitrust cases during his tenure since 1990. He took no part in the Court's consideration of *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990).

² *Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451 (1992) (tying and monopolization claims in single-product aftermarkets).

³ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (minimum resale price maintenance).

⁴ *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991) (sham exception to *Noerr-Pennington* immunity); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (predatory pricing); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007) (implied antitrust immunity).

⁵ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993) (attempted monopolization); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (maximum resale price maintenance); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998) (group boycotts); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (horizontal restraints within joint ventures); *Illinois Tool Works Inc. v. Indep. Ink*, 547 U.S. 28 (2006) (whether patents confer market power); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007) (predatory bidding).

⁶ *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (refusal to deal); *Pac. Bell Tel. Co. v. linkLine Commc'ns*, 129 S. Ct. 1109 (2009) (price squeeze claims).

⁷ See *Brooke Group*, 509 U.S. 209 (1993); *Spectrum Sports*, 506 U.S. 447 (1993); *NYNEX*, 525 U.S. 128 (1998); *Weyerhaeuser*, 549 U.S. 312 (2007); *Trinko*, 540 U.S. 398 (2004); *linkLine*, 129 S. Ct. 1109 (2009).

⁸ *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). His two other antitrust opinions, both rendered in 1993, are (a) *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), in which he wrote for the majority on the scope of the antitrust exemption for the insurance business and the scope of Sherman Act jurisdiction in a case involving foreign defendants and foreign conduct; and (b) *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993) (Souter, J., concurring), in which he wrote a concurring opinion to clarify one aspect of Justice Thomas's majority opinion on the scope of the sham exception to *Noerr-Pennington* immunity.

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Both opinions were highly controversial and have materially altered antitrust jurisprudence. *California Dental Association* has made it more difficult for plaintiffs to prevail or even to survive the summary judgment stage on challenges to many kinds of horizontal restraints; *Twombly* has made it more difficult for plaintiffs to survive the initial pleading stage and thus to begin any discovery process in a broad range of antitrust and non-antitrust cases. These two opinions are the focus of this article.

California Dental Association v. FTC

Justice Souter's 1999 majority opinion in *California Dental Association v. FTC (CDA)* concerned a code of ethics promulgated and enforced by a nonprofit association of 19,000 California dentists that prohibited members from engaging in broad categories of price and quality advertising.⁹ The FTC's Administrative Law Judge, in his Initial Decision after trial, held the prohibitions to be the kind of "inherently suspect" horizontal restraints that warranted condemnation under the agency's so-called *Mass. Board* standard.¹⁰ On appeal, the Commission held the price advertising restraint to be illegal per se and, in the alternative, both the price and quality advertising restraints illegal under a somewhat abbreviated rule of reason analysis.¹¹ On CDA's appeal from those determinations, the Ninth Circuit rejected the per se illegality holding but upheld the alternative rule of reason holdings.¹² In the Ninth Circuit's view, the Commission had properly "applied an abbreviated, or 'quick look,' rule of reason analysis designed for restraints that are not per se unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry."¹³ On CDA's appeal from the latter holding, a 5–4 majority reversed it because, as Justice Souter explained at some length, the Ninth Circuit's "quick look" was too quick for restraints of the kind at issue.

Justice Souter distinguished all three of the Court's prior decisions blessing quick-look analysis on the ground that in those cases "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."¹⁴ However, in the Souter majority's view, the case before the Court "fail[ed] to present a situation in which the likelihood of anticompetitive effects is comparably obvious."¹⁵ This was explained in terms of what the majority saw to be special attributes of professional advertising that presented considerable risk of consumer deception so that the restraints there at issue "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition."¹⁶ Thus, in this context, more than a " cursory treatment" was required to determine

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⁹ *CDA*, 526 U.S. at 759–61.

¹⁰ *California Dental Ass'n*, 121 F.T.C. 190, 268–72 (1996) (Initial Decision) (referring to *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988) (Opinion of the Commission)). In *Mass. Board*, the Commission set forth the following framework for analyzing horizontal restraints: if the restraint is "inherently suspect," the burden shifts to the defendant to establish a "plausible efficiency justification." If the justification is plausible, then a rule of reason analysis is conducted; but if it is not plausible, the restraint is condemned as unreasonable under the rule of reason "without further inquiry" because "there are no likely benefits to offset the threat to competition." *Mass. Board*, 110 F.T.C. at 604.

¹¹ *California Dental Ass'n*, 121 F.T.C. 190, 300–22 (1996) (Opinion of the Commission).

¹² *California Dental Ass'n v. FTC*, 128 F.3d 720 (9th Cir. 1997).

¹³ *Id.* at 727.

¹⁴ *CDA*, 526 U.S. at 770 (referring to *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978), *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), and *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986)).

¹⁵ *Id.* at 771.

¹⁶ *Id.*

whether the restraints at issue were anticompetitive and whether the association's arguably "plausible" justifications were valid; these questions called for "empirical" analysis.¹⁷

Justice Souter concluded with several observations seemingly intended to narrow or at least qualify the import of the majority's rejection of quick-look analysis in this case: holding the restraints at issue "required a more extended examination of the possible factual underpinnings than [they] received is not, of course, necessarily to call for the fullest market analysis";¹⁸ "our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear";¹⁹ there "is always something of a sliding scale in appraising reasonableness";²⁰ what "is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint";²¹ the "object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of the restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one."²²

There was voluminous commentary on the decision over the year immediately following its issuance, including a great variety of predictions about its impact on the antitrust treatment of horizontal restraints generally in the years ahead.²³ Of most interest for present purposes is the way three former FTC officials closely associated with the agency's development of horizontal restraints policy found silver linings in Justice Souter's opinion: its "clear affirmation of the legitimacy of the flexible approach to the rule of reason, which can be truncated in appropriate cases";²⁴ its "set-back for market power screens" and "the call for application of a 'sliding scale' of antitrust analysis";²⁵ and recognition "that the rule of reason [is] a continuum, allowing for many levels of scrutiny," acknowledgement that the Court's earlier decisions in *BMI*, *NCAA*, and *IFD* established the legitimacy of a "quick look" approach in some cases, and "rejection of a rigid bipolar approach [per se versus full rule of reason] to analyzing restraints among competitors."²⁶

Both enforcement agencies effectively adopted that "positive" spin on the Souter opinion by citing to it no less than four times in support of central aspects of the 2000 DOJ-FTC Antitrust

¹⁷ *Id.* at 773, 774.

¹⁸ *Id.* at 779.

¹⁹ *Id.*

²⁰ *Id.* at 780 (internal quotations omitted).

²¹ *Id.* at 781.

²² *Id.* Justice Breyer authored a dissenting opinion in which three other Justices joined. While expressing agreement with the general principles stated at the conclusion of Justice Souter's opinion, he presented his own extended analysis of how "a traditional application of the rule of reason to the facts as found by the Commission require[d] affirming the Commission—just as the Court of Appeals did below." *Id.* However, Justice Souter in his majority opinion noted that the Breyer analysis was "no 'quick look'" and that it offered "little to demonstrate the sufficiency of the Court of Appeals's review." *Id.* at 779.

²³ See, e.g., Stephen Calkins, *California Dental Association: Not a Quick Look but Not the Full Monty*, 67 ANTITRUST L.J. 495 (2000); Marina Lao, *Comment: The Rule of Reason and Horizontal Restraints Involving Professionals*, 68 ANTITRUST L.J. 499 (2000); Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 ANTITRUST L.J. 461 (2000); Timothy J. Muris, *The Rule of Reason After California Dental*, 68 ANTITRUST L.J. 527 (2000); Willard K. Tom & Chul Pak, *Toward a Flexible Rule of Reason*, 68 ANTITRUST L.J. 391 (2000); David Balto, *Some Observations on California Dental Association v. FTC*, ANTITRUST, Fall 1999; William J. Kolasky, *California Dental Association v. FTC: The New Antitrust Empiricism*, ANTITRUST, Fall 1999; James A. Meyers & Robert A. Skitol, *Supreme Court Muddies the Waters of Horizontal Restraints Analysis*, 524 FTC WATCH 2 (1999).

²⁴ Balto, *supra* note 23, at 64.

²⁵ Calkins, *supra* note 23, at 496–97.

²⁶ Muris, *supra* note 23, at 529–31.

Guidelines for Collaborations Among Competitors: twice for the proposition that rule of reason analysis “entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances”;²⁷ once for the proposition that rule of reason analysis “focuses on only those factors, and undertakes only the degree of factual inquiry, necessary to assess accurately the overall competitive effect of the relevant agreement”;²⁸ and once in support of the proposition that “where the likelihood of anticompetitive harm is evident from the nature of the agreement, . . . then, absent overriding benefits that could offset the anticompetitive harm, the Agencies challenge such agreements without a detailed market analysis.”²⁹ The Guidelines avoid any use of the “quick look” label but adopt the essence of the quick look approach in many places throughout them (with citations to the decisions Justice Souter blessed as creating the quick look doctrine—*Professional Engineers, NCAA, and Indiana Federation of Dentists*).³⁰

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Carefully applying those guidelines over the past decade, the Commission has found that its citations to CDA’s language allowing less than “full” rule of reason scrutiny in appropriate cases actually helped it win affirmances in two significant horizontal restraints cases: the D.C. Circuit’s 2005 decision in *PolyGram Holding, Inc. v. FTC*, upholding the agency’s order against an agreement between music distributors to refrain from advertising and discount pricing on their concert albums;³¹ and the Fifth Circuit’s decision in *North Texas Specialty Physicians v. FTC*, upholding the agency’s conclusion that physicians’ joint negotiation of contracts with payers through their association was anticompetitive.³² Both cases, however, were tried and decided on the basis of relatively extensive analysis of the effects of the restraints at issue and detailed consideration of proffered justifications. In short, they are not “quick look” cases as that term generally was understood prior to CDA.

More instructive is the role CDA has played in defeating private plaintiffs’ reliance on the quick look idea in recent years. Prominent examples in which decisions based on quick look analysis were reversed are the Fourth Circuit’s 2002 decision in *Continental Airlines v. United Airlines*, reversing a decision condemning an agreement among airlines limiting the size of carry-on baggage;³³ the Sixth Circuit’s 2004 decision in *Worldwide Basketball & Sports Tours, Inc. v. NCAA*, reversing a decision against a rule restricting intercollegiate men’s basketball teams to two certified tournaments over four years;³⁴ and the Second Circuit’s 2008 decision in *Major League Baseball Properties, Inc. v. Salvino, Inc.*, affirming a decision rejecting a challenge to an agreement among baseball teams on an exclusive trademark licensing arrangement and upholding the agreement under the rule of reason.³⁵

Those decisions reflect the core problem that Justice Souter’s opinion introduced into horizontal restraints law: the absence of any meaningful guidance on how courts should apply the “slid-

²⁷ U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for Collaborations Among Competitors 3, 10 (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

²⁸ *Id.* at 7–8.

²⁹ *Id.* at 10–11.

³⁰ *Id.* at 3, 8–12.

³¹ *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

³² *N. Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008).

³³ *Cont’l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499 (4th Cir. 2002).

³⁴ *Worldwide Basketball & Sports Tours, Inc. v. NCAA*, 388 F.3d 955 (6th Cir. 2004).

³⁵ *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008).

ing scale” concept. More specifically, how is one to know as a practical matter when “full” rule of reason scrutiny is required; or when the anticompetitive nature of a restraint is sufficiently “obvious” to dispense with extended market analysis; or when proffered justifications are sufficiently “plausible” to require “empirical” evidence of net effects; or what actually constitutes an “enquiry meet for the case”? Given the amorphous nature of these terms, it is now perilous at best for any plaintiff to rely on a quick look approach to anything other than restraints pretty close to horizontal price-fixing or market division, “naked” restraints of the sort long treated as per se illegal.

Bell Atlantic Corp. v. Twombly

Justice Souter’s 2007 majority opinion in *Bell Atlantic Corp. v. Twombly* is his most significant contribution to antitrust jurisprudence. At issue was whether the plaintiffs had pled sufficient facts for an alleged antitrust conspiracy among the four leading telecommunication carriers in the United States. It led the Court to a fresh consideration of its holding of fifty years earlier in *Conley v. Gibson*, the leading precedent on pleading requirements.³⁶

The plaintiffs had filed a putative class action complaint for injunctive and monetary relief, alleging that four incumbent local exchange carriers (ILECs) unlawfully conspired to inflate prices for local telephone and high-speed Internet services in violation of Section 1 of the Sherman Act.³⁷ The plaintiffs proffered two theories of harm: first, they alleged that the ILECs “engaged in parallel conduct” to restrict the growth of competitive local exchange carriers (CLECs) in their territories, conduct that included “making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs’ relations with their own customers”;³⁸ second, that the ILECs agreed not to compete against one another—agreements that could be “inferred” from, for example, the ILECs’ “common failure” to pursue “attractive business opportunities in contiguous markets where they possessed substantial competitive advantages.”³⁹

The district court granted the defendants’ motion to dismiss on the ground that the allegations of conscious parallel business conduct, without more, did not state a claim for conspiracy under Section 1 of the Sherman Act.⁴⁰ In the court’s view, the plaintiffs were required to allege additional facts that “‘ten[d] to exclude independent self-interested conduct as an explanation for defendants’ parallel behavior.’”⁴¹ The Second Circuit reversed, holding that “‘plus factors are not required to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal.’”⁴² Invoking *Conley v. Gibson*, the court of appeals stated that “‘to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.’”⁴³ The Supreme

³⁶ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (holding that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”).

³⁷ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

³⁸ *Id.*

³⁹ *Id.* at 551 (internal quotations omitted).

⁴⁰ *Id.* at 552.

⁴¹ *Id.* (quoting *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 179 (2003)).

⁴² *Id.* at 553 (quoting *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005)).

⁴³ *Id.* (quoting *Twombly*, 425 F.3d at 114 (2d Cir. 2005)).

Court granted certiorari “to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.”⁴⁴

The Supreme Court reversed, holding that the complaint did not state a claim and therefore should have been dismissed.⁴⁵ Writing for the seven-justice majority, Justice Souter emphasized that plaintiffs must set forth “plausible” grounds at the pleading stage: “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.”⁴⁶ Justice Souter explained that the plaintiff’s allegations “must be enough to raise a right to relief above the speculative level”;⁴⁷ must be “suggestive enough to render a [claim] plausible”;⁴⁸ and must surpass the “line between possibility and plausibility of entitlement to relief.”⁴⁹ This “requirement of plausibility” ensures that “there are enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [a claim].”⁵⁰

In demanding that a plaintiff’s allegations be plausible, the Court was mindful of the high cost of antitrust discovery. Justice Souter recognized that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”⁵¹ By requiring plausibility, courts would be able “to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence” to establish a claim.⁵²

The Court thus abandoned the *Conley v. Gibson* standard under which “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can provide *no set of facts* in support of his claim which would entitle him to relief.”⁵³ This “no set of facts” language, Justice Souter explained, can be interpreted “as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings.”⁵⁴ Under that approach, “a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.”⁵⁵ In Justice Souter’s view, the “no set of facts” phrase “is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of

⁴⁴ *Id.*

⁴⁵ *Id.* at 570.

⁴⁶ *Id.* at 555 (quoting Fed. R. Civ. P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

⁴⁷ *Id.* at 555.

⁴⁸ *Id.* at 556.

⁴⁹ *Id.* at 557 (quotations and citations omitted).

⁵⁰ *Id.* at 556, 560.

⁵¹ *Id.* at 559.

⁵² *Id.* (quotations and citations omitted).

⁵³ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (emphasis added).

⁵⁴ *Twombly*, 550 U.S. at 561.

⁵⁵ *Id.* (citing *Conley*, 355 U.S. at 45–46).

facts consistent with the allegations in the complaint.⁵⁶ In short, a plaintiff must allege sufficient facts “to state a claim to relief that is plausible on its face.”⁵⁷

Applying these principles to the plaintiffs’ allegations, the Court held that stating a Section 1 claim “requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made” and “allegations plausibly suggesting (not merely consistent with) agreement.”⁵⁸ More specifically, “an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.”⁵⁹ The Court thus concluded that, “[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”⁶⁰

In the two years since *Twombly* was decided, there have been thousands of pages of commentary on the implications of Justice Souter’s opinion on not only antitrust cases but federal litigation practice generally.⁶¹ Many predicted that the decision’s new “plausibility” standard would “impose a substantially higher burden on plaintiffs to allege facts that support their claim than a literal application of the old *Conley* ‘no set of facts’ standard would have required.”⁶² As one article noted, “*Twombly* should send a clear signal to lower court judges that they should not allow the enormously burdensome discovery inherent in any antitrust case to proceed before they determine whether the plaintiff has alleged a plausible claim for relief.”⁶³ With regard to Section 1 conspiracy claims, *Twombly* “replace[d] the old ‘plus factors approach’ to inferring an agreement from parallel competitive behavior with a “no alternative explanation” test,⁶⁴ examining—in accord-

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⁵⁶ *Id.* at 563.

⁵⁷ *Id.* at 570.

⁵⁸ *Id.* at 545, 556.

⁵⁹ *Id.* at 556–57.

⁶⁰ *Id.* at 570. Justice Stevens argued in dissent that Justice Souter’s majority opinion “is the first by any Member of this Court to express any doubt as to the adequacy of the *Conley* formulation.” *Id.* at 578 (Stevens, J., dissenting). Justice Stevens also speculated about the potential reach of the majority’s decision: “Whether the Court’s actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer.” *Id.* at 596.

Interestingly, in *Ashcroft v. Iqbal*, the Supreme Court’s first case applying *Twombly*, Justice Souter dissented from the majority’s ruling that a prisoner failed to state a claim for constitutional violations asserted against the former Attorney General and the Director of the Federal Bureau of Investigation. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Justice Souter argued that the majority “misapplied” *Twombly* and contended that the Court’s finding that the plaintiff’s claims were implausible rested on a “fundamental misunderstanding of the enquiry that *Twombly* demands.” *Id.* at 1955, 1959 (Souter, J., dissenting). He explained that “*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true;” rather, “a court must take the allegations as true, no matter how skeptical the court may be.” *Id.* at 1959.

⁶¹ See Manfred Gabriel, *Twombly: A Journey from the Conceivable to the Plausible*, ANTITRUST SOURCE, June 2007, <http://www.abanet.org/antitrust/at-source/07/06/Jun07-Gabriel6-21f.pdf>; James A. Keyte, *Twombly: How Courts Are Interpreting and Extending Its Principles*, ANTITRUST, Fall 2008; William Kolasky & David Olsky, *Bell Atlantic Corp. v. Twombly: Laying Conley v. Gibson to Rest*, ANTITRUST, Fall 2007; Randall C. Picker, *Twombly, Leegin, and the Reshaping of Antitrust*, 2007 Sup. Ct. Rev. 161; Gerald A. Stein, *Bell Atlantic Corp. v. Twombly: Requiring a Plausible Analysis at the Pleadings Stage*, ANTITRUST SOURCE, Dec. 2008, <http://www.abanet.org/antitrust/at-source/08/12/Dec08-Stein12-22F.pdf>; Scott Dodson, *Pleading Standards After Bell Atlantic v. Twombly*, 93 VA. L. REV. (IN BRIEF) 135 (2007) <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>.

⁶² Kolasky & Olsky, *supra* note 61, at 27. See also A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008).

⁶³ Kolasky & Olsky, *supra* note 61, at 27. See also Douglas G. Smith, *The Twombly Revolution*, 36 PEPPERDINE L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1147862>.

⁶⁴ Kolasky & Olsky, *supra* note 61, at 30. See also Stein, *supra* note 61.

dance with *Monsanto v. Spray-Rite*⁶⁵ and *Matshusita v. Zenith Radio*⁶⁶—whether the alleged conduct is consistent with independent behavior.

Case law applying *Twombly* over the past two years reflects four themes. First, courts are grappling with the meaning of the plausibility standard, some calling it “vague” or “less than pellucid.”⁶⁷ As the Second Circuit has observed, *Twombly* has created “[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings”;⁶⁸ and “conflicting signals” from the Supreme Court have “create[d] some uncertainty as to the intended scope of the Court’s [*Twombly*] decision.”⁶⁹

Second, some pre-*Iqbal* courts suggested limiting the application of the plausibility standard to antitrust cases,⁷⁰ while others indicated that the standard applies in all complex civil cases.⁷¹ Most pre-*Iqbal* courts were unwilling to circumscribe *Twombly*’s interpretation of Rule 8 to the antitrust context, asserting it would be “cavalier to believe that the Court’s rejection of the ‘no set of facts’ language from *Conley* . . . applies only to section 1 antitrust claims.”⁷²

Third, *Twombly* specifically examined what facts needed to be plausibly pled in addition to conscious parallel conduct to establish a conspiracy under Section 1 of the Sherman Act. Courts examining these Section 1 claims on motions to dismiss have applied *Twombly* with mixed results. In *In re OSB Antitrust Litigation*, for example, the plaintiffs alleged a price fixing conspiracy among nine manufacturers of oriented strand board.⁷³ Denying the defendants’ motion to dismiss, the district court held that “Plaintiffs have made specific factual allegations of Defendants’ wrongdoing—including actions in furtherance of the conspiracy, Defendants’ purported motive, the approximate time and manner of their agreement, and the mechanism by which Defendants fixed prices. *Twombly* requires no more.”⁷⁴

Other courts have been much tougher on conspiracy allegations. In *In re Elevator Antitrust Litigation*, for example, the Second Circuit affirmed dismissal of plaintiffs’ conspiracy claims against elevator manufacturers and service providers.⁷⁵ The court found that the complaint’s enumeration of “every type of conspiratorial activity that one could imagine . . . in entirely general

⁶⁵ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

⁶⁶ *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁶⁷ See *Wilkerson v. New Media Tech. Charter Sch., Inc.*, 522 F.3d 315, 322 (3d Cir. 2008) (noting that “the exact parameters of the *Twombly* decision are not yet known”); *Robbins v. Okla. ex rel. Dep’t of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (“We are not the first to acknowledge that the new formulation is less than pellucid.”); *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 n.7 (4th Cir. 2007) (“In the wake of *Twombly*, courts and commentators have been grappling with the decision’s meaning and reach.”).

⁶⁸ *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007), *rev’d*, *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

⁶⁹ *Id.* at 157. The Third Circuit stated that the decision is “confusing,” finding that the “issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come.” *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008).

⁷⁰ See, e.g., *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 n.5 (9th Cir. 2008) (“At least for the purposes of adequate pleading in antitrust cases, the Court specifically abrogated the usual ‘notice pleading’ rule, found in Federal Rule of Civil Procedure 8(a)(2) and *Conley v. Gibson*.”).

⁷¹ See, e.g., *Robbins*, 519 F.3d at 1249 (“The *Twombly* standard may have greater bite” in cases that “include complex claims against multiple defendants.”).

⁷² *Iqbal v. Hasty*, 490 F.3d at 157 n.7. See also *Phillips*, 490 F.3d at 234 (“[W]e decline at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context.”); *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 n.2 (2d Cir. 2007) (“We have declined to read *Twombly*’s flexible ‘plausibility standard’ as relating only to antitrust cases.”).

⁷³ *In re OSB Antitrust Litig.*, No. 06-826, 2007 U.S. Dist. LEXIS 56573 (E.D. Pa. Aug. 3, 2007).

⁷⁴ *Id.* at *1.

⁷⁵ *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007).

terms without any specification of any particular activities by any particular defendant” constituted conclusory allegations that could not survive *Twombly*.⁷⁶ It also criticized plaintiffs’ allegations of parallel conduct, which included similarities in contractual language, pricing, and equipment design, as deficient because “while that conduct is ‘consistent with conspiracy, [it is] just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.’”⁷⁷

Fourth, *Twombly*’s plausibility standard has been applied beyond Section 1 conspiracy cases to other elements of antitrust claims. The Tenth Circuit in *Christy Sports v. Deer Valley Resort* affirmed dismissal of the plaintiff’s claims for monopolization and attempted monopolization because the plaintiff was unable sufficiently to plead market power in a relevant market and anti-competitive conduct.⁷⁸ Courts also have relied on *Twombly* to affirm dismissal based on insufficient allegations of antitrust injury. In *NicSand v. 3M*, for example, the Sixth Circuit affirmed dismissal of the plaintiff’s Section 2 claims because “NicSand’s speculations show at most the ‘possibility’ of an entitlement to relief, which is just what *Bell Atlantic [Twombly]* said would not suffice at the pleading stage.”⁷⁹

Given these developments, there is little doubt that the impact of Justice Souter’s *Twombly* opinion on antitrust litigation has been significant. The Court’s plausibility standard has required plaintiffs to allege facts that articulate logical claims for relief and has empowered judges to act as gatekeepers to curtail the exorbitant costs associated with discovery in antitrust cases. The result has been an increase in dismissals of antitrust claims.

Conclusion

Justice Souter’s opinion in *CDA* ten years ago and his opinion in *Twombly* two years ago share two features that define his overall antitrust legacy. First, both opinions introduced a significant degree of complexity and thus uncertainty into antitrust jurisprudence—the “enquiry meet for the case” for horizontal restraints analysis and the “plausibility” principle for antitrust pleading requirements. Second, both opinions have become significant setbacks for private antitrust plaintiffs—making it harder for them to get to a jury on horizontal restraint claims and harder to survive initial motions to dismiss in antitrust claims of all kinds. Justice Souter’s legacy in these respects appears likely to remain a central feature of the antitrust landscape for many years. ●

⁷⁶ *Id.* at 50–51.

⁷⁷ *Id.* at 51 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007)).

⁷⁸ *Christy Sports, LLC v. Deer Valley Resort Co., Ltd.*, 555 F.3d 1188, 1196 (10th Cir. 2009).

⁷⁹ *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 458 (6th Cir. 2007) (en banc) (quoting *Twombly*, 550 U.S. at 557).