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Is "Plausibility" a Rorschach Test? Fourth Circuit's Divided Opinion on Twombly's Motion to Dismiss Standard

Article By:

Jason C. Hicks

A recent *Fourth Circuit* case demonstrates the inherently subjective nature of the "plausibility" standard used to evaluate a motion to dismiss under Rule 12(b)(6). This standard, first articulated by the ***Supreme Court*** in ***Bell Atlantic Corp. v. Twombly*****,** 550 U.S. 544 (2007), requires a district court to look beyond the face value of allegations in a complaint to determine if they are, in fact, "plausible." The Supreme Court recognized that determining "plausibility" would be a "context-specific task that requires the reviewing court to draw on its own judicial experience and common sense." The problem, however, is that different judges have different "experiences" and different notions of "common sense."

Those differences are on full display in the Fourth Circuit's opinion in ***SD3, LLC v. Black & Decker (U.S.) Inc. et al.,*** 801 F.3d 412 (4th Cir 2015). The opinion is worth reading both for its in-depth analysis of the "plausibility" standard and for the pithy back-and-forth attacks between the judges.

In this antitrust case, the plaintiff alleged that all of the major table-saw manufacturers conspired to boycott plaintiff's "SawStop" safety technology to keep it off the market. The district court granted defendants' motion to dismiss, finding that the complaint did not plausibly allege an "agreement" or "conspiracy," a necessary element under Section 1 of the Sherman Act.

On appeal, a two-judge majority of the Fourth Circuit reversed, finding that the complaint had adequately alleged a conspiracy because plaintiff had alleged parallel conduct among the defendants plus additional factors suggesting an agreement, thus meeting the "parallel plus" standard under Section 1. The majority criticized the district court for confusing the motion-to-dismiss standard with the standard for summary judgment and, in so doing, applying "a standard much closer to probability" than the "plausibility" standard from *Twombly*.

In a strongly worded dissenting opinion, Judge Wilkinson attacked the majority for misapplying *Twombly.* The vigor of the dissent prompted Judge Wynn, of the majority, to write a separate and equally caustic concurring opinion taking shots back at the dissent.

Apart from the entertaining back-and-forth between the judges, this opinion displays the wide, yet hard to define, difference between something being plausible and implausible. All three of the judges on the panel read the same complaint, and they all agree as to the elements of an antitrust claim and

the standards for analyzing a motion to dismiss. Although both sides quote the same language from *Twombly*, the real difference between the dissent and the majority/concurrence is how they apply *Twombly* to the allegations in the complaint. This appeal did not involve a legal issue or a disputed fact so much as different perspectives or outlooks.

This case shows that "plausibility," like beauty, is in they eye of the beholder. One judge looks at the allegations and declares them implausible. Another looks at the same allegations and sees them as plausible. When legal standards turn on something as amorphous as "plausibility," it is not surprising that there are such widely disparate opinions from very smart and very well-meaning judges.

It is somewhat surprising, however, that the judges engaged in such heated rhetoric when they all agree on the substantive and procedural rules. This is not a case where the majority believes in X and the dissent believes Y. Perhaps it is this inability to precisely describe the difference between believing something plausible and believing it implausible that gives rise to the personal attacks in this case. One side cannot claim that the other side applied the wrong rule, so they attack each other's judgement, character or motives--sometimes in Latin and sometimes IN ALL CAPITAL LETTERS!

Whatever the reason, the dissent and concurrence are littered with caustic, sarcastic, and pithy attacks at each other. The criticisms are so well written, that they need to be quoted at length to be fully appreciated:

WILKINSON, Circuit Judge, concurring in part and dissenting in part:

> The majority's view of modern commerce is unfortunate...
>
> I would suggest, most respectfully, that the majority has committed basic conceptual errors and that the consequences of those errors, which the majority prefers not to face and to dismiss as policy, are regrettable....
>
> *Twombly* counsels that we not leap to pejorative explanations when legitimate business considerations are more likely at play....
>
> ... we should [not] rush too quickly to drape innocent commercial activity in sinister garb.
>
> The majority however, adopts the reverse sequence. It fashions a template for the frustrated market participant: Whenever routine business decisions don't go your way, for whatever reason, simply claim an industry conspiracy under the Sherman Act and the courts will infer malfeasance.... WARNING: HOLDING OR ATTENDING THIS TRADE ASSOCIATION MEETING WILL INCREASE YOUR EXPOSURE TO ANTITRUST SUITS....
>
> The majority's cardinal conceptual error lies in the adoption of an ends-based approach to parallel conduct in a circumstantial antitrust case... The majority thus uses its ends based analysis to reward the least marketable products with the greatest possibility of success. WARNING: FAILURE TO ADOPT THIS PRODUCT FOR WHATEVER REASON WILL

INCREASE YOUR EXPOSURE TO ANTITRUST SUITS....

The majority alights on a minor motif of that Supreme Court decision [*Twombly*], while leaving its main point wholly unobserved.... Put simply, the majority proceeds as if *Twombly* were at most persuasive authority, and not very persuasive authority at that....

The majority refuses to undertake this second, more analytical step [i.e., looking beyond the face value of the allegations to determine if they are "plausible"]. My concurring colleague simply wishes it away. There is a time warp here, a nostalgia for the old pleading ways and days. Those earlier standards were easier for us, I admit. But our nostalgia now flies in the face of a controlling Supreme Court decision....

The majority's assurance that of course district courts can control discovery is the sort of appellate wand-waving that ignores every reality on the ground...

With its its invented version of *Twombly*, the majority allows plaintiffs to contort normal marketplace behavior into a potential antitrust violation....

The majority's ready acceptance of [plaintiff's] unsupported superiority assumption is part of the fallacy of its ends-based perspective ....

The majority thus sets a nifty trap: if defendants engage in similar means, it's collusion; if they engage in dissimilar means, it's deceit. Given those options, businesses should either keep to themselves or close up shop....

The majority ignores all of this in its rush to flatten pleading standards, make communications perilous, and consign antitrust law to isolationist ends. It is an odd time for the majority to assume a more isolationist stance. It raises the risk that antitrust law will render American companies comparatively incommunicative and thus at a competitive disadvantage at the very time global commercial interactions are becoming more commonplace....

If the complaint had spun even a remotely plausible narrative of impermissible collusion, I should have been the first to waive it through the *Twombly* gates... But I cannot conspire [pun intended, one must assume] with my colleagues in the demise of the *Twombly* decision.

WYNN, Circuit Judge, concurring:

"Judges ought to remember that their office is *jus dicere*, and not *jus dare*--to interpret the law, and not to make law or give law." ... Respectfully, the dissenting opinion strays beyond our limited review here and encroaches on policy issues best left to other branches of government...

> First, rather than confront the issues actually in play, the dissenting opinion dresses up points of agreement as dire rifts. The dissent asserts, for example, ... [listing things asserted by the dissent] ... Nonsense....
>
> Second, rather than address [plaintiff's] complaint as it is written, the dissenting opinion employs verbiage like "commercial interactions" to revise the complaint so as to omit the allegations of a secret agreement to refuse to deal. Again sounding in policy, the dissenting opinion asserts ... Thus, the dissenting opinion editorializes ... Yet, when read with a judicious eye, [plaintiff's] complaint clearly alleges ...
>
> Ignoring such specific allegations to [plaintiff's] detriment is nothing shy of an all-out perversion of the generous lens through which we must view the complaint...
>
> Finally, the dissenting opinion focuses on its own policy preferences, thereby abandoning this Court's limited role--which is simply to assess whether [plaintiff] plausibly alleges the elements of its Section 1 claim....
>
> The dissenting opinion embarks on yet another odyssey into policy, as well as assumptions untethered to reality, must less the complaint at issue here ...
>
> In sum, courts exist to resolve disputes, not to pervert procedural rules into swords with which to fight policy battles... Accordingly with all due respect for the dissenting view, I joint in the judicious and well-reasoned majority opinion.

This does not sound like two judges who agree on both the procedural and substantive law, yet they do. The difference is one of perspective, which probably explains the heated rhetoric.

Interestingly, the Fourth Circuit's panel opinion may not be the last word on this case. A petition for certiorari is currently pending with the the United States Supreme Court. Will the Supreme Court want to weigh in on the proper way to apply the "plausibility" standard it articulated in *Twombly*? If so, will the Supreme Court be able to clarify the standard to assist lower courts? Or is "plausibility" really just a Rorschach test that reflects back on the subjective beliefs of the judge? Is there an objective standard here, or is "plausibility" merely in the eye of the beholder? It will be interesting to watch how this dispute over civil procedure develops...

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