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When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards

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Executive Summary

This paper applies a simple economic framework to the choice between pleading and summary judgment as points at which a claim can be dismissed. It concludes generally that pleading standards should vary with the evidentiary demands of the associated legal standards and the social costs of litigation. The common law's imposition of higher pleading standards for fraud claims is consistent with this proposition. The theory implies that the rigorous summary judgment standards that have been developed by antitrust courts should lead to a correspondingly rigorous assessment at the pleading stage.

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1. Introduction

Pleading is the term lawyers apply to the claims plaintiffs assert when they enter court, and the specific language used to assert them. As every law student quickly learns, pleading under the common law was a high-stakes game. Under the common law writ system, a legal action began when the plaintiff obtained a writ ordering the defendant to appear and defend himself. A plaintiff could lose if he chose the wrong writ, and each writ had its own pleading requirements.

In the latter half of the 1800s, courts in England and in the United States began to reform the pleading process in an effort to simplify the requirements.[1] The reforms aimed to make the pleadings serve the functions of providing notice to defendants and guidance to courts. The simplified pleading requirements were designed to make legal judgments turn on the underlying merits of the case rather than the skill of lawyers in satisfying arcane pleading rules.

There are opposing views today on the degree to which courts should use pleading requirements to police the types of claims allowed to enter courts. One view holds that in order for pleadings to serve the purpose of guiding courts and providing notice, courts need to rigorously enforce pleading rules in order to bar claims that fail to meet them. The opposing view argues that the pleading rules should not be used to bar many claims because there are other devices that can serve this purpose; such as pretrial discovery, pretrial conference, and summary judgment.

The purpose of this paper is to examine the choice between using pleading rules and other devices to screen claims.[2] Specifically, I will focus on the choice between the

[1] See, e.g., Friedenthal, Kane, and Miller (2005), at 252.

[2] For a general discussion of the economics of pleading standards, see Bone (2003), 125-157. There is a related literature on the allocation of burdens of proof, see Hay and Spier (1997). While this paper addresses in a general way the setting of optimal proof burdens, it does not address the allocation of proof burdens.

pleading stage and summary judgment stage as points at which a claim can be dismissed.[3] I will apply the results of the analysis to the law on pleading standards, and especially the pleading standard for conspiracy claims under the Sherman Act.

The results suggest a positive theory of the common law on pleading standards and a normative theory for the developing antitrust pleading standards. In general, pleading standards should vary with the evidentiary demands of the associated legal standards and the social costs of litigation. This explains why the common law imposed higher pleading requirement for certain claims – e.g., claims of fraud, which were difficult to prove and imposed substantial social costs beyond litigation expenses. The theory developed here implies that the rigorous summary judgment standards that have been developed recently by antitrust courts with respect to predatory pricing, resale price maintenance, and conspiracy claims based on parallel conduct should lead to a correspondingly rigorous assessment at the pleading stage.

2. Economics of Civil Procedure: Dismissals and Pleading Standards

In order to gain some economic intuition for the role of pleading standards, we must first examine the function of dismissals in the litigation process. In this section I briefly set out the standard model of litigation and introduce dismissals into that model.

Standard model of litigation

The standard model of litigation is a one period model that focuses on the filing and settlement decisions. A suit is filed if the expected judgment exceeds the cost of litigation. If we let P_p equal the plaintiff's prediction of the likelihood of a verdict in his favor, v equal the loss suffered by the plaintiff (and also the amount awarded if the plaintiff wins his case), and c_p the plaintiff's cost of litigation, a lawsuit will be filed when

$$P_p v > c_p \qquad (1)$$

[3] Typically, defendants challenge cases at the pleading stage by filing a motion to dismiss for failure to state a claim. The summary judgment motion typically occurs later in the litigation process and often challenges not only the sufficiency of the allegations but also the existence of factual support for the allegations. See Friedenthal, Kane, and Miller, at 465-469.

Let P_d equal the defendant's prediction of the likelihood of a verdict in the plaintiff's favor and c_d the defendant's cost of litigation.

Settlement, in the standard model, is described by the "Landes-Posner-Gould" condition, under which settlement occurs if and only if

$$(P_p - P_d)v < c_p + c_d \qquad (2)$$

Introducing dismissals

The standard model does not incorporate dismissal of lawsuits. Dismissal should occur when the social gain from litigation is less than its cost. Following Shavell (1982) (and Hylton (1990a), at 165-166), the social desirability of litigation can be determined by comparing social costs when litigation occurs to social costs when litigation is prohibited. Let θ_{nc} equal the probability of an injury when the potential defendant/injurer does not take care, θ_c equal the probability of an injury when the potential defendant does take care, x equal the cost of care, h equal the likelihood of a lawsuit, and w equal the percentage of potential injurers who take care because of the threat of liability.[4]

The percent of potential injurers who take care, w, is a function of the *merit* of lawsuits. Meritless lawsuits will target with equal likelihood injurers who took care and injurers who did not. As a result, meritless lawsuits will provide relatively weak incentives for potential injurers to take care. In general, the injurer's incentive to take care depends on the difference between his expected liability when he takes care and when he does not. As this difference increases, the injurer's incentive to take care increases. Since the difference between the injurer's expected liability when he takes care and when he does not declines as the merit level of lawsuits declines, so does the incentive to take care.[5] Assume, then, that w is an increasing function of the merit of the average lawsuit. We can let P_p serve as a proxy for the lawsuit's merit.

When lawsuits are prohibited, no one takes care, so total social cost is

$$\theta_{nc}v \qquad (3)$$

[4] This model is general enough to apply to intentional harms as well. For example, in the antitrust setting, x could represent the profit forgone by the dominant firm if it forbears from some anticompetitive act.

[5] Obviously, this is an extremely simple version of a more complicated model; see Hylton (1990b), which can easily be modified to formalize this intuitive argument.

When lawsuits are permitted, the fraction w of potential injurers take care, so social cost is

$$(1\text{-}w)\ \theta_{nc}v + w(\theta_c v + x) + h(c_p + c_d) \qquad (4)$$

Suit is socially desirable, then, when

$$w[(\theta_{nc} - \theta_c)v\text{-}x] > h(c_p + c_d) \qquad (5)$$

In words, this means that a suit is socially desirable when the "deterrence benefits" (injuries avoided net of avoidance costs) exceed the total litigation costs. An ideal system of civil procedure rules would seek to maximize the difference between deterrence benefits and litigation costs. Equivalently, an ideal system would minimize the sum of under-deterrence, over-deterrence, and litigation costs. Yet another way of saying the same thing is that an ideal system would minimize the sum of false-acquittal, false-conviction, and litigation costs.

This implies that there is a critical level of merit below which lawsuits should be barred. Specifically, since $w(P_p)$ is an increasing function, if we allow $\overline{P}_p$ to be the level of merit at which the left and right hand sides of (5) are equal, suit should be dismissed whenever $P_p < \overline{P}_p$. When a plaintiff files a claim that appears to fall below that critical level of merit, the court should dismiss the claim.

Multi-stage litigation and abusive suits

As Baxter (1980) noted, the standard model fails to capture the multi-stage nature of litigation. Litigation consists of several motions, some of which (e.g., the dismissal motion) can put an end to the case, while others alter its direction sharply.

The first model to show how the multi-stage nature of litigation changes the results of the standard one-period approach is that of Bebchuk (1996). In the Bebchuk model, the multi-staged nature of litigation results in the prosecution of suits that appear to have a negative expected value.

The key reason negative-expected-value suits are prosecuted in the Bebchuk model is because early-stage litigation expenditures become sunk costs as litigation progresses. Thus, once a plaintiff has reached a late stage of litigation, his incentive to

continue depends on the prospect of winning and the prospective (forward looking) cost of litigation.

For example, suppose the cost of litigation to the plaintiff is $100 in each of two periods (the total cost to the plaintiff is $200). The expected value of the judgment to the plaintiff is $180 at the start of the first period. This appears to be a negative expected value suit. However, at the start of the second period, the plaintiff's profit from continuing the litigation is $80. Given this, the plaintiff has a credible threat of maintaining the lawsuit after the first stage. Suppose, in view of that credible threat, the defendant is willing to settle at the start of the second period for $110. Given this settlement amount at the beginning of the second period, the plaintiff's threat to sue at the start of the first period becomes credible.

One lesson from the Bebchuk model is that the multi-stage nature of litigation can generate frivolous or abusive claims. For the present, I will loosely define an abusive claim as one with such a low probability of victory on the merits that the plaintiff's primary purpose for bringing the suit is to take advantage of the possibility of an erroneous decision in his favor.

Information and sunk-cost effects in litigation

In addition to the "sunk-cost" effect identified by the Bebchuk model, multi-stage litigation also includes information effects.[6] As the litigants move from one stage to another, the information on the plaintiff's probability of winning changes.

Consider a two-stage litigation process with: P_p^i, P_d^i, c_p^i, c_d^i, $i = 1, 2$. Given that first period costs are sunk, at the start of the second period the plaintiff's claim remains credible if $P_p^2 v > c_p^2$. Again, given sunk costs, the parties will reach a settlement if $(P_p^2 - P_d^2)v < c_p^2 + c_d^2$.

Suppose that settlement amount is S^2. Following Bebchuk, suit will be filed at the beginning of the first period if $S^2 > c_p^1$. Given that a credible suit will be filed at the beginning of the first period, the defendant has an incentive to settle at the same time. The settlement incentive for the defendant will increase as the defendant's first period litigation cost increases. These are straightforward implications of the Bebchuk model.

[6] See Bone (2003), at 38.

However, there is one difference between the case just explored and the Bebchuk model. In this version, the plaintiff's probability of victory changes over time. It is only the second stage probability of victory that matters to the plaintiff's incentives to file. Thus, a plaintiff could file a suit with a virtually zero chance of victory based on information available at the start of stage 1. Such a suit would appear to be abusive in the sense loosely defined above.

This suggests a different approach to assessing abusiveness. Abusiveness should be determined based on information available at the start of the second period of litigation. Thus if P_p^2 is below some critical threshold, the suit should be considered abusive, even if P_p^1 is above that threshold. In a setting in which the likelihood of victory changes over time, credibility should be determined by the likelihood of victory at the final stage.

In addition, the notion of a positive-expected-value lawsuit should also reflect the final period likelihood of victory. Thus, if we consider the expected likelihood of victory at the end of the second period, based on information available at the start of the first, a lawsuit has a positive expected value when $E(P_p^2 | P_p^1)v > c_p^1 + c_p^2$. Credibility, which should also be determined by the end-period expectation of victory, may exist even when this positive-expected-value condition is not satisfied.

Pleading standards and dismissal: pleading versus summary judgment

In this part I will focus on dismissal in the multi-stage model. Assume now that the first stage of litigation is the pleading stage, and the beginning of the second stage is the summary judgment moment.

Let us now define an abusive suit as one in which

$$P_p^2 < \tau , \qquad (6)$$

where τ *is the threshold level of merit below which a suit should not be permitted to survive a motion for summary judgment*. The threshold merit level should be based on the objective of minimizing social costs (see part II.B of this paper), or, equivalently, on the goal of minimizing the sum of false-acquittal, false-conviction, and litigation costs. It follows that the threshold merit level should increase as litigation becomes less productive as a deterrent and more costly to society.

The question examined in this section is the standard a court should apply to the pleading stage. Given the merit threshold necessary at the summary judgment stage, at the pleading stage a court should dismiss if

$$E(P_p^{\,2} \mid P_p^{\,1}) < \tau \ . \qquad (7)$$

In other words, if, given information available at the pleading stage, the expected merit level of the lawsuit at the summary judgment stage is below the threshold at which dismissal should occur, the plaintiff's lawsuit should be dismissed at the pleading stage. Pleading stage dismissals are socially desirable under this rule because they enable courts to reduce overall social costs without having to further increase the merit threshold.

To gain useful insights from the pleading stage dismissal criterion, consider a case in which there are two merit levels possible at the final (summary judgment) stage. One is the same level of merit at the pleading stage, $P_p^{\,1}$. This is the pessimistic scenario in which the plaintiff finds nothing to enhance the merit of his claim after engaging in discovery. The other merit level is the *discovery-enhanced merit level* ψ, where $\psi > P_p^{\,1}$. Suppose the likelihood of reaching the discovery-enhanced merit level ψ is α. Since $E(P_p^{\,2} \mid P_p^{\,1}) = \alpha\psi + (1 - \alpha)\, P_p^{\,1}$, a case should be dismissed at the pleading stage whenever $\alpha < \overline{\alpha}$, where

$$\overline{\alpha} = \frac{\tau - P_p^1}{\psi - P_p^1}. \qquad (8)$$

This implies several rules for dismissal at the pleading stage.

1. Dismissal at the pleading stage should occur only in those cases in which the claims and evidence asserted at the pleading stage are insufficient to meet the merit requirement at the summary judgment stage (i.e., $P_p^{\,1} < \tau$).

2. Given that the pleadings are insufficient to meet the summary judgment merit requirement ($P_p^{\,1} < \tau$), a claim should be allowed to pass the pleading stage only if the discovery-enhanced merit level is unambiguously greater than the summary judgment merit requirement (i.e., $\psi > \tau$).

3. Again, assume the pleadings are insufficient to meet the summary judgment merit requirement. If the discovery-enhanced merit level is barely sufficient to satisfy the summary judgment merit threshold, the plaintiff's pleadings must indicate that it is

virtually certain that he will produce that enhanced level of merit in order to be allowed past the pleading stage (i.e., where ψ is only slightly greater than τ, α must be close to one).

4. Since the threshold merit level (τ) is increasing in the social cost of the type of litigation initiated by the plaintiff, dismissals should occur more often for more costly claims. For example, if the plaintiff's claim imposes relatively high costs on the defendant, say by severely damaging his business or by imposing exorbitant discovery costs, the threshold level of merit should be correspondingly high.

This analysis of pleading-stage dismissal implies a rather stingy approach on the part of courts. In any case in which there is considerable doubt as to whether the plaintiff will be able to survive summary judgment, because the potential quantum of evidence in support of the plaintiff will at best approximate the minimum needed to survive summary judgment, the courts should dismiss at the pleading stage.

Circumstantial and direct evidence

To further explore the implications of this analysis of pleading-stage dismissal, suppose the level of merit at the summary judgment phase is a function of two types of evidence, circumstantial and direct. Circumstantial evidence, as the name implies, is evidence that creates a strong inference in favor of the proposition it supports, while falling short of direct support. For example, footprints of the same size as the defendant's provide circumstantial evidence that the defendant was at the scene of an accident or a crime. Direct evidence, on the other hand, is evidence that more or less demonstrates the proposition it supports. For example, a videotape showing the defendant at the scene of an accident or a crime provides direct evidence in support of the plaintiff's claim.

The foregoing analysis implies that the court's quickness to dismiss at the pleading stage, for any given summary judgment dismissal standard, should vary with the relative probabilities of direct and circumstantial evidence entering the case. If the probability of obtaining direct evidence is high, a court should be more willing to allow the claim to proceed beyond the pleading stage. For example, suppose the plaintiff is likely to obtain through discovery a document or eyewitness testimony that conclusively

links the defendant to an accident or a crime. This analysis suggests the court should be relatively lenient in allowing such claims to pass the pleading stage.

On the other hand, if the likelihood of direct evidence is low, and the level of merit likely to result from circumstantial evidence is just below the level needed to meet the summary judgment threshold, the court should dismiss at the pleading stage. Under these assumptions, the foregoing pleading-stage dismissal analysis implies that the plaintiff should be almost certain to meet the circumstantial evidence requirement at the summary judgment stage in order to avoid dismissal at the pleading stage. However, if the plaintiff were almost certain to avoid dismissal at the summary judgment stage, he should be able to indicate that level of merit at the pleading stage. Given this, a claim that fails to demonstrate that level of merit at the pleading stage should be dismissed.

3. Application to Pleading Law

This analysis suggests that there should be a close relationship between the summary judgment dismissal standard and the pleading stage dismissal standard. The summary judgment dismissal standard is a function of the legal standard for liability and the facts offered to support the plaintiff's claim that the legal standard will be satisfied. This has immediate implications for existing views on the proper standard for dismissal at the pleading stage.

Liberal versus conservative views of pleading requirements

On one hand there are liberal views, such as the "aggregate of operative facts" and "primary right" theories.[7] Under the operative-facts theory, proponents assert that plaintiffs should be able to pass the pleading stage if they have asserted all of the facts that might lead to a valid claim for liability, even if they have not linked those facts to specific legal theories. This view appears to be too liberal under this paper's analysis because if the facts asserted fail to allow one to predict what will happen at the summary judgment stage, then the claim should be dismissed at the pleading stage.

[7] Friedenthal, Kane, and Miller, at 259-260.

The other liberal approach to pleading focuses on the primary right of the plaintiff: for example, whether there has been a violation of the plaintiff's right to exclusive use of his property. This approach also appears to be too liberal. Asserting the violation of a primary right at the pleading stage may not be enough to allow a court to predict the outcome of a summary judgment motion.

The conservative position is the "theory of the pleadings" doctrine, which requires the plaintiff to tailor his assertions at the pleading stage to satisfy a specific legal theory.[8] This is closer to the approach suggested by this paper. Of course, it might be too conservative, if applied in a manner that does not take into account the possibility that there could be more than one legal theory.

The proper standard suggested by this paper requires an assessment of the pleading stage in light of what will be required at the summary judgment stage. This suggests that pleading stage requirements should vary with the demands of summary judgment stage requirements. Certainly, specific legal theories will be required at the summary judgment stage, as well as facts to support those legal theories. Where the summary judgment standard is relatively high, in terms of the factual support required, the pleading stage requirements should be relatively high. Conversely, where the summary judgment stage requirements are relatively low, the courts should be liberal at the pleading stage.

This does not, at least in theory, lead to the "man-traps" that Bentham once complained had riddled the common law,[9] causing plaintiffs to lose valid claims because they had failed to assert some special combination of words at the pleading stage. The theory implied here suggests that an objective observer, presumably the court, should attempt to forecast the legal theories and summary judgment standards associated with those theories. This approach would not penalize a plaintiff for failing to assert a claim that was clearly implied by the facts set out in the pleadings.

Understanding the law on pleading

[8] Id. at 261.
[9] Bentham (1928), at 163-164.

We can understand the law on pleading standards in light of the foregoing analysis. And by "the law", I refer to the way courts have dealt with pleadings more than the particular rules set out in the civil procedure codes. The procedural codes reflect broad judgments about the desirability of litigation that may not be reflected in some of the narrow, case-specific decisions on pleading.

Discrimination claims appear to have relatively light pleading requirements.[10] This is consistent with the theory of this paper because the summary judgment stage requirements are relatively low. At the summary judgment stage, a discrimination plaintiff will either have direct evidence or circumstantial evidence of discrimination.

If the plaintiff has direct evidence of discrimination, such as a memo in which an employer asserts a plan to discriminate against a certain class of employees, he will most likely win his case and clearly have enough to survive a summary judgment motion. Some courts have defended the relatively low pleading threshold in discrimination cases on the basis of this possibility, but that is unpersuasive. Direct evidence is unlikely to appear, and the prospect of discovering it would provide a basis for allowing every claim to continue beyond the pleading stage.

The more likely scenario is the case in which the plaintiff will have only circumstantial evidence at the summary judgment stage. However, the circumstantial evidence required in discrimination cases is not particularly difficult to amass and relatively easy to interpret. For example, if the plaintiff can show that similar employees not within the same protected class were treated differently (better) by the employer, that may be sufficient to survive a summary judgment motion.

However, the discrimination claim is a relatively new species within the population of legal claims. The best evidence to support the theory of this paper is likely to be found in the common law treatment of pleading requirements. Two cases in which the common law imposed special pleading requirements are fraud and defamation.

In the case of fraud, the common law required pleading of specific facts detailing the fraudulent act. One justification typically provided is that fraud amounts to an allegation of immorality. The other traditional justification is that an allegation of fraud could serve as the basis for avoiding contracts, deeds, and similar documents. For

[10] See Swierkiewicz v. Sorema, 534 U.S. 506 (2002)

example, a contracting party might refuse to pay after a delivery of widgets. When the widget supplier sues for payment, the purchaser could assert a claim of fraud against the supplier. Given the potential damage to commerce if claims of this sort dragged on in court without any serious effort to weed frivolous from valid charges, the specificity requirement developed in the common law governing fraud actions seems desirable.

In terms of this paper's theory, the specificity requirement adopted under the common law for fraud actions is an example of courts raising the merit threshold in order: (1) to ensure that a claim admitted into court was likely to meet the evidentiary requirements of the legal standard and (2) to reduce the frequency of socially wasteful litigation. As legal hornbooks note, the law imposed high evidentiary burdens on plaintiffs in fraud actions, requiring them to prove misrepresentation of fact, knowledge of falsity, intent to deceive, reliance, and substantial injury.[11] Where the legal standard imposes a heavy burden on plaintiffs, the pleading standard should impose a relatively high burden.

In addition to the difficulty of meeting the legal standard, the social cost of fraud litigation provides another reason under this paper's theory for imposing a heightened pleading standard. There are several costs clearly connected to fraud claims. One is the cost of litigation, which is associated with any legal claim. Another is the reputation cost imposed on the defendant. In markets in which reputation matters greatly, an allegation of fraud could severely damage a business. And another cost is the disruption in commerce. If courts refused to screen out frivolous claims of fraud, businesses would find it more difficult to enforce valid contracts, forcing them to rely on alternatives such as long-term relationships or demanding property to be held as security.

The common law also required specificity in pleading for defamation actions. This is also consistent with this paper's analysis. Here, the problem is not the burden imposed on the class of potential defendants. In the case of defamation claims, as Holmes noted long ago,[12] society has an interest in making sure that they do not discourage speech. Defamation claims have had to meet relatively high proof standards.

[11] See, e.g., Calamari and Perillo (1977), 278-292.
[12] Holmes (1881), 138-140.

The rigorous pleading standard is a reflection of the relatively high proof standard and the perceived social cost of cheap defamation litigation.

Pleading in antitrust

Like discrimination claims, antitrust is also a relatively new area of litigation. Because of its relatively recent birth, one cannot examine the common law treatment of pleading in antitrust claims in order to test whether the theory set out earlier in this paper provides a justificatory account of long-settled law. Moreover, the dismissal standards at summary judgment and pleading stages are still in the process of development in antitrust.[13]

Recognizing the social costs of false convictions, antitrust courts have raised the evidentiary requirements to survive a summary judgment motion with respect to many claims. *Brooke Group* establishes a recoupment test for predatory pricing claims that plaintiffs find extremely difficult to satisfy at the summary judgment stage.[14] The courts have recognized the high costs of permitting erroneous claims of predation to work their way all the way to a jury. The resale-price-maintenance cases have established high proof standards for claims that reach the summary judgment stage.[15] Here the law reflects the increasing recognition that resale price maintenance is not, as a general matter, socially harmful, and is in many instances socially beneficial. The conspiracy case law has imposed a "plus factors" requirement at the summary judgment stage that requires plaintiffs to provide evidence suggesting that the defendants' conduct could not be explained by independently-motivated action.[16]

In many of these areas of antitrust litigation, courts have not worked out precisely what should be required at the pleading stage. In other words, summary judgment tests have imposed increasingly high burdens on plaintiffs in antitrust, while pleading

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[13] For a recent independent analysis of antitrust dismissal standards that reaches conclusions similar to those in this part, see Epstein (2006). On the general point that antitrust dismissal standards sometimes reflect general perceptions of the social costs of litigation, see Calkins (1988).

[14] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

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

[16] See, e.g., Gellhorn, Kovacic, and Calkins (2004), at 277-282. For an alternative to the "plus factors" view, see Judge Posner's opinion in *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651 (7th Cir. 2002). Citing his view that Section 1 of the Sherman Act prohibits tacit collusion, Judge Posner would permit courts to follow a totality-of-the-circumstances approach to assessing circumstantial evidence at the summary judgment stage.

standards have remained unclear in many jurisdictions. This opens the possibility of high merit thresholds required at the summary judgment stage coupled with low merit thresholds at the pleading stage.

A current example of this legal uncertainty is *Twombly v. Bell Atlantic*.[17] The plaintiffs assert that the incumbent "baby-bell" telephone monopolies, also known as Incumbent Local Exchange Carriers (ILECs), conspired to: (1) prevent competitive local exchange carriers (CLECs) from entering into their markets and competing against them, as encouraged by access requirements of the Telecommunications Act of 1996, and (2) avoid entering each other's markets in order to compete.

The district court examined the plaintiff's complaint for evidence that it was likely to satisfy the summary judgment standard, which requires the provision of evidence of plus factors (evidence that the alleged conspirators were acting against individual self-interest). The district court found that all of the evidence asserted by the plaintiff's complaint was entirely consistent with individually-motivated profit-seeking conduct. The district court dismissed the complaint at the pleading stage.

The Second Circuit reversed on the ground that the Federal Rules of Civil Procedure do not impose heightened pleading standards for antitrust claims. The court noted that heightened standards exist for fraud, mistake, and defamation claims; and asserted that outside of those narrow categories all that is required is that the complaint be sufficient to give notice of the claims the plaintiff intends to prove in court.

This paper's theory would require the plaintiff to satisfy the standard adopted by the district court. There are several reasons. First, the merit threshold has already been set high at the summary judgment stage in order to reduce the frequency and costs of false convictions. Failing to adjust the pleading standard is inconsistent with this policy. Maintaining a low merit standard at the pleading stage undermines the restrictive policy embodied in the high summary judgment standard by encouraging the very lawsuits that the high summary judgment standard aimed to discourage.

Second, a low pleading standard permits the plaintiff to impose discovery costs on the defendants, which are generally understood to be a heavy burden in antitrust cases. The discovery costs are large enough to encourage defendants to settle claims even when

[17] 425 F.3d 99 (2d Cir. 2005).

the plaintiff's claim is highly likely to fail. In the case of large class action for treble damages, high discovery costs coupled with only a one percent chance of victory at trial could force defendants to pay substantial settlements.

What, precisely, are the false-conviction costs associated with conspiracy claims based on circumstantial evidence? Suppose firms in an oligopolistic industry are not colluding, but they have reduced prices in parallel fashion (i.e., roughly simultaneous and similar conduct). A low proof standard for pleading encourages plaintiffs to file suit whenever a case, however weak, can be made that harmful price-fixing may have occurred. Realizing this, the potential defendant would be well advised to avoid increasing price in a parallel fashion, since that would generate price-fixing claims. But if firms are aware that lawsuits will follow parallel price increases, then they will also know that it is risky to engage in price competition, since upward price movements, which inevitably must occur if price competition is really vigorous, will be followed by lawsuits. The result is that the litigation threat discourages the vigorous competition that the law aims to encourage.

The third reason the conspiracy plaintiffs in *Twombly* should be required at the pleading stage to present evidence that indicates that they will be able to satisfy the summary judgment standard is that the best that they can hope for is to satisfy the summary judgment standard. And given this, the plaintiffs should be required to show that they are highly likely to satisfy that standard. The likelihood of finding direct evidence of a conspiracy is low, and would require combing through warehouses full of internal documents. There is no obvious upside to the proof that the plaintiffs might bring in these cases, which distinguishes them from most employment discrimination cases. In parallel-action conspiracy cases the standard types of circumstantial evidence are insufficient to meet the summary judgment standard, while the standard types of circumstantial evidence are sufficient in discrimination cases. Parallel-action conspiracy claims therefore depend heavily on the hope of finding direct evidence, which is highly unlikely.

The pleading standard demanded by the district court recognizes what common law courts have recognized for many years; that pleading standards should be adjusted to take into account the requirements of the legal standard and the social costs of litigation.

Pleading standards for fraud were set relatively high under the common law for these reasons. Pleading standards in antitrust should be based on the same factors.

4. Conclusion

This paper applies a simple economic framework to the choice between pleading and summary judgment as points at which a claim can be dismissed. It concludes generally that pleading standards should vary with the evidentiary demands of the associated legal standards and the social costs of litigation. The common law's imposition of higher pleading standards for fraud claims is consistent with this proposition. It also implies that the rigorous summary judgment standards developed in antitrust courts with respect to claims of predation, resale price maintenance, and conspiracy should be paired with rigorous pleading requirements.

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