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Litigation

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THIRD CIRCUIT HOLDS THAT *TWOMBLY* INJECTS A PLAUSIBILITY REQUIREMENT INTO RULE 8 PLEADING STANDARDS

On February 5, 2008, in *Phillips v. County of Allegheny*,¹ the Third Circuit Court of Appeals set forth the most thorough discussion to date of the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*² and the issues *Twombly* raises for courts addressing motions to dismiss for failure to state a claim. *Phillips* is important not only because it is one of the first appellate courts to interpret *Twombly*, but also because it may herald a shift in the way motions to dismiss are presented and analyzed.

Background

Phillips involved a state-created danger claim pursuant to 42 U.S.C. § 1983. The plaintiff alleged that the County of Allegheny, its emergency 911 call center and certain dispatchers from the call center violated her son's civil rights by failing to prevent an

operator from improperly using the 911 system to locate his ex-girlfriend and her new boyfriend. The boyfriend was killed by the operator, following which the administrator of the decedent's estate filed suit. All defendants except Allegheny County moved to dismiss plaintiff's claims for failure to state a claim upon which relief could be granted. The district court granted the motion to dismiss in its entirety and entered judgment for all defendants, holding that plaintiff had failed adequately to plead three of the four required elements of a state-created danger claim. The Third Circuit reversed the district court's dismissal of the claims against the individual dispatchers, in the process engaging in a discussion of *Twombly* and the Rule 8 pleading standard that is relevant to civil actions in any context.

The Supreme Court's *Twombly* Decision

The Supreme Court in *Twombly* analyzed the pleading standards required pursuant to Rule 8 of the Federal Rules of Civil Procedure for the first time since *Conley v. Gibson*.³ The *Twombly* decision rejected the *Conley* formulation 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." Instead, *Twombly* held that factual allegations must raise a right to relief "above the speculative level." In so holding, *Twombly* explained that the *Conley* "no set of facts" language could be interpreted to permit any conclusory statement providing a theory of the claim to survive a motion to dismiss, so long as the

For further information about this Client Alert, please contact any of the following attorneys:

Sander Bak,
Partner, Litigation Group
(212) 530-5125
sbak@milbank.com

Deborah A. Elman,
Associate, Litigation Group
(212) 530-5510
delman@milbank.com

You may also contact any member of Milbank's Litigation Group. Contact information can be found on Milbank's website at: http://www.milbank.com/en/PracticeAreas/LitigationArbitration_alpha.htm

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¹ No. 06-2869, 2008 WL 305025 (3d Cir. Feb. 5, 2008).

² 127 S.Ct. 1955 (2007)

³ 355 U.S. 41 (1957).

pleadings left open the possibility that plaintiffs “might later establish some undisclosed set of facts to support recovery.”⁴

However, the Court rejected the notion that it was imposing a heightened pleading requirement, stating that it merely required a plaintiff to provide “plausible grounds” to support a claim, and that the need at the pleading stage for plausible allegations simply reflected Rule 8(a)(2)’s threshold requirement that the “plain statement” possess enough heft to “sho[w] that the pleader is entitled to relief.”⁵ Because the *Twombly* plaintiffs had not “nudged their claims across the line from conceivable to plausible,” the Court held that their complaint had to be dismissed.⁶

The Third Circuit’s Decision

Following oral argument in *Phillips*, the Third Circuit asked the parties to brief the *Twombly* decision’s impact on pleading standards. In its written decision, the Third Circuit summarized *Twombly* as introducing two new concepts to Rule 8 pleading standards: (1) the requirement that plaintiffs must now make a showing, rather than merely allege, that they are entitled to relief, and (2) the retirement of the “no set of facts” language from *Conley*.

First, the Third Circuit took note of *Twombly*’s requirement under Rule 8 of a “showing,” rather than a blanket assertion of entitlement to relief, such that the plain statement “possess[es] enough heft” to show that the pleader is entitled to relief and “rise[s] above the speculative level.”⁷ The Third Circuit

understood *Twombly* to hold that, read in context, a complaint could be so lacking in factual development as to fall short of even the minimal notice pleading standard of Rule 8 because it fails to put the defendant on notice of the type of claim asserted. Without some factual allegation in the complaint, the court cautioned, a claimant cannot satisfy the requirement that he or she provide not only “fair notice,” but also the “grounds” on which the claim rests.⁸

Second, the Third Circuit discussed *Twombly*’s disavowal of the long-established and oft-cited “no set of facts” language set forth in *Conley*. Recognizing that this language was problematic because it could be read to require judges to speculate about undisclosed facts, the Third Circuit accepted the new formulation under *Twombly* that “[o]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” After *Twombly*, the Third Circuit held, it is not sufficient for a plaintiff simply to allege the elements of a claim in order to overcome a motion to dismiss; instead, a plaintiff must allege “facts suggestive of [the proscribed] conduct.”⁹

The Third Circuit then addressed whether *Twombly* imposed a new “plausibility” requirement at the pleading stage that materially altered the notice pleading regime.¹⁰ In attempting to interpret the Court’s intent, the Third Circuit noted that the numerous references to “plausibility” in the *Twombly* decision suggest that this is the new standard for notice pleading.

The Third Circuit also took heed of *Twombly*’s holding that while improbability does not warrant dismissal, the right to relief cannot be speculative. It will remain for later courts to determine where the universe between improbability and speculation lies.

Conclusion

In the wake of *Twombly*, courts have expressed confusion about what remained intact and what was changed in the fundamentals of pleading under Rule 8. In *Phillips*, the Third Circuit addressed this uncertainty, concluding that the *Twombly* formulation of the pleading standard could be summed up as follows: “[S]tating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.”¹¹ Although courts may continue to struggle with the exact contours of the Supreme Court’s decision in *Twombly*, the Third Circuit’s decision offers much-needed clarity by indicating that in order to withstand a motion to dismiss under Rule 12(b)(6) a complaint filed in a federal civil action must make a plausible “showing” of plaintiff’s entitlement to relief. A complaint that contains a blanket assertion of plaintiff’s right to relief, even if it recites all the elements of the cause of action, likely cannot withstand a motion to dismiss after *Twombly*.

⁴ *Id.* at 1968.

⁵ *Id.* at 1965-66.

⁶ *Id.*

⁷ *Id.* (citing *Twombly*, 127 S. Ct. at 1965 & n. 3).

⁸ *Id.*

⁹ *Id.* at *5 (citing *Twombly*, 127 S.Ct. at 1969).

¹⁰ *Id.* at *6 (citing *Twombly*, 127 S.Ct. at 1988 (Stevens, J., dissenting)).

¹¹ *Id.* at *6.

For further information about this client alert, please visit our website at www.milbank.com or contact one of the Litigation partners listed below.

New York

Wayne M. Aaron	212-530-5284	waaron@milbank.com
Thomas A. Arena	212-530-5328	tarena@milbank.com
Parker H. Bagley	212-530-5343	pbagley@milbank.com
Sander Bak	212-530-5125	sbak@milbank.com
Jeffrey Barist	212-530-5115	jbarist@milbank.com
James N. Benedict, <i>Chair</i>	212-530-5696	jbenedict@milbank.com
George S. Canellos	212-530-5174	gcanellos@milbank.com
James G. Cavoli	212-530-5172	jcavoli@milbank.com
Christopher E. Chalsen	212-530-5380	cchalsen@milbank.com
Scott A. Edelman	212-530-5149	sedelman@milbank.com
David R. Gelfand, <i>Practice Group Leader</i>	212-530-5520	dgelfand@milbank.com
John M. Griem, Jr.	212-530-5429	jgriem@milbank.com
Douglas W. Henkin	212-530-5393	dhenkin@milbank.com
Michael L. Hirschfeld	212-530-5832	mhirschfeld@milbank.com
Lawrence T. Kass	212-530-5178	lkass@milbank.com
Sean M. Murphy	212-530-5688	smurphy@milbank.com
Michael M. Murray	212-530-5424	mmurray@milbank.com
Stacey J. Rappaport	212-530-5347	srappaport@milbank.com
Richard Sharp	212-530-5209	rsharp@milbank.com
Alan J. Stone	212-530-5285	astone@milbank.com
Errol B. Taylor	212-530-5545	etaylor@milbank.com
Andrew E. Tomback	212-530-5971	atomback@milbank.com
Fredrick M. Zullo	212-530-5533	fzullo@milbank.com

Washington, DC

David S. Cohen	202-835-7517	dcohen2@milbank.com
Robert J. Koch	202-835-7520	rkoch@milbank.com
Andrew M. Leblanc	202-835-7574	aleblanc@milbank.com
Michael D. Nolan	202-835-7524	mnolan@milbank.com
William E. Wallace, III	202-835-7511	wwallace@milbank.com

Los Angeles

Linda Dakin-Grimm	213-892-4404	ldakin-grimm@milbank.com
Gregory Evans	213-892-4488	gevans@milbank.com
Jerry L. Marks	213-892-4550	jmarks@milbank.com
Daniel Perry	213-892-4546	dperry@milbank.com
Mark Scarsi	213-892-4580	mscarsi@milbank.com

London

David Perkins	44-20-7615-3003	dperkins@milbank.com
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Offices Worldwide

Beijing Frankfurt Hong Kong London Los Angeles Munich New York Singapore Tokyo Washington, DC