Like Jack in Jack and the Beanstalk, public power must deal with unfriendly giants. Electricity giants often control transmission, base load power, fuel, information and money. They have advantages in participating in organized energy markets. They have political strength. Like storybook heroes, public power heroes (usually) have pure hearts. But they do not have magic. They must use the law to correct abuses of power.

The antitrust laws protect against anti-competitive market structure and conduct. Regulatory agencies are supposed to fully consider antitrust principles in their decision making, but often antitrust enforcement is not their highest priority. Therefore, effective antitrust enforcement, crucial to the public’s well-being, is often left to the courts.

The antitrust laws bar companies from acting jointly to restrain trade, such as by agreeing to fix prices or divide markets. Illegal activity can include companies jointly building generation and transmission or forming markets to buy and sell power, but excluding smaller utilities from such joint activity. The antitrust laws also bar acts of monopolization, such as companies with monopoly power refusing to deal with smaller competitors in order to maintain or expand their monopoly power. One refusal to deal case, well-known to public power, is the U.S. Supreme Court’s 1973 ruling, Otter Tail Power Co. v. United States. Otter Tail’s refusals to sell transmission and wholesale power to competing or potentially competing municipal utilities were held illegal. The antitrust laws protect public power’s rights to fair access to generation, transmission and power markets.

In 2004, the Supreme Court decided Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko. In Trinko, the Supreme Court refused to give antitrust protection to plaintiffs, who alleged that Verizon abused its monopoly power by refusing to deal in essential services. (See “The Trinko Ruling: The Sky Is Not Falling, But It Is Getting Cloudy,” Public Power, May-June 2004.)

Earlier this year, in Bell Atlantic Corp. v. Twombly, the Supreme Court further limited antitrust protections, this time by weakening plaintiffs’ ability to sue for parallel conduct in restraint of trade. The Supreme Court also expanded pleading requirements by enlarging what plaintiffs must allege in their court complaints, making it more difficult for plaintiffs to get courts to hear their cases. The court even suggested that anticompetitive conduct can be justified as legitimate business practices if defendants are acting to protect their monopoly power.

Twombly has a shocking effect on those who are concerned that cities and others injured by antitrust activities get fair judicial hearings. After Twombly, public power utilities need to be very careful in drafting court complaints. Plaintiffs must demonstrate that defendants’ conduct affords companies illegitimate benefits and results in serious harm to cities and the public that will not be remedied by the marketplace.

Plaintiffs’ allegations—The Sherman Antitrust Act makes illegal all contracts, combinations and conspiracies in restraint of trade. Plaintiffs in Twombly alleged that the so-called Baby Bells (BellSouth, Qwest, SBC Communications and Verizon) “engaged in parallel conduct” not to sell in each other’s service areas. They further alleged that these incumbent local exchange carriers (ILECs), agreed both not to compete in each other’s territories and to block competition from new entrants by providing inadequate access to their communications networks. Plaintiffs’ complaint quoted one former CEO as stating that “competing in another ILEC’s territory ‘might be a quick way to make a quick dollar, but that doesn’t make it right.’” In dissent, Justices John Paul Stevens and Ruth Bader Ginsburg noted that “[o]ne possible (indeed plausible) inference” is that he had agreed not to compete.

The Supreme Court held that plaintiffs did not allege sufficient facts in their complaint to “plausibly” justify that defendants’ conduct stemmed from ILEC agreements with each other. By doing so, the Supreme Court disregards the requirement in the Federal Rule of Civil Procedure that complaints have “a short and plain statement of the claim showing that the pleader is entitled to relief.” This change in the requirements for complaints may seem unimportant, but in a broad array of cases, it will permit defendants to argue that plaintiffs did not allege “enough facts.”
The antitrust laws bar companies from acting jointly to restrain trade, such as by agreeing to fix prices or divide markets.

or that the facts that they alleged are not sufficiently “plausible” to permit their case to be heard even before they have to answer a complaint (and have to admit or deny plaintiff’s allegations), before the plaintiffs have had discovery from defendants’ sole possession and before any further proceedings take place.

Procedural rules matter—We have long had what is called “notice pleading” under which a party bringing a suit need merely allege sufficient facts to put defendant on notice of a claim. If a defendant claims not to understand the complaint or needs more information, it may ask for clarification. It may move for dismissal of claims that are not legally justified or for summary judgment of a case that does not have a demonstrable factual or legal basis. If a summary judgment motion is made, the plaintiff can examine defendants under oath or seek other information about the basis for defendants’ contentions and can submit evidence to show the validity of his or her claims. However, except when statutes or specific rules provided otherwise, before Twombly a plaintiff did not have to prove his or her case in the complaint.

This new requirement could lead to untold litigation about what complaints must allege and how much detail is necessary, perhaps increasing the wealth of trial lawyers and protecting some defendants, but not helping to resolve claims fairly and in a timely manner. Motions to dismiss, answers to motions, and replies to answers leading, perhaps, to amended complaints and new rounds of motions, answers and replies create costs and delays. Disputed interpretations of appellate decisions can lead to endless wrangling. As the dissent states, if dismissal comes even before defendants must admit or deny the allegations in the complaint and before any discovery takes place, plaintiffs may have the impossible task of pleading facts that are in the sole possession of defendants and that cannot be found without discovery from defendants.

Conscious parallelism—The court ruled that, to be entitled to relief, plaintiffs must show that there was an actual agreement between defendants, thereby limiting the availability of the “conscious parallelism” doctrine. Conscious parallelism occurs when competitors, conscious of each others’ conduct, act in parallel to achieve a common result. If competing wholesale power sellers agree to sell power at a certain price or to divide the territories in which they sell, nobody would doubt that such agreements constitute illegal price fixing or market divisions. In one case, Gainesville Utilities Department v. Florida Power & Light Co., the Fifth Circuit U.S. Court of Appeals found a Florida Power Corp.-Florida Power & Light Co. wholesale power territorial agreement illegal, where the companies would not sell wholesale power or otherwise deal with municipalities in the other’s service territory. Conscious parallelism occurs where sellers do not formally agree to such illegality, but act in parallel to achieve the same result.

The availability of the conscious parallelism doctrine is very important to the public and to public power. The California energy crisis provides a vivid example. Suppose that California power sellers had no written contract with each other specifying that they would not bid to sell power at their incremental costs of production, the level that economists theorize sellers offer products in competitive markets. Or at least suppose that representatives of the public did not have a copy of any such an agreement, if one existed. But suppose that the sellers did bid to sell power at very high prices that yielded astronomical profits and that all sellers knew that if they bid their costs, others would follow and they would all earn less. Finally, suppose that sellers knew the amount of generation that was available, market prices and market demand.

Clearly, this happened in California: sellers bid prices far above their costs aware that competitors would not undercut them. The California Energy Oversight Board estimated power costs in 2001 were $60 billion higher than in prior years. California claimed $8.9 billion in refunds of overcharges at FERC. What happened in California cannot be explained without reference to conscious parallelism, where sellers received excess profits and consumers paid exorbitant prices. The results were the same as occurs
in the case of price fixing.

Those who fix prices or divide markets rarely write their agreements down and, if they do, even more rarely make their agreements available to their victims. However, the Supreme Court said plaintiffs must show "enough factual matter . . . to suggest" in their complaint (and, therefore, before the legal discovery process has taken place) that the defendants had agreed to fix prices or divide markets. Under the court's Twombly standard, plaintiffs often would be unable to allege enough facts at the pleading stage to demonstrate an agreement.

Some commentators have said that conscious parallelism is evidence of actual agreements that exist but that the plaintiffs cannot provide. Where competitors offer to sell at the same non-competitive prices, when the distorted price offers can only be sensibly explained as the result of collusion, they infer that agreements exist. Others have referred to conscious parallelism as involving tacit agreements, fitting within the Sherman Act's "contract, combination or conspiracy" in restraint of trade language. Still others believe that conscious parallelism should be actionable where there may not be an agreement per se, but that purposefully parallel actions not to compete for self-advantage amount to the same thing as contracting not to compete and should be treated as such. The Supreme Court has at least implied that this last interpretation is not valid. However, the courts have also stated, repeatedly, that "no formal agreement is necessary to constitute an unlawful conspiracy."

Many lower courts have looked to "plus factors," saying that if, in addition to parallel pricing or like conduct, there are additional factors that demonstrate anticompetitive action, defendants’ conduct may be condemned. Courts enumerate and define different factors, but these generally amount to conduct on the part of the defendants that would make no economic sense in competitive markets. No sensible seller would maintain prices at far above cost, for example, unless he or she were confident that other sellers would not undercut those high prices by offering to sell at or near cost.

There are many examples where, by one's actions, one enters into agreements. A person who sits at a shoe shine stand and watches his shoes being shined, but says not a word, has entered into a contract. The Supreme Court intends that one cannot, at the pleadings stage, prove antitrust conspiracies or contracts using circumstantial evidence, especially in situations where defendants are unlikely to memorialize or publicize their agreements, consumer antitrust protection will be greatly weakened. In energy and other markets, where market power exists, allowing parallel conduct to take place with a wink and a nod will permit distorted markets and millions of dollars of excessive energy prices.

Monopolization and trade restraints—In testing whether the Twombly complaint meets the Supreme Court’s requirement that the complaint contain “plausible grounds to infer an agreement,” the court cited the complaint’s allegations that the ILECs did not meaningfully compete in each other’s markets, that the ILECs acted in parallel, and other facts to justify that the ILECs “have entered into a contract, combination or conspiracy to prevent competitive entry into their…markets and have agreed not to compete with each other.” The court deems that "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway," i.e., “parallel decisions to resist competition.” Thus, the court can be read as writing into antitrust law that it is legitimate for companies to act “naturally” to maintain monopoly power, even by employing anticompetitive means.

Plaintiffs alleged that the ILECs resisted “especially attractive business opportunities” in surrounding markets dominated by other ILECs” and that the ILECs’ parallel conduct in refusing to deal in others’ markets “was strongly suggestive of conspiracy.” In antitrust law, acting contrary to one’s economic interests is evidence that one lacks a legitimate independent business purpose for one’s anticompetitive conduct. The court, however, posits "an obvious alternative explanation":

“The ILECs were born in that world [where] ... monopoly was the norm in telecommunications, not the exception..., doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing”

This language is not necessary to the court’s decision and therefore binding in other cases. The court merely surmises that the allegation that the ILECs were not competing in each other's service area is not evidence of an antitrust agreement or conspiracy. Further, the court’s surmise is much looser than the explanations the court seems to have demanded in the past. In Aspen Skiing Co. v. Aspen Highlands Skiing Corp., for instance, the court referred to the defendants’ failure to offer any “efficiency justification” for their failure to compete. Here, in contrast, the court veers into the psychological.

The court’s language suggests that it may find it acceptable for companies having monopoly power not to compete or deal with others in order to preserve their monopoly positions. Under the monopolization provisions of the Sherman Antitrust Act, it has long been held that those with monopoly power may not refuse to deal with competitors to preserve or expand their markets unless they have a legitimate business purpose for doing so. Preservation or expansion of monopoly power is not a legitimate business purpose. Think, for example, of Otter Tail. The suggestion that the court would legitimize the refusal of companies like Otter Tail to deal because they were “sitting tight, expecting their neighbors to do the same thing” could greatly weaken antitrust law application not only in joint action cases, but in monopolization and merger cases, as well.

Limitations to Twombly—The Supreme Court and lower courts may not apply Twombly expansively. In Erickson v. Pardus, which was decided almost immediately after Twombly, the court reversed an appeals court decision that a plaintiff had not pled his claim with
adequate specificity. The Erickson court said:

“Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief.” Specific facts are not necessary; the statement need only “give the defendant fair notice of what the ... claim is and the grounds upon which it rests.”

It must be stressed that the court cited Twombly and quoted Conley v. Gibson, which it had limited in Twombly. What lower courts are to make of all of this is hard to tell, but Erickson indicates that the Supreme Court did not think it was changing the basic pleading rules.

However, the result leaves lower courts considerable leeway on which complaints to accept. Law firms throughout the country are aware of Twombly and will have a strategic weapon available in claiming that opponents’ complaints are inadequate to delay decisions and potentially defeat them, and to make plaintiff’s litigation more expensive and more complicated.

Likewise, in Twombly, the Supreme Court did not purport to be changing substantive antitrust law or the applicability of conscious parallelism to prove illegal joint action. Whatever the opinion’s negative attitudes toward antitrust or plaintiffs’ litigation may be, the court does not purport to be changing the law.

Twombly plus Trinko—Twombly and Trinko have similarities. Both are big antitrust cases. Twombly is a Sherman Act Section 1 case addressed to illicit joint action in restraint of trade. Trinko is a Section 2 case addressed to acts of monopolization. In both, the court found apparently non-correctible deficiencies in the complaints.

Both Twombly and Trinko were brought as class action cases in which plaintiffs sued to vindicate the rights of broad segments of the public, with each class member having a small claim, but with large aggregate claims. Both cases were brought against Baby Bells. In both, predictably, if plaintiffs had won or settled, the plaintiffs’ lawyers would have been well paid. In Trinko, the named plaintiff was a law firm. Successful antitrust plaintiffs are entitled to collect their legal fees from defendants.

Both the court’s Twombly and Trinko decisions appear to be influenced by the court’s distaste for “strike suits” targeting well-heeled defendants, that are sometimes mainly brought, it is alleged, for the benefit of law firms. Certainly, nobody can justify frivolous litigation (although what is frivolous is often in the eye of the beholder). In a different time, the court might have been influenced by its recognition of antitrust law as our “charter of economic liberty,” as the Supreme Court has called it, viewing plaintiff’s litigation as playing a powerful, positive role in securing antitrust enforcement. Today, the court appears more concerned that unfounded litigation may unduly burden defendants, inhibiting defendants from aggressive competition and innovation.

In justifying the need for complaints to show plausible allegations of justifications for relief, the Twombly court emphasizes the high costs of discovery (often a full 90 percent of litigation costs):

The briefs of the defendants, the solicitor general, and of allied business interests (as amici) were replete with assertions of the problems of untoward litigation. They argued that it was unfair to defendants and deleterious to the public and the economy for plaintiffs to be able to plead just enough to allow them to force discovery of defendants’ documents and to examine their executives in the hopes that they would find sufficient evidence of wrongdoing to prove their case or extort a settlement. For example, the U.S. Chamber of Commerce and other corporate entities submitted an amici brief to the Court stating that the “practical consequences” of the court of appeals’ ruling allowing the complaint to be heard is that by alleging parallel conduct,” plaintiffs “could impose colossal expense on defendants and subject them to blackmail settlements; ...encourag[ing] still more abusive cases; adversely affect[ing] businesses that had done no wrong... Because of the risk that massive class actions will be filed solely to pressure defendants to settle, rather than to endure enormous discovery costs, even though the claims have no merit, it is proper for courts to scrutinize such cases more carefully than cases that do not entail such risks.”

The brief alleged that the “impetus for cases like this one...brought by a law firm that is part of the organized plaintiffs’ class-action bar...is not actual suspicion of wrongdoing....but the hope that the thinnest of allegations...will survive motions to dismiss and begin to put pressure on defendants to settle complex litigation.” It quotes former Attorney General Dick Thornburgh, calling class actions “judicial weapons of mass destruction,...[that] promise such devastating consequences that even the most innocent of defendants must settle or risk mass destruction.”

Less flamboyantly written, the solicitor general’s government brief alleged that accepting plaintiffs’ conclusory allegations of an agreement or conspiracy of parallel conduct would “simply take up the time of a number of other people...representing an in terrem increment of the settlement value.” It said that alleging “a sufficient factual predicate is the price of entry, even to discovery.”

It is of some note that recently the solicitor general, although attorney for the
The High Court’s Antitrust Thunderbolts

government before appellate courts, did not side with a Securities and Exchange Commission request to support Enron investors, state attorneys general, and consumer and investor advocates in a securities fraud case before the Supreme Court after President Bush sent a message that only the SEC should be able to sue in order to reduce “unnecessary lawsuits.” At issue were investor claims of collusion between financial institutions and companies. A presidential spokesperson is quoted as saying:

“We think the SEC is the right entity to bring those lawsuits and make sure investors are protected.... We are in a society that is overly litigious and it’s very harmful to society, very harmful to investors.”

“The president believes that it’s important to make certain that we reduce the unnecessary lawsuits because that’s a very big burden to the economy, which adversely impacts investors.”

We all are aware of political and business claims of the need for “reform” to protect against claimed unnecessary litigation and of compelling and professional advertisements showing closed children’s playgrounds and the like because of fears of litigation.

Plaintiff and various amici argued that all of this is hyperbole and that the evidence of harm from illegitimate litigation is vastly overstated. They argued that the solution is not cutting off access to the courts, but rather for courts to control discovery and take other actions to prevent abuse. Cutting plaintiffs off from litigation by creating stringent pleading requirements or changing legal standards has the danger, certainly in the antitrust field, of promoting unchecked, monopoly abuse and, more generally, of allowing wrong-doing and failing to remedy harm.

In *Trinko*, the court minimized the marginal benefits of litigation, stating that where regulatory oversight is available, judicial antitrust enforcement may yield small additional competitive benefits. It stated concern about courts finding “false positives,” that is liability where defendants’ conduct is innocent. It said the forced facilities “sharing” (i.e., joint facilities participation) that was sought in that case could limit companies’ investments:

“Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LEC’s [local exchange carriers].”

The key to *Twombly* and *Trinko* appears to be that the court does not intend to change the law, at least as it finds it to be, but that the court is influenced by alleged harms of frivolous litigation and is seeking to control abuse. Although neither *Twombly* nor *Trinko* technically reach questions of the scope of the Sherman Act, taken together, the cases exhibit reduced court concern for antitrust enforcement and a willingness to erect barriers to court relief.

Moreover, in considering the intended scope of *Twombly*, at least some consideration must be given to the court’s 5-4 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, decided at the very end of the recent court term. There, over a strong dissent, the court reversed close to a century-old, well-established case to decide that “vertical price restraints” would no longer be deemed automatically illegal under Section 1 of the Sherman Act, but would be found illegal only if the plaintiffs could prove in a trial that manufacturers and customers agreeing on minimum product resale prices would injure competition. The court speculated that resale price restrictions could benefit competition (for example by promoting retail interbrand competition, new market entry or better service). Justice Stephen Breyer concluded in his dissent that the “only safe predictions” are that the court’s decision “will likely raise the price of goods at retail and that it will create considerable legal turbulence.” And in *Credit Suisse Securities Remedies (USA) LLC v. Billing*, also decided at the very end of the 2006-07 term, the court decided that
underwriters were immune from antitrust attack in setting the terms for marketing and distributing securities issuances by jointly agreeing on commissions and the terms of future company issuances, because these matters are subject to potentially conflicting regulation by the Securities and Exchange Commission. The court appears willing to make significant antitrust law changes, providing reduced consumer protection.

Remedies—The Twombly and Trinko decisions will make it easier for lower courts to dismiss antitrust and other complaints that they do not think should win, but many complaints should survive. However, the cases hold lessons for those concerned with and dependent upon antitrust enforcement, including public power utilities.

If we are correct that the Supreme Court’s Twombly and Trinko decisions can be explained to a significant degree by court concerns about abusive and ill founded litigation, the solution for plaintiffs who must bring suit to vindicate their essential rights is to articulate in their complaints (and throughout trial) the extent of their own and public injuries and why their opponents’ legitimate business interests will not be harmed by granting plaintiffs relief. Plaintiffs should make supported allegations that allowing the case to go forward will not stifle innovation or legitimate competition. Plaintiffs should meet all of the underlying concerns that may motivate courts to rule adversely to their positions, regardless of the extent to which doing so is technically required.

Most of the court’s concerns should be easy to satisfy. Public power utilities and their lawyers do not bring suits for attorney benefit. Public power exists to benefit the public. It seeks fair access to facilities, joint company arrangements, markets and information in order to foster competition and to survive—again for the benefit of the public. Denials of our rights do not promote investment and innovation. They promote excess profits and monopolization.

Moreover, public power claims are usually brought to allow public power utilities to invest in facilities, participate fairly in markets and eliminate noncompetitive pricing. Granting relief allowing public power investment often increases available infrastructure financing, benefiting all consumers. Enron did not reinvest the profits from its market-distorting actions in new plant or distribute them to the public, but public power does. In Otter Tail or in Florida Power & Light, defendants could show no innovation that would come from their refusal to transmit. Rather, they wanted to insulate their existing markets from competition. Where antitrust law is often rooted in speculative applications of sophisticated economic principles, a strong factual showing that defendants’ actions hurt competition should carry the day.

Those subject to antitrust abuse must carefully consider potential agency and state remedies. The flip side of Trinko and Credit Suisse and, to a lesser extent, of Twombly, is that the court is leaving more antitrust enforcement to administrative agencies. A failure of agencies to exercise that authority on a reasoned basis may be held on appeal to be an abuse of discretion. Especially in light of Trinko and Credit Suisse, in court cases, plaintiffs should show that meaningful relief is not available from administrative agencies.

Trinko and Twombly suggest that public power should place emphasis on joint ownership (as many public power utilities are doing). They show the importance of joint action agencies. Although there are risks to making investments, if the Supreme Court is signaling that it will enforce the antitrust laws more loosely, this will create greater market risks of high prices. Therefore, there will be added benefits to participation in markets as owners.

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