The International Handbook on Private Enforcement of Competition Law

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9 Procedural defenses short of trial

Jonathan L. Rubin[1]

Introduction

Defendants in civil antitrust lawsuits brought in the US federal courts have several opportunities short of a trial on the merits by which to dispose of claims against them. This chapter concerns three categories of defenses: i) challenges to the court's subject matter jurisdiction, ii) defenses available by pre-answer motion, and iii) pretrial summary proceedings and affirmative defenses. The chapter that follows after this one deals with discovery issues under the Federal Rules of Civil Procedure.

Rule 12 of the Federal Rules of Civil Procedure[2] gives defendants 20 days after being legally notified of the suit filed against them (the 'service of process'[3]) within which to serve the plaintiffs with a 'responsive pleading' answering the allegations in the complaint. The responsive pleading also must allege affirmative defenses the defendant intends to raise. The time to respond to a complaint may be extended to 60 days (or 90 days for defendants not found in any US judicial district) if the defendant acknowledges notice of the suit and waives objections to the form or manner of service of process.[4]

In practice, however, a responsive pleading is only rarely filed within the initial time limits that run from the time of service of process. Defendants more often opt to toll the time to respond through the use of Rule 12(b), which permits a defendant to interpose a pre-answer motion to dismiss raising the defenses enumerated in Rules 12(b)(1)–(7). The list is non-exhaustive. Generally speaking, Rule 12(b) defenses require little or no inquiry beyond the pleadings, self-authenticating documents, or matters of public record. The first of these defenses, in Rule 12(b)(1), is lack of subject matter jurisdiction. This concept can be particularly important in international antitrust cases, because the authority of US federal courts to hear antitrust suits arising from conduct that does not have a direct, substantial, and reasonably foreseeable effect on US domestic commerce, or that solely causes independent, non-US economic harm, is circumscribed by statute.

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[2] The Federal Rules of Civil Procedure, which govern procedure, practice and evidence in the federal courts, are referred to hereinafter as the 'Rules' or 'Rule ___.' The federal courts also promulgate 'Local Rules' that codify the customary practice before that particular court for implementing the Rules. Congress authorizes the federal judiciary to promulgate the Rules in the Rules Enabling Act, 28 U.S.C. §§2071–2077. Effective December 1, 2007, the Rules underwent a plenary revision in style and the sample Forms were rewritten. Practitioners should be aware of numbering changes when conducting legal research on a particular Rule.

[3] Service of process customarily consists of a summons issued by the court clerk and a complete copy of the complaint or petition personally delivered to an individual defendant or to the agent designated by a defendant business entity.

[4] Rule 12(a)(1)(A)(ii).

Dismissal for lack of subject matter jurisdiction differs from dismissal based on the other defenses that may be raised on a Rule 12(b) pre-answer motion in two important respects. First, because courts are never permitted to adjudicate claims for which subject matter jurisdiction is lacking, Rule 12(h)(3) requires the court to dismiss an action at *any time* it is determined that it lacks subject matter jurisdiction. Thus, determinations of subject matter jurisdiction may arise not only on a Rule 12(b) motion but at any stage of the litigation. Second, because courts cannot adjudicate claims over which subject matter jurisdiction is lacking, dismissal on Rule 12(b)(1) grounds does not have the effect of a final decision on the merits of the claim, as does a final order of dismissal on other grounds, such as Rule 12(b)(6) grounds of failure to state a justiciable cause of action. Accordingly, Rule 12(b)(1) challenges to subject matter jurisdiction are treated separately in Section 1 of the chapter.

Section 2 addresses the remaining procedural defenses permitted to be raised in a Rule 12(b) pre-answer motion. Two of these defenses – failure to state a claim upon which relief may be granted (Rule 12(b)(6)) and failure to join a required party to the lawsuit (Rule 12(b)(7)) – may, but need not be, raised in a Rule 12(b) pre-answer motion because they cannot be waived. A claim that the complaint fails to state a claim upon which relief may be granted is a demurrer, which tests the sufficiency of the pleaded allegations or challenges the plaintiff's legal right to prosecute the claim on the facts alleged. Rule 12(b)(6) and (7) defenses also may be raised for the first time later in the litigation, for example, in any pleading allowed by Rule 7(a), in a motion for judgment on the pleadings under Rule 12(c), or at trial, and may be heard and ruled upon at the court's discretion any time up to and including at trial.

The remaining defenses that may be raised in a pre-answer motion, listed in Rules 12(b)(2)–(5), are challenges to the court's jurisdiction over the defendant's 'person,'[5] improper venue,[6] and challenges to the issuance of the court's summons or to the manner in which it was served upon the defendant.[7] These defenses may be waived if not raised in a timely manner, so they are customarily raised in a Rule 12(b) pre-answer motion.

Section 3 of the chapter discusses the defensive use of summary proceedings for summary judgment or pre-trial adjudication of affirmative defenses. A defendant can prevail on summary judgment if the parties' submissions demonstrate the absence of any disputed material issue of fact for determination at trial. A non-exhaustive list of affirmative defenses, which are also frequently determined on a motion for summary judgment, is set out in Rule 8(c).[8]

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[5] Rule 12(b)(2).

[6] Rule 12(b)(3).

[7] Rules 12(b)(4) and 12(b)(5).

[8] The enumerated defenses are: accord and satisfaction; arbitration and award; assumption of risk; contributory negligence; discharge in bankruptcy; duress; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; laches; license; payment; release; res judicata; statute of frauds; statute of limitations; and waiver.

1. Dismissal for lack of subject matter jurisdiction

In the US system, a federal court is a forum of limited jurisdiction with authority under Article III of the Constitution to hear only live 'cases or controversies' involving specifically enumerated federal subject matter.[9] Federal courts require statutory or common law authority to hear and decide the dispute before them. These requirements delineate the subject matter jurisdiction of the federal courts.

A lack of subject matter jurisdiction may never be waived by any party, nor may a party be estopped from asserting it or consent to submit to jurisdiction where none exists. Thus, while subject matter jurisdictional challenges may be raised by a Rule 12(b)(1) pre-answer motion well before trial, the defendants may also move for dismissal or suggest a lack of subject matter jurisdiction at any time the claim is pending, either before trial, at trial, or on appeal.

Rule 8(a)(1) specifies that a statement of a claim for relief must contain 'a short and plain statement of the grounds for the court's jurisdiction . . . .' This jurisdictional pleading requirement applies only to subject matter jurisdiction, and not to jurisdiction over the person, or *in personam* jurisdiction.[10]

There are four statutory grounds for subject matter jurisdiction:

- Federal question jurisdiction;
- Diversity of citizenship jurisdiction;
- Admiralty jurisdiction; and
- Supplemental jurisdiction.

Private federal civil antitrust claims are properly based on federal question jurisdiction, but in appropriate circumstances diversity jurisdiction may provide an additional statutory basis for jurisdiction, or establish federal jurisdiction over antitrust claims based on state law, including certain class actions. Antitrust claims do not arise in admiralty. The balance of this section is devoted to challenges to federal question, diversity, and supplemental subject matter jurisdiction.

The plaintiff bears the burden of establishing subject matter jurisdiction (even though it is challenged in the defendant's motion).[11] *Facial* challenges to subject matter jurisdiction may be determined on a Rule 12(b)(1) pre-answer motion or a Rule 12(c) pre-trial motion for judgment on the pleadings. In reviewing a facial challenge on a Rule 12(b)(1) motion, the court is limited to the allegations in the complaint (which are presumed to be true), the documents referred to in or attached to the complaint, and matters of public record.[12]

In reviewing a *factual* challenge to subject matter jurisdiction, the court is not limited to the allegations in the complaint and the presumption of truthfulness does not attach

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[9] State trial courts, by contrast, are considered courts of 'general jurisdiction,' with presumptive common law jurisdiction to hear all civil disputes concerning persons, properties or activities affecting the state.

[10] *See* Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1090 (D.C. Cir., 1998) (antitrust plaintiff not required to plead the basis of *in personam* jurisdiction).

[11] Kokkonen v. Guardian Life Ins. Co. of America, 511 US 375 (1994).

[12] Gould Electronics Inc., v. U.S., 220 F.3d 169, 176 (3d Cir. 2000).

to the complaint. The challenge is raised as an affirmative defense subject to proof on a Rule 56 motion for summary judgment or at trial. An allegation that the suit is barred because the statute of limitations lapsed before the complaint was filed is an example of a factual challenge to subject matter jurisdiction.

a. Challenges to federal question jurisdiction

Congress in 28 U.S.C. §1331 authorizes the federal district courts to hear 'all civil actions arising under the Constitution, laws, or treaties of the United States.'[13] This jurisdiction also encompasses claims arising under federal common law, such as contract disputes with the federal government.[14] The broad grant of federal subject matter jurisdiction in §1331 overlaps with other statutes, in which jurisdiction is granted to the district courts to hear particular private causes of action in specific areas of federal law. In the field of antitrust, 28 U.S.C. §1337 authorizes the district courts to hear 'any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. . . .'[15] In addition, §4 of the Clayton Act, 15 U.S.C. §15, provides that:

> any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

The statute thus grants an express private right of action in a district court for treble damages plus a reasonable attorney's fee to 'any person' injured in his 'business or property' by reason of conduct 'forbidden in the antitrust laws.' An antitrust treble damages complaint that states, 'This court has subject matter jurisdiction over the federal antitrust claims asserted in this action under §4 of the Clayton Act, 15 U.S.C. §15, and Title 28 U.S.C. §§1331 and 1337,' satisfies the pleading requirement of Rule 8(a)(1) for a 'short and plain statement of the grounds for the court's jurisdiction,' provided the balance of the pleading purports to set forth one or more claims based on conduct 'forbidden in the antitrust laws.'

Substantive antitrust violations include price fixing or cartelization, or the allocation of product lines, territories, customers, or market share, forbidden by §1 of the Sherman Act, 15 U.S.C. §1, or monopolization, monopoly maintenance, or attempted monopoly, forbidden by §2, 15 U.S.C. §2. Other substantive violations for which a private cause of action is available include price discrimination in the sale of goods in violation of §2 of the Clayton Act, 15 U.S.C. §13, commodity prices, discounts or rebates conditioned on an agreement not to deal with competitors in violation of §3 of the Clayton Act, 15 U.S.C. §14, or damages legally caused by an unlawful merger in violation of §7 of the Clayton Act, 15 U.S.C. §18.[16]

Plaintiffs sometimes seek an injunction to prevent a threatened antitrust injury.

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[13] 28 U.S.C. §1331.
[14] Up State Federal Credit Union v. Walker, 198 F.3d 372, 375 n. 4 (2nd Cir., 1999).
[15] 28 U.S.C. §1337(a).
[16] For further discussion of substantive antitrust violations, see Chapter 4 of this *Handbook*.

Section 16 of the Clayton Act, 15 U.S.C. §26, authorizes private parties to 'sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws. . . .' In the event of an emergency, a plaintiff may be heard on the need for an immediate court order to prevent some imminent, irreparable harm to persons or property due to a threatened antitrust violation.[17]

i. Statute of limitations Several statutes limit federal question jurisdiction over private antitrust actions. For example, §4B of the Clayton Act, 15 U.S.C. §15b, provides that private antitrust causes of action 'shall be forever barred unless commenced within four years after the cause of action accrued.'

Rarely is a statute of limitations defense unambiguously borne out by the allegations pleaded in the complaint, so the defense is usually factual rather than facial, and, therefore, not determinable on a Rule 12(b)(1) pre-answer motion. The defense is ordinarily litigated as an affirmative defense and proven by admissions from the plaintiff or other evidence that the claim is time-barred.

ii. Insufficient effect on US domestic commerce or imports A claim that the cause of action is barred by §7 of the Sherman Act, 15 U.S.C. §6a, also known as the Foreign Trade Antitrust Improvements Act of 1982 ('FTAIA'), on the other hand, is a challenge to federal question subject matter jurisdiction that may be determined on a defendant's Rule 12(b)(1) pre-answer motion to dismiss.[18] The FTAIA provides that the Sherman Act shall not apply to conduct involving trade or commerce with foreign nations, other than import transactions, unless i) such conduct has 'a direct, substantial, and reasonably foreseeable effect' on domestic or import commerce or on the export business of a domestic person and ii) the effect is of a kind that the antitrust laws consider harmful.

The FTAIA's domestic-injury requirement had been the subject of a split in authority among the Circuit Courts of Appeals,[19] but in a series of decisions arising out of the global vitamins cartel that came to light in the 1990s, the courts, including the US Supreme Court, significantly clarified the pleading requirements for foreign parties suing

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[17] 15 U.S.C. §9; *see also* Rule 65. For further discussion of antitrust remedies, see Chapter 11 of this *Handbook*.

[18] Dicta in a recent decision by a Ninth Circuit panel observed that '[i]t is unclear . . . whether the FTAIA is more appropriately viewed as withdrawing jurisdiction from the federal courts . . . or as simply establishing a limited cause of action requiring plaintiffs to prove . . . an [additional] element of the claim.' *In re:* Dynamic Random Access Memory (DRAM) Antitrust Litigation, 546 F.3d 981, 985, note 3 (9th Cir. 2008) (alteration added). The court's observation is based on a mistaken interpretation of the basis of the Second Circuit's decision in *In re*: Elevator Antitrust Litigation, 502 F.3d 47 (2nd Cir. 2007), in which the court affirmed dismissal of the complaint on Rule 12(b)(6) grounds. The court's holding in that case, however, was expressly limited to the failure of the pleadings to 'state a claim,' obviating the need for the court to 'consider the extraterritorial reach of the Sherman Act' under the FTAIA. *Id.* at 52, note 8. The *DRAM* panel's misreading of the *Elevator* holding caused it to see confusion over whether a challenge on FTAIA grounds is properly raised on a Rule 12(b)(1) motion where none, in fact, exists.

[19] *See* F. Hoffmann-LaRoche, Ltd. v. Empagran SA, 542 US 155, 161 (2004) (citing cases).

for, or being sued for, a violation of US antitrust law. The case was brought as a class action on behalf of both US-domestic and non-US direct purchasers of vitamins against foreign and domestic vitamin manufacturers for injury caused by a global price-fixing conspiracy conducted largely outside the US and supra-competitive prices in the world-wide market. The defendants moved to dismiss the claims brought by non-US purchasers, five vitamin distributors located in the Ukraine, Australia, Ecuador and Panama, on the grounds that the FTAIA makes the Sherman Act inapplicable to conduct involving non-import foreign trade or commerce. The defendants argued that, because the non-US plaintiffs had not purchased vitamins in the US, the conduct did not satisfy the domestic-injury requirement. The district court agreed, and dismissed the Sherman Act claim against them for lack of subject matter jurisdiction.

On appeal, the District of Columbia Circuit reversed, reinstating the foreign purchasers' claim, finding that the allegations of injurious anticompetitive effects of the foreign conduct in both US and non-US markets were sufficient to bring the claim within the domestic-injury requirement in the FTAIA. In *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*,[20] the US Supreme Court, on a limited set of facts, reversed, holding that the foreign purchasers' claims did not meet the domestic-injury requirement. The facts were limited to circumstances in which '[t]he price-fixing conduct significantly and adversely affected both customers outside the United States and customers within the United States, but the adverse foreign effect was independent of any adverse domestic effect.'[21] The Court framed the basic question thus:

> Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?*[22]

Finding no good reason, the Court vacated the DC Circuit's order that reinstated the case. At the same time, however, the Court made note of its maintained assumption that the anticompetitive conduct 'independently caused foreign injury; that is, the conduct's domestic effects did not help to bring about that foreign injury.'[23] Because it reviewed a limited set of facts, the Court did not consider the plaintiffs' related, alternative claim that the domestic US effects were linked to the foreign injury, which could not have been inflicted but for the harm to the domestic US economy. The plaintiffs contended that, because vitamins are fungible and readily transportable, cross-border price differentials would be arbitraged away, the defendants could not have maintained their international price-fixing arrangement, and the plaintiffs would not have suffered their foreign injury. The plaintiffs argued that such causation-in-fact was sufficient to bring their claim within the scope of the FTAIA domestic-injury exception.

The Supreme Court declined to consider this argument because the DC Circuit had not considered it. The Court instructed the DC Circuit on remand, however, to decide whether the plaintiff's alternative (and more economically realistic) scenario should

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20 542 US 155 (2004).
21 *Id*. at 164.
22 *Id*. at 166.
23 542 US at 175.

bring the foreign conduct within the exception to the FTAIA's exclusion of non-import foreign trade from the Sherman Act.

On remand, the DC Circuit found that the plaintiffs had painted

> a plausible scenario under which maintaining super-competitive prices in the United States might well have been a 'but-for' cause of the [plaintiff's] foreign injury. . . . [H]owever, 'but-for' causation between the domestic effects and the foreign injury claim is simply not sufficient to bring anti-competitive conduct within the FTAIA requirement. The statutory language – 'gives rise to' – indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for 'nexus' the [plaintiffs] advanced in their brief. This interpretation of the statutory language accords with principles of 'prescriptive comity' – 'the respect sovereign nations afford each other by limiting the reach of their laws.'[24]

The court held that while supra-competitive US pricing may have facilitated the defendants' scheme, it was not alleged that US domestic effects of the defendants' conduct proximately caused the foreign plaintiffs' injuries. As a consequence, the law in the DC Circuit provides that district courts have subject matter jurisdiction over foreign antitrust injury claims based on a Sherman Act violation only if the injury is alleged to have been proximately caused by the US domestic anticompetitive effects.

The court distinguished its result from *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*,[25] in which the DC Circuit expressly found that the FTAIA exception applied to a non-US plaintiff seeking redress against a non-US defendant for economic harm occurring outside the US. The defendant, a commercial radio station operator, stood accused of misrepresenting the reach of its signal for the purpose of monopolizing the US and non-US radio advertising markets for Caribbean-area advertisers. The court distinguished *Caribbean Broadcasting* from *Empagran* on the ground that the US domestic effect, excessive prices paid by US radio advertisers, was sufficient to bring the case within the scope of the FTAIA requirement. A more cogent basis on which to distinguish *Caribbean Broadcasting*, however, is that *Caribbean Broadcasting* involved a competing radio station that claimed injury from being excluded from business with US domestic advertisers, so the US domestic effects 'gave rise to,' or proximately caused, the non-US harm. By contrast, *Empagran* involved a suit by non-US direct purchasers in non-US markets in transactions that can fairly be characterized as 'wholly foreign.'

The rule that an overlapping, global, or interrelated market, without more, does not satisfy the requirement that US domestic effects 'give rise to' the complained-of harm has since been followed in the Second,[26] Eighth[27] and Ninth[28] Circuits.

Even where the plaintiff is a competitor in a global relevant geographical market in which worldwide anticompetitive conduct is alleged, jurisdiction over foreign antitrust injury is unlikely to lie on that basis alone. Thus, the district court in *Intel Corp.*

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[24] Emparan SA v. F. Hoffmann-LaRoche, Ltd., 417 F.3d 1267, 1270–71 (D.C. Cir. 2005) cert. denied 126 S.Ct. 1043 (2006) (citations omitted).

[25] 148 F.3d 1080 (DC Cir. 1998).

[26] Sniado v. Bank Austria AG, 378 F.3d 210 (2nd Cir. 2004).

[27] *In re*: Monosodium Glutamate Antitrust Litigation, 477 F. 3d 535 (8th Cir. 2007).

[28] *In re*: Dynamic Random Access Memory (DRAM) Antitrust Litigation, 546 F.3d 981 (9th Cir. 2008).

Microprocessor Antitrust Litigation[29] found that harm occurring outside the US was beyond the reach of the Sherman Act. The market in that case was the world supply of x-86 microprocessors, the brains of the personal computer, in which Intel and AMD constitute a duopoly. AMD fabricates its products in Germany and assembles them in Asia. In its complaint against Intel, AMD alleged that Intel's business practices throughout the world were designed to prevent AMD from expanding its worldwide market share or operating at efficient minimum scale.

Intel asserted that AMD was, in part, seeking relief for business practices that affected the sale of AMD's microprocessors in foreign countries, foreign claims outside of the domestic-injury requirement of the FTAIA. In response, AMD argued that the US market was but an integral part of the world market, and that Intel had kept AMD from selling microprocessors in foreign markets with the purpose and effect of weakening AMD as a domestic rival. 'Intel has necessarily had to cut AMD off from business opportunities throughout the market, including opportunities with foreign customers.'[30]

The court, however, observed that the direct effects requirement meant that the effects in the US had to be an immediate consequence of the alleged anticompetitive conduct abroad with no intervening developments. 'AMD's chain of effects [was] full of twists and turns, which themselves [were] contingent upon numerous developments,'[31] including the use of profits from foreign sales to shore up US domestic marketing. The court agreed with Intel that the 'simultaneous, direct foreign and direct domestic effects, with the plaintiffs' antitrust claim arising from those direct domestic effects,'[32] that characterized *Caribbean Broadcasting* did not obtain where 'the foreign harm . . . arises from the effects of the alleged foreign conduct and there is no direct link between the foreign conduct and the domestic antitrust injury.'[33] The court then struck the allegations of AMD's complaint that claimed injury due to lost sales to European and Japanese computer manufacturers, the interference with product launches by those manufacturers, lost sales to non-US distributors selling to non-US markets, and interference with sales to European-based retailers.

It is worth noting that not all FTAIA jurisdictional challenges are reviewed as facial challenges, but may require a factual record. In *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*,[34] for example, where the defendants in a global DRAM-memory chip price-fixing scheme moved to dismiss from US litigation transactions made by the plaintiffs' foreign affiliates, the court ruled that 'if plaintiffs can articulate and prove a legal theory that . . . they stand in the shoes of or are the alter ego of their foreign affiliates as well as a factual basis for such a claim, the court would be permitted to find that proximate cause under the FTAIA is necessarily satisfied, and that jurisdiction exists.'[35] The court denied the motion and moved the case into the discovery phase, without prejudice to a renewed defense motion on the same grounds after discovery. Ultimately, however,

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[29] 452 F.Supp.2d 555 (D. Del. 2006).
[30] *Id.* at 560 (citation omitted).
[31] *Id.*
[32] *Id.* at 562.
[33] *Id.*
[34] 534 F.Supp.2d 1101 (ND Cal. 2007).
[35] *Id.* at 1116.

the plaintiff was unable to establish that it 'stands in the shoes of its foreign subsidiaries,' so the court viewed the foreign purchases 'as foreign transactions made by independent subsidiary entities' that did not satisfy the jurisdictional requirements of the FTAIA.[36]

iii. Express antitrust immunities and exemptions Numerous other statutes and common law doctrines limit the reach of the antitrust laws by providing an express immunity or exemption for particular industries or commercial activities, giving rise to additional challenges to federal question subject matter jurisdiction in the appropriate circumstances.

In the agricultural field, the Clayton Act §6, 15 U.S.C. §17, permits, among other things, the operation of non-profit, non-stock agricultural or horticultural mutual assistance organizations. The Capper-Volstead Agricultural Producers' Associations Act, 7 U.S.C. §§291–92, allows agricultural producers to act in concert for the purpose of 'collectively processing, preparing for market, handling, and marketing' products, and to have 'market agencies in common.' The Capper-Volstead Cooperative Marketing Act of 1926, 7 U.S.C. §§451–457, authorizes the acquisition and exchange of past, present, and prospective pricing, production, and marketing data among agricultural producers and associations.

Similarly, under the Export Trading Company Act of 1982, 15 U.S.C. §§4001–4003, a certificate of review issued by the Secretary of Commerce with the concurrence of the Attorney General provides limited antitrust immunity for specific export trade, export trade activities, and methods of operation. The Webb-Pomerene (Export Trade) Act, 15 U.S.C. §§61–66, immunizes the formation and operation of associations by competing businesses to engage in collective export sales, excluding anticompetitive effects within US domestic commerce or injury to domestic competitors of the export trade association members.

Collective activity by employees relating to a dispute concerning terms or conditions of employment and legitimate objectives of labor organizations are immune from the antitrust laws by virtue of the Clayton Act §20, 29 U.S.C. §52. The Norris-LaGuardia Act of 1932, 29 U.S.C. §§101–115, provides that US courts may not issue restraining orders or injunctions against certain labor union activities, for example, on the grounds of a threatened antitrust violation.

The McCarran-Ferguson Act, 15 U.S.C. §§1011–15 exempts the 'business of insurance' from the antitrust laws to the extent 'regulated by state law,' except for acts of 'boycott, coercion or intimidation.' The Fishermens' Collective Marketing Act, 15 U.S.C. §§521–22, permits fishermen to act together for the purpose of catching, producing, and marketing their products. The Newspaper Preservation Act of 1970, 15 U.S.C. §§1801–04, provides a limited antitrust exemption for joint operating arrangements between newspapers that share production facilities and commercial operations. The Sports Broadcasting Act of 1961, 15 U.S.C. §§1291–95, exempts certain agreements

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[36] Sun Microsystems, Inc. v. Hynix Semiconductor, Inc., Order Granting Motion to Dismiss; Denying Motion to Exclude; and Granting Summary Judgment in Part and Denying Summary Judgment in Part, No. 06-1665-PJH (N.D. Cal., March 31, 2009). For a discussion of how the FTAIA has served as an obstacle to the United States becoming a single forum for private claims in the context of global cartels, see Chapter 37 of this *Handbook*.

among professional sports teams to negotiate through their leagues for the sale of television rights. Still other laws exempt certain joint research activities, local governments, and joint purchasing in national emergencies. All of these provisions are part and parcel of substantive US antitrust law that may arise in litigation as facial or factual challenges to subject matter jurisdiction.

b. Challenges to diversity jurisdiction

Although federal question jurisdiction customarily provides the jurisdictional basis for antitrust matters, federal subject matter jurisdiction also exists for claims arising under state antitrust laws, including certain state antitrust class actions, if the applicable requirements of diversity of citizenship or supplemental jurisdiction are met. Plaintiffs may wish to plead a state cause of action because it affords them greater rights than are available under federal law. Diversity of citizenship jurisdiction is discussed in this subsection, and supplemental jurisdiction is discussed in the following subsection.

Under 28 U.S.C. §1332(a) federal courts have original jurisdiction over state claims in four situations:

- a case between citizens of different US states;
- between citizens of a state and a citizen or subject of a foreign state;
- between citizens of different states in which foreign citizens are additional parties; or,
- between a foreign state as plaintiff and citizens of a US state.

The concept of 'citizenship' for diversity purposes requires an individual to be domiciled in the state, amounting to physical presence with the intent to reside in the state indefinitely. A US citizen domiciled abroad is not a 'citizen of a state' nor a subject or citizen of a foreign state, so such an individual may not bring suit in the federal courts based on diversity jurisdiction.[37] On the other hand, Subsection 1332(a) provides that 'an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.' A corporation is a citizen of each state in which it is incorporated plus the state in which it has its one principal place of business. Courts look either to the location of the corporation's headquarters (taking a corporate 'nerve center' approach[38]), the place where the bulk of the corporate assets are found, or both.

All diversity claims must satisfy both the technical rules for diversity of citizenship and an amount in controversy requirement, which should be alleged as a 'short and plain statement of the grounds for the court's jurisdiction,' as required by Rule 8(a)(1). Diversity of citizenship requires 'complete diversity,' that is, all plaintiffs must have citizenship different from all defendants. Jurisdiction fails if any defendant shares citizenship with any plaintiff. The complaint should allege the citizenship of each individual party, the state of incorporation and principal place of business of each corporate party, and that the amount in controversy in each claim of each plaintiff exceeds US $75,000,

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[37] Coury v. Prot, 85 F.3d 244, 248 (5th Cir. 1996).

[38] *See* Metropolitan Life Ins. Co. v. Estate of Cammon, 929 F.2d 1220, 1222 (7th Cir. 1991).

exclusive of interest and costs. A failure to allege jurisdictional facts in sufficient detail to establish complete diversity or the amount in controversy is grounds for a Rule 12(b)(1) pre-answer motion to dismiss for lack of subject matter jurisdiction.

Congress made major changes in diversity jurisdiction for class actions commenced on or after February 18, 2005. A new Subsection 1332(d) provides more generous jurisdictional standards for class actions that relax the complete diversity requirement and permit plaintiffs to aggregate their claims to meet a total amount in controversy threshold of US $5,000,000. Sections 1332(d)(2)(A)–(C) provide that diversity for class actions is satisfied if any class member is a citizen of a different state from any defendant, any class member is a foreign state or a citizen of a foreign state and any defendant is a citizen of a US state, or any class member is a citizen of a US state and any defendant is a foreign state or citizen. However, Subsection 1332(d)(4) requires the court to decline jurisdiction where more than two-thirds of the class members are citizens of the forum state and any significant defendant is also a citizen of that state. Under Subsection 1332(d)(3) the court may decline to exercise jurisdiction where more than one-third but less than two-thirds of the class members and the primary defendants are citizens of the forum state, based on six factors enumerated in the statute. Subsection 1332(d)(9) excludes certain securities and corporate law class action claims. State law class actions based on diversity jurisdiction that do not satisfy all the standards of §1332 may be challenged on subject matter jurisdiction grounds.

c. Challenges to supplemental jurisdiction

Supplemental jurisdiction is not an independent basis for subject matter jurisdiction, unlike federal question or diversity jurisdiction. It arises only when jurisdiction already exists for one or more of the other claims in the complaint, in which case the pleader is permitted to litigate non-federal claims related to the same 'case or controversy.'[39] Supplemental jurisdiction, authorized by Congress in 28 U.S.C. §1367 in 1990, codifies the common law doctrines of pendant and ancillary jurisdiction.[40]

Supplemental jurisdiction will fail if the original action is based on diversity jurisdiction and the exercise of supplemental jurisdiction would contradict the requirements of diversity, except in exceptional circumstances.[41] Where the claims conferring original federal jurisdiction are dismissed, whether the claims based on supplemental jurisdiction may or must be dismissed depends on the reasons for dismissal. If the original federal subject matter jurisdiction was lacking, the supplemental claims must be dismissed. If dismissal relates to the merits of the federal claims, the district has discretion to decline to continue to exercise jurisdiction.[42]

2. Pre-answer defenses

This section begins by discussing challenges available to achieve dismissal of a complaint for failure to state a claim upon which relief may be granted, focusing on the significance

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[39] 28 U.S.C. §1337(a).

[40] *See* Peacock v. Thomas, 516 US 349, 355 n. 5 (1996). Practitioners should be aware that some features of prior law in this area were abrogated by the statute.

[41] 28 U.S.C. §1367(b).

[42] 28 U.S.C. §1367(c)(3).

of the *Bell Atlantic Corp. v. Twombly*[43] and *Ashcroft v. Iqbal*[44] decisions on the applicable pleading standards for antitrust claims. The remainder of the section considers the other procedural defenses that may be raised in a pre-answer motion.

a. Rule 12(b)(6) pre-answer motion to dismiss for failure to state a claim upon which relief may be granted

As a practical matter, Rule 12(b)(6) pre-answer motions to dismiss for failure to state a claim arise in nearly every case. Rule 12(b)(6) codifies the common law plea of demurrer, that is, that the complaint fails 'to state a claim upon which relief can be granted.' It tests the legal sufficiency of the claim to screen out lawsuits 'that are fatally flawed in their legal premises and destined to fail. . . .'[45] Dismissal on these grounds is warranted when a claim either i) asserts a legal theory that is not cognizable as a matter of law, or ii) fails to allege sufficient facts to support a cognizable legal claim.

i. Non-cognizable claims Some defenses that do not challenge subject matter jurisdiction are nonetheless based on a limitation of the applicability of the antitrust laws. In industries in which competitive conduct is regulated defendants may claim an implied antitrust immunity (as distinct from an express statutory immunity or exemption) or, in a §2 monopolization claim, the lack of any antitrust duty to deal.[46]

Implied antitrust immunity may arise where regulatory statutes are silent with respect to antitrust but courts determine that application of the antitrust laws to conduct closely supervised by a regulatory body should be implicitly precluded. The US Supreme Court re-formulated the standard for implied immunity in the 2007 case of *Credit Suisse Securities (USA) LLC v. Billing*.[47] The case involved a Sherman Act §1 claim by a putative class of investors seeking to recover for injuries allegedly sustained as a result of anticompetitive agreements among major underwriters regarding the terms of sale for initial public offerings. Summarizing its view of prior securities industry cases, the Court identified the following factors as critical to finding sufficient incompatibility between the securities laws and the antitrust complaint in any given case:

> (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct.[48]

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[43] 550 US 544 (2007).

[44] 556 US ____, 129 S.Ct. 1937 (2009).

[45] Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc., 988 F.2d 1157, 1160 (Fed.Cir. 1993).

[46] By an express statutory immunity, Congress divests the district courts of subject matter jurisdiction over immune activities or parties, so it is properly raised in a Rule 12(b)(1) motion. The resolution of an implied immunity defense, by contrast, requires, at a bare minimum, the factual background alleged in the complaint. If the facts alleged establish an implied immunity, the complaint should be dismissed under Rule 12(b)(6).

[47] 551 US 264, 127 S.Ct. 2383 (2007).

[48] 127 S.Ct. at 2392.

In reference to previous occasions on which the Court found an antitrust claim non-cognizable on the grounds of implied immunity by virtue of the securities laws, the Court noted that 'the possible conflict [between antitrust and securities regulation] affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.'[49] As with other of its recent pronouncements in the field, the Supreme Court in *Credit Suisse* incrementally limited the reach of the antitrust laws by re-calibrating the standard applicable to the decision before it (in this case, the well-established 'clear repugnancy' test governing antitrust immunity implied by a regulatory regime).

Implied immunity may be unavailable if an 'antitrust savings clause' is enacted in the regulatory enabling legislation. But, at least four legal avenues other than implied immunity also may bar an antitrust claim against a regulated entity, even where Congress includes an antitrust savings clause. The first is the so-called 'state action doctrine.' This rule, originating in *Parker v. Brown*,[50] emerges from federalism to protect the activities of the states. The state action doctrine shields certain anticompetitive conduct when the conduct is (1) in furtherance of a clearly articulated state policy, and (2) actively supervised by the state. This protection is available to officials and agencies of the states and may be available to many lower-level functionaries and public–private activities.

The second defense is the 'filed rate doctrine,' adopted in *Keogh v. Chicago & N.W. Ry. Co.*,[51] and reaffirmed in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*,[52] which bars antitrust claims which seek remedies that are incompatible with the rate approval process of a regulatory agency.

Third, the doctrine of primary jurisdiction directs a district court to defer an antitrust claim where the case 'requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.'[53] '[I]n such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.'[54]

Finally, limitations on the cognizability of antitrust claims against regulated entities may arise from the alteration of the market environment induced by regulation or deregulation. Thus, in *Town of Concord, Ma. v. Boston Edison Co.*,[55] the First Circuit did not say either that the antitrust laws did not apply to the electrical wholesale market or that they applied less stringently, but rather that the regulatory scheme itself made 'a critical difference in terms of antitrust harms, benefits, and administrative considerations.'[56]

In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[57] the Supreme

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[49] *Id.*
[50] 317 US 341 (1943).
[51] 260 US 156 (1922).
[52] 476 US 409 (1986).
[53] Ricci v. Chicago Merc. Exch., 409 US 289 (1973).
[54] United States v. Western Pacific R. Co. 352 US 59, 64 (1956), citing General American Tank Car Corp. v. El Dorado Terminal Co., 308 US 422, 433 (1940).
[55] 915 F.2d 17 (1st Cir. 1990), cert. denied, 499 US 931 (1991).
[56] 915 F.2d, at 23.
[57] 540 US 398 (2004).

Court relied on this perspective to shield newly deregulated telephone companies from the application of §2 of the Sherman Act. The deregulatory legislation imposed duties on regional monopoly telephone carriers to interconnect with rival firms. In the Court's view, this governmental scheme would have been 'a good candidate for implication of antitrust immunity,'[58] but an antitrust savings clause prevented this. Nonetheless, the Court found that the investment disincentives of imposing an antitrust duty on telephone carriers to share their infrastructure were in tension with the underlying purposes of the antitrust laws. Moreover, regulatory redress was available and was obtained on the basis of the defendant's failure to abide by mandated interconnection duties. The Court also noted the prospect of inconsistent decisions in the area by antitrust courts throughout the country. Consequently, in a decision that appears to have narrowed the range of circumstances in which monopolists may be compelled by antitrust law to deal with rivals, the Court declined to recognize a cause of action for an incumbent telephone carrier's failure to fulfill its statutory duties. The Court concluded that the firms had not violated any duty to deal that was or should be imposed by the antitrust laws, rendering the plaintiff's claim non-cognizable.

ii. Non-justiciable claims By virtue of the act of state and political question doctrines, or for considerations of international comity, a private antitrust action may be non-justiciable and subject to dismissal on a Rule 12(b)(6) pre-answer motion. These defenses were raised by the defendants and discussed in detail in *Refined Petroleum Products Antitrust Litigation*,[59] in which US domestic oil companies stood accused of participating with the Organization of Petroleum Exporting Countries ('OPEC') in the planning and execution of output restrictions and other concerted conduct prohibited by §1 of the Sherman Act. The defendants, arguing that the court may not find unlawful the conduct of a sovereign state and that the case presented a non-justiciable political question of foreign policy reserved to the Executive branch, submitted a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. The plaintiffs instead urged the court to treat the matter as a Rule 12(b)(6) motion to dismiss for failure to state a claim for which relief may be granted.

The court observed that, in deciding a Rule 12(b)(1) motion to determine whether the court has the constitutional or statutory power to adjudicate a case (i.e. subject matter jurisdiction), the court may consider the pleadings, undisputed facts evidenced in the record, and disputed matters of fact that the court has resolved. The burden of proof rests with the party asserting jurisdiction (ordinarily, the plaintiffs, but on removal from state court, the party seeking removal), and a dismissal on jurisdictional grounds alone does not constitute adjudication on the merits. By contrast, in deciding a Rule 12(b)(6) motion to determine whether the complaint states a cognizable and justiciable claim for relief, the court may only consider the pleadings, documents central to the claim, and matters of public record. The burden of proof is on the defendant, and a final order of dismissal has the effect of an adjudication on the merits.

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[58] 540 US at 406.
[59] 2009 WL 81923 (SD Tex. Jan 9, 2009).

The court quoted the Supreme Court's decision in *Baker v. Carr*[60] distinguishing between these two categories of defenses:

> First: That the facts and injury alleged, the legal bases invoked as creating the rights and duties relied upon, and the relief sought, fail to come within that language of Article III of the Constitution and of the jurisdictional statutes which define those matters concerning which United States District Courts are empowered to act;
>
> Second: That, although the matter is cognizable and facts are alleged which establish infringement of appellants' rights . . . the court will not proceed because the matter is considered unsuited to judicial inquiry or adjustment.
>
> We treat the first ground of dismissal as 'lack of jurisdiction of the subject matter.' The second we consider to result in a failure to state a justiciable cause of action.[61]

Accordingly, the *Petroleum Products* court treated the defendant's act of state and political question defenses as an attack on the justiciability of the plaintiffs' claim rather than an attack on subject matter jurisdiction.

Although adopting the approach urged by the plaintiffs, the court ruled that the defendants had met their burden on both grounds. The act of state doctrine is a 'principle of decision' binding on federal and state courts that arises only when the outcome of the case turns upon the effect of official action by a foreign sovereign.[62] The doctrine bars courts from having to declare invalid the official act of a foreign sovereign performed within its own territory.[63] Because the §1 claim in *Petroleum Products* could not 'be resolved without the court having to rule on the legality of governmental acts and agreements that foreign sovereign members of the alleged conspiracy made with respect to crude oil production in their own territory,' and the complaint did not state a claim that the defendants *alone* had violated §1, the act of state doctrine rendered the claim non-justiciable.

The court also invoked the political limitations of the judiciary by finding that 'to determine the legality of crude oil production decisions of foreign sovereigns would express a lack of respect for the Executive Branch because of its longstanding foreign policy that issues relating to crude oil production by foreign sovereigns be resolved through intergovernmental negotiation.'[64] The political question doctrine counsels courts against entering at the will of litigants into a delicate area of foreign policy which the executive and legislative branches have chosen to approach with restraint.[65]

iii. Failure to allege facts sufficient to state a cognizable legal claim Two recent US Supreme Court decisions, *Bell Atlantic Corp. v. Twombly*,[66] decided May 21, 2007, and *Ashcroft v. Iqbal*,[67] decided May 18, 2009, strengthened the interpretation of the pleading requirements of Rule 8(a)(2) for stating a claim in antitrust and other federal civil cases.

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60 369 US 186 (1962).
61 369 US at 698–89.
62 2009 WL at *8 (citations omitted).
63 *Id.*
64 *Id.* at *23.
65 *Id.* at *24 (citation omitted).
66 550 US 544 (2007).
67 556 US ____, 129 S.Ct. 1937 (2009).

As a consequence, private plaintiffs now bear a greater obligation at the inception of their lawsuit to allege facts reasonably confirmable by discoverable evidence and, based on a coherent antitrust and economic theory, reasonably sufficient, if proven, to establish the grounds for the plaintiffs' claimed right to compensatory and treble damages for an antitrust injury. Naturally, defendants in antitrust cases have been placing increasing emphasis on challenging the plaintiffs' right to seek relief on the basis of the facts alleged in the complaint.

In *Bell Atlantic Corp. v. Twombly*[68] the Court's stated intention was to 'address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct,'[69] and to take a 'fresh look at [the] adequacy of pleading when a claim rests on parallel conduct.'[70] The plaintiffs were a putative class of consumers alleging that the defendants, the regional US Bell telephone monopolies, had agreed to – and did – refrain from expanding into one another's service regions in order to maintain an anti-competitive market allocation and exclude competitive, third-party potential entrants, in violation of §1. The plaintiffs also alleged that, in so doing, defendants acted against their individual economic self-interests. The Supreme Court in *Twombly* found that the allegations in the plaintiffs' amended complaint did not adequately establish grounds entitling plaintiffs to a claim for relief. An allegation of parallel conduct in a §1 case, without more, the Court held, does not suffice to state a claim. '[S]uch a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.'[71]

The Court likened the plaintiffs' claim to a claim alleging parallel pricing, which by itself neither proves an unlawful §1 agreement[72] nor is sufficient to overcome a defendant's motion for summary judgment.[73] Indeed, the amended complaint in *Twombly* was ideal for illustrating the principle that oligopolistic interdependence does not support an inference of agreement in the legal sense. Both before the 1996 deregulatory telecommunications legislation and afterward, the regional telephone companies each occupied in their own regions optimal, jointly profit-maximizing monopoly positions from which none of the companies would have had an economic incentive to deviate, and for the maintenance of which no prohibited agreement would have been necessary. To allege that the defendants had acted against their own self-interest after passage of the Act in

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[68] 550 US 544 (2007).

[69] 550 US at 553.

[70] *Id.* at 561, n. 7.

[71] *Id.* at 556.

[72] Theatre Enterprises, Inc. v. Paramount Film Dist. Corp., 346 US 537, 540 (1954) ('To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement . . . [but the Court] . . . has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense'), citing Interstate Circuit, Inc. v. United States, 306 US 208 (1939), United States v. Masonite Corp. 316 US 265 (1942), United States v. Bausch & Lomb Optical Co., 321 US 707 (1944), American Tobacco Co. v. United States, 328 US 781, and United States v. Paramount Pictures, Inc., 334 US 131 (1948).

[73] Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 US 574, 588 (1986) ('conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy').

circumstances where it appeared they had simply chosen to continue in a position upon which it was difficult or impossible to improve did not supply sufficient grounds to infer that the defendants had entered into an unlawful agreement.

Twombly was decided in light of settled precedent that to survive a defense motion for summary judgment in a parallel pricing case (and, perforce, to make out a *prima facie* case at trial), the plaintiff must present additional evidence beyond mere parallel conduct that tends to contradict tacit, lawful oligopoly conduct in order to create a factual issue on whether there was an agreement. In connection with summary proceedings, ambiguous evidence of parallel conduct must be accompanied by what the courts have recognized as 'plus factors,' evidence '"that tends to exclude the possibility" that the alleged conspirators acted independently.'[74] Although the question in *Twombly* of whether the pleaded allegations of parallel conduct in the amended complaint were sufficient to state a §1 claim was decided against this background, the Court did not look to the plus factor paradigm to address what it framed as a separate issue here. Instead, it looked to the general requirements of Rule 8(a)(2), which calls for 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Following a pattern seen in several recent decisions, the Court proceeded from first principles, modified the applicable standard, and then applied the modified standard to decide the case before it.

The plus factor paradigm in any case would have been inadequate for the Court's purposes of articulating pleading standards for §1 driven by the evidentiary requirements for proving unlawful collusion. The plus factor approach treats all evidentiary factors more or less equally.[75] The Court's *Twombly* analysis, by contrast, distinguishes between four categories of evidence of agreement: i) direct evidence of the agreement itself, ii) unambiguous circumstantial evidence of an agreement, iii) ambiguous evidence of an agreement, and, iv) 'labels and conclusions' and formulaic recitations of the elements of a claim.

The *Twombly* Court held that '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.'[76] Under the 'Rule 8 entitlement requirement'[77] a complaint requires '[f]actual allegations . . . enough to raise a right to

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[74] *Id.* quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 US 752, 764 (1984).

[75] *See* William E. Kovacic, 'The identification and proof of horizontal agreements under the antitrust laws,' 38 *Antitrust Bull.* 5, 35 (Spring, 1993) ('. . . [C]ourts rarely attempt to rank plus factors according to their probative value or to specify the minimum critical mass of plus factors that must be established to sustain an inference that the observed market behavior resulted from concerted conduct rather than from "consciously parallel" choices.').

[76] 550 US at 555 (citation omitted, alteration in original).

[77] The Court cited Dura Pharmaceuticals, Inc. v. Broudo, 544 US 336 (2005) for the 'Rule 8 entitlement requirement.' *Dura* involved securities fraud litigation in which the plaintiffs' alleged injury was having paid an inflated price for shares compared to what the price would have been in the absence of the fraud. The Supreme Court held that the purchase of shares, the market price of which fluctuates for a variety of reasons, does not cause injury, so the complaint lacked the required allegation of 'loss causation.' Reversing the Ninth Circuit, the Court held that a complaint lacking the necessary elements of a cause of action is insufficient under Rule 8, because it fails to give adequate notice of the grounds for the plaintiffs' entitlement to relief.

Table 9.1 Summary of Twombly standard

Nature of the Allegation	Type of Inference Required	Applicable Standard
1. Direct evidence of agreement	No inference	Plausible
2. Communications and other unambiguous circumstantial evidence of agreement	Ordinary inference from circumstantial evidence	Plausibly suggestive
3. Parallel conduct and other ambiguous circumstantial evidence of agreement	Inference from economic data or market behavior	Plausibly suggestive when placed in context
4. Labels and conclusions	No inference warranted	Not creditable

relief above the speculative level,'[78] and 'something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.'[79] The 'threshold requirement [is] that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief."'[80]

Thus, the Court explained that the Rule 8 entitlement requirement requires allegations to be weighed in terms of plausibility, suggestiveness and discoverability. Suggestiveness calls for allegations that cross the 'boundary . . . between the factually neutral and the factually suggestive . . .' to enter 'the realm of plausible liability.'[81] Plausibility demands that grounds for entitlement be alleged with 'enough facts to state a claim to relief that is plausible on its face.'[82] And the discoverability component hinges entitlement to relief on a 'reasonable expectation that discovery will reveal relevant evidence.'[83]

With respect to allegations of conspiracy under §1, the *Twombly* standard requires plausible direct evidence of agreement, circumstantial evidence 'plausibly suggesting' agreement,[84] or parallel conduct 'placed in a context that raises a suggestion of a preceding agreement.'[85] 'A blanket assertion of entitlement to relief' and 'labels and conclusions' are not entitled to credit as well-pleaded facts. This flexible standard is summarized in Table 9.1.[86]

The most frequent forms of direct evidence of agreement in private §1 claims are guilty pleas in criminal prosecutions and the admissions recited in deferred prosecution agreements. Unambiguous circumstantial evidence is indirect evidence, such as evidence of secret communications or clandestine meetings of the conspirators or of documents that appear to further a common scheme or purpose, which is probative of agreement and also

[78] 550 US at 555.
[79] *Id.*
[80] *Id.* at 557 (citation omitted, second alteration in original).
[81] 550 US at 557 n. 5. The word 'plausible' appears fifteen times in the opinion as a noun, adverb, and adjective, excluding quoted instances.
[82] *Id.* at 570.
[83] *Id.* at 556.
[84] 550 US at 557.
[85] *Id.*
[86] The table is a heuristic construct intended to summarize the author's analysis of the decision.

tends to exclude the hypothesis of non-cooperation, justifying an inference of agreement. By contrast, evidence of parallel conduct or other economic data may be ambiguous on the issue of agreement, that is, as consistent with agreement as it is with oligopolistic interdependence.[87] In singling out this category of evidence for special treatment, the *Twombly* decision serves as the vehicle for the incorporation into antitrust of the principle that economic evidence of this kind often requires interpretation and factual context to show that it rejects the hypothesis of a Nash non-cooperative equilibrium before an inference of agreement is justified. Standing apart from a sufficiently suggestive context, such evidence is what the *Twombly* court labeled 'factually neutral' on the issue of agreement. The flexible plausibility standard, therefore, accommodates the practical distinction between allegations of non-economic, circumstantial evidence of agreement and economic evidence of a market outcome probative of agreement only if inconsistent with non-cooperation. Finally, allegations that are conclusions and labels do not constitute grounds for relief.

Under this standard, the *Twombly* plaintiffs' allegations that the defendants engaged in a 'contract, combination or conspiracy' and 'agreed not to compete with one another' were merely legal conclusions resting on the prior allegations or, in terms of the foregoing taxonomy, category 4 allegations not entitled to the presumption of truth.[88] 'The nub of the complaint,' the Court observed, 'is the [defendants'] parallel behavior.'[89] But, applying the standard for category 3 to those allegations, the *Twombly* Court concluded that the complaint had not 'nudged [the] claims across the line from conceivable to plausible' by pleading a sufficiently suggestive context.

The alleged parallel conduct lacked a suggestive context even though the plaintiffs had alleged a widely recognized plus factor, that the defendants' conduct was contrary to their individual economic self-interests. Had the alleged plus factor been instead category 2 circumstantial evidence of agreement, the parallel conduct would have been more suggestive and plausible grounds for relief likely would have been stated. But, plaintiffs apparently knew of no category 2 evidence. The Court's implicit conclusion was that the complaint did not allege facts that were inconsistent with non-cooperative equilibrium in the US telephone market, despite the alleged plus factor. Indeed, the defendants' *ex ante* occupancy of allocated monopolies fails to suggest that refraining from competition was necessarily against their individual economic self interests. Under the circumstances, the Court deemed plaintiffs' assertion in this regard as conclusory and not entitled to the presumption of truth, placing it in category 4.

The Court cited three factual scenarios that might provide plausibly suggestive context for a claim based on parallel conduct. The first is 'parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.'[90] The

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[87] *See In re*: High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 655 (2002) ('The evidence upon which a plaintiff will rely will usually be . . . of two types – economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete.')

[88] 550 US at 565.

[89] *Id.* at 566.

[90] 550 US at 557, n. 4 quoting 6 P. Areeda & H. Hovenkamp, Antitrust Law ¶1425, at 167–185 (2d ed.2003).

second is 'conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement.'[91] Finally, 'complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason'[92] would also provide a suitable context. These allegations supporting a plausible inference of conspiracy are likely to supplant plus factors as the focus of §1 claims based on circumstantial evidence for the simple reason that what must be alleged also must be proven.

The *Twombly* decision adds significant precision to the analysis of proof of agreement in circumstantial §1 cases and, as such, is an important antitrust precedent. But, the decision is also an important civil procedure precedent, in which the Court articulated a more granular pleading standard based on the character of the evidence being described. For complaints alleging direct evidence or unambiguous circumstantial evidence that posseses a reasonable hope of being discovered (i.e. category 1 and 2 allegations) the existing pleading standard remains largely unaffected. But, in complaints describing ambiguous circumstantial evidence and stating conclusory assertions of liability, that is, allegations in categories 3 and 4, grounds for entitlement to relief are unlikely to be stated unless the ambiguous evidence can be situated in a suggestive factual context.

It bears mention that, in spite of the Court's claim to the contrary, a pleading standard that differentiates conclusions and allegations of indeterminate evidence from allegations of standard direct and circumstantial evidence does not follow directly from the Court's precedent or the general standards of pleading. For half a century, the requirements of Rule 8(a)(2) have described a 'notice pleading' standard based on 'the accepted rule [of *Conley v. Gibson*] 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.'[93] By singling out for special treatment indeterminate and factually neutral circumstantial allegations, the *Twombly* standard is inconsistent with this part of the long-standing *Conley* rule. Repudiating this part of *Conley*, the Court declared that the 'no set of facts' language 'ha[d] earned its retirement,'[94] and observed that the language 'ha[d] been questioned, criticized, and explained away long enough,' and '[wa]s best forgotten as an incomplete, negative gloss on an accepted pleading standard. . . .'[95]

In *Erickson v. Pardus*,[96] decided two weeks after *Twombly*, however, the Court was quick to reaffirm the undisturbed portion of *Conley* and its continued fidelity to the

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[91] *Id.* quoting Blechman, 'Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws', 24 *N.Y.L. S. L.Rev.* 881, 899 (1979).

[92] *Id.* quoting Brief for Respondent (Twombly) at 37.

[93] *Conley v. Gibson*, 355 US 41, 45–46 (1957). Bills have been introduced in the House and Senate to repeal *Twombly* and restore the *Conley* 'no set of facts' standard. *See*, *e.g.*, Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (1st Sess. 2009) ('A bill to provide that Federal courts shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 US 41 (1957)').

[94] *Id.*

[95] 550 US at 563.

[96] 551 US 89, 127 S.Ct. 2197 (2007).

concept of notice pleading. Quoting from *Twombly*, which in turn quoted from *Conley*, the Court's Per Curiam order reiterated that a pleading need only '. . . give the defendant fair notice of what . . . the claim is and the grounds upon which it rests.' A more direct declaration of fidelity to the part of the *Conley* notice pleading standard that survived the Court's repudiation of the neighboring 'no set of facts' formulation is difficult to imagine. Thus, rather than signaling a retreat from the essential standard of notice pleading, *Twombly* more profitably may be conceived as applying the notice pleading standard with greater rigor to the 'short and plain statement . . . showing that the plaintiff is entitled to relief' called for by Rule 8(a)(2). It does so using a plausibility standard with two effects. A substantive effect through the Rule 8 entitlement requirement calls for allegations that show a cognizable narrative of 'loss causation' connecting a wrongful act by a defendant with a remediable injury to the plaintiff. A procedural effect is exerted through evidentiary standards that no longer tolerate complaints that describe facts merely consistent with a claim or allege more factually neutral evidence or conclusions of liability, requiring instead that a pleading allege suggestive and discoverable grounds for the plaintiff's entitlement to relief. The Court took up the subject of civil pleading standards again in *Ashcroft v. Iqbal*,[97] which confirmed that *Twombly*, as an 'interpretation and application of Rule 8,' 'expounded the pleading standard for "all civil actions."'[98] The *Iqbal* Court offered the following guidance for implementing the *Twombly* standard:

> Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal involved a civil claim against US government officials for prisoner abuse and discrimination which alleged that the Attorney General and FBI Director personally 'knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'[99] The Court held that '[u]nder *Twombly*'s construction of Rule 8,' these allegations 'are conclusory and not entitled to be assumed true.'[100] As to the remaining allegations describing the conduct of the officials inflicting the discrimination, while arguably consistent with an intent of the two named defendants to discriminate, the Court concluded that the plaintiff needed 'to

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[97] 556 US ____, 129 S.Ct. 1937 (2009). The Court had already expanded the *Twombly* analysis to §2 of the Sherman Act, *see* Pacific Bell Telephone Co. v LinkLine Comm'ns, Inc., 556 US ____, 129 S.Ct. 1109, 1123 (2009) ('[i]t is for the District Court on remand to consider whether the amended complaint states a claim [for predatory pricing] upon which relief may be granted in light of the new pleading standard we articulated in *Twombly*').

[98] 129 S.Ct. at 1953 quoting Rule 1.

[99] 129 S.Ct. at 1951.

[100] *Id.*

allege more by way of factual content to "nudg[e]" his claim of purposeful discrimination "across the line from conceivable to plausible."'[101]

The *Twombly* plausibility standard suggests that Rule 12(b)(6) motions to dismiss claims based on circumstantial grounds for relief should identify and discredit conclusory allegations and then test whether the remaining allegations describe sufficiently suggestive facts to state grounds for relief. Facts that are equally as consistent with an entitlement to relief as not, such as parallel conduct, state grounds for relief only if pleaded in a sufficiently suggestive factual context.[102]

iv. Dismissal for lack of standing The final Rule 12(b)(6) pre-answer motion discussed in this section seeks dismissal on the grounds that the plaintiffs do not have 'antitrust standing' to bring their claim. Section 4 of the Clayton Act provides that 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor.'[103] The dual purpose of this provision is to deprive violators 'of the fruits of their illegality and to compensate victims of antitrust violations for their injuries.'[104] However, courts have never read §4 to grant a private treble damage suit to every person to have incurred an economic loss as the result of an antitrust violation, nor does it 'encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation.'[105] A plaintiff may satisfy the constitutional requirement of injury in fact yet not necessarily be a proper party to bring a private antitrust action. 'Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.'[106] The party invoking federal jurisdiction bears the burden of establishing standing.[107]

b. Rule 12(b)(7) pre-answer motion to dismiss for failure to join a required party

Rule 19 covers certain circumstances in which a non-party to the litigation may be necessary and indispensable to the proper adjudication of the controversy. Rule 19(a)(1)(A) addresses a person in whose 'absence, the court cannot accord complete relief among existing parties,' and Rule 19(a)(1)(B) protects unrepresented interests in the subject of the action where adjudication would i) 'as a practical matter impair or impede the person's ability to protect the interest,' or ii) leave the party 'subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.' The absence of a required party is typically raised by a Rule 12(b)(7) motion to dismiss

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[101] *Id.* at 1952 quoting *Twombly*, 550 US at 570 (alteration in original).

[102] *Twombly* and *Iqbal* have already been cited in thousands of reported cases, including opinions issued by the 1st, 2nd, 3rd, 6th, 7th, 9th and Federal Circuit Courts of Appeal.

[103] 15 U.S.C. §15.

[104] Pfizer Inc. v. Gov't. of India, 434 US 308, 314 (1978) (internal quotation marks and citations omitted).

[105] Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 US 519, 529 (1983).

[106] *Id.* at 535, n. 31.

[107] For further discussion of antitrust standing, see Chapter 6 of this *Handbook*.

for failure to join a party under Rule 19, but may also be raised in any responsive pleading. Although an objection that a required party has not been joined may be properly denied for lack of timeliness if it is raised too late in the proceedings, it is not among the Rule 12(b) defenses that is waived if not raised in a Rule 12(b) pre-answer motion (if one is filed) or in the responsive pleading (if a Rule 12 motion is not filed). The burden of persuasion lies with the party seeking dismissal to demonstrate that the non-party is a required party.

The Rule sets out a two-part analysis. First, the court will determine whether the person is essential to the litigation. If so, and joinder of the party is feasible, the court must issue an order joining the party. If the person is required but for some reason cannot be joined, the court must then use the factors outlined in Rule 19(b)(1)–(4) to 'determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed.' The application of Rule 19 is highly fact specific, and courts may examine both legal and factual elements of the court's ability to accord complete relief or the impairment of a non-party's interest in the litigation.

c. Rule 12 motions objecting to personal jurisdiction, venue and service of process

The second category of procedural defenses are the three kinds of issues raised by pre-answer motions under Rules 12(b)(2)–(5), objections to personal jurisdiction, venue and service of process. These defenses may be waived if not raised in a timely manner, or may be deemed waived by implication, if the defendant's conduct is inconsistent with the objection. These defenses must be raised in a Rule 12 motion if one is filed or in the responsive pleading if one is not.

i. Dismissal for lack of personal jurisdiction Individual parties may be dismissed from a lawsuit if the exercise of the court's jurisdiction over the 'person' of the defendant does not meet the due process standards of the Fifth and Fourteenth Amendments of the US Constitution. However, when a case is dismissed for lack of personal jurisdiction, the plaintiff is not precluded from refiling the lawsuit in a forum where personal jurisdiction over the defendant lies. The practical consequence of the exercise of personal jurisdiction over a defendant is to require the defendant to travel to the court to defend the action. For most civil actions the limitations on the exercise of personal jurisdiction by state courts are guided by the same considerations of due process, so Rule 4(k) equates the territorial limits of effective service of process in the federal court with the limits of personal jurisdiction of the courts of the state in which the federal court sits, with a special provision for Rule 19 parties, third parties, and interpleaded parties, which may be served anywhere within one hundred miles of the federal court, irrespective of any limitation on the state courts. The Rule also allows for personal jurisdiction over certain parties that have sufficient contacts with the US as a whole.[108]

In the case of corporations, private antitrust suits present an exception to the general rules of personal jurisdiction by virtue of §12 of the Clayton Act, 15 U.S.C. §22, which permits private antitrust defendants to be sued and served in any judicial district 'where it may be found or transacts business.' The appellate courts are split on the extent to

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[108] Rule 4(k)(2).

which federal 'nationwide service of process' statutes obviate considerations of due process, with some courts holding that the plaintiffs' choice of forum must still be fair and reasonable even where Congress has authorized nationwide personal jurisdiction.[109] Service of process in non-US jurisdictions ordinarily requires compliance with international treaties or service of process in accordance with the customs of the non-US jurisdiction.

Objections to personal jurisdiction may be waived if not raised in a timely manner, that is, in a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction (if a Rule 12(b) motion is filed) or in the responsive pleading. The federal appellate courts are split as to whether a defendant contesting personal jurisdiction who simultaneously pleads a counterclaim is deemed to have waived objection to personal jurisdiction. The burden of persuasion lies with the party asserting that the court has jurisdiction. There is no required order for the court's determination as between an objection to subject matter jurisdiction and an objection to personal jurisdiction.[110]

The three kinds of jurisdiction over 'persons or things' are: i) personal, or *in personam*, jurisdiction, ii) attachment, or quasi *in rem*, jurisdiction, and iii) jurisdiction over an object or land, or *in rem* jurisdiction. At least one form of personal jurisdiction must be established over each defendant in the lawsuit. Private antitrust litigation ordinarily requires *in personam* jurisdiction over the defendant. If no form of jurisdiction has been acquired, the court will typically dismiss the action.

The due process analysis considers the contacts of the defendant with the forum state and the quality of the notice to the defendant. The most common means of satisfying the due process requirement are:

- The defendant's consent to personal jurisdiction;
- Service of process on a defendant found within the state; and
- Service of process on a defendant outside the state where the defendant has sufficient contacts with the forum state.

In general, parties to a contract may consent by agreement to personal jurisdiction in a specified forum. Parties that waive objection to personal jurisdiction because they fail to timely object may also be deemed to have consented. A defendant that objects to personal jurisdiction consents to be bound by the court's determination of whether personal jurisdiction exists.[111]

Because the Rules encourage waiver of service of process, they encourage defendants to consent to personal jurisdiction implicitly. Where a defendant submits a written waiver of service of process and, therewith, waives objections to personal jurisdiction, the time to respond to the complaint will be enlarged from 20 to 60 days.[112]

A defendant found within the state may be in transit and need not necessarily reside in

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[109] *See*, *e.g.*, Peay v. BellSouth Medical Assistance Plan, 205 F.3d 1206, 1210 (10th Cir. 2000) (nationwide service of process proper where defendants 'have adequate contacts [within] the United States as a whole').

[110] Ruhrgas AG v. Marathon Oil Co., 526 US 574 (1999).

[111] Insurance Corp. of Ireland v. Compagnie des Bauxites di Guinee, 456 US 694 (1982).

[112] Rule 4(d)(1).

the state or be regularly found there.[113] However, persons induced to travel to the forum state by coercion or fraud will not be subject to personal jurisdiction.[114] Defendants not found within the forum state may nonetheless be subject to the court's personal jurisdiction if the party has sufficient minimum contacts of such a nature so as not to offend 'traditional notions of fair play and substantial justice.'[115]

ii. Motion to dismiss or to transfer for improper venue Venue refers to the appropriate federal district in which to bring a lawsuit, and should be proper even where subject matter and personal jurisdiction are satisfied. The general criteria for federal court venue are set forth in 28 U.S.C. §1391. Section 1391(a) covers cases in which federal jurisdiction is based on diversity of citizenship, and §1391(b) covers non-diversity cases. Both provisions emphasize where the defendant resides, where the events giving rise to the lawsuit took place, and where a defendant is subject to personal jurisdiction.

Defendants have available two types of challenges to improper venue. A Rule 12(b)(3) motion to dismiss for improper venue invokes the common law principle of *forum non conveniens*, as described, for example, in *Gulf Oil Corp. v. Gilbert*.[116] The second kind of challenge to improper venue is a motion to transfer pursuant to the authority granted to the court by 28 U.S.C. §1404, which provides that '[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.' However, 28 U.S.C. §1406(a) directs 'a district court in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division. . . .' Finally, §1406(b) provides that '[n]othing . . . shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.' That is, objections to venue, like objections to personal jurisdiction, may be waived if not timely raised. Courts are split on which party bears the burden of proof when venue is challenged, but the majority view is that the party that has chosen the forum bears the burden for establishing proper venue. The procedure for resolving objections to venue is the same as that for determining issues of personal jurisdiction.[117]

iii. Dismissal for insufficient process or service Rules 12(b)(4) and 12(b)(5) provide related but different procedures for objection to the basis on which the defendant was served with the court's process. Rule 12(b)(4) is used to challenge the sufficiency of the form of the process, rather than the manner or method by which it is served. By contrast,

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[113] Rule 4(e)(2).

[114] *See*, *e.g.*, Amusement Equipment, Inc. v. Mordelt, 779 F.2d 264, 271 (5th Cir. 1985). For further discussion of personal jurisdiction, see Chapter 7 of this *Handbook*.

[115] International Shoe Co. v. Washington, 326 US 310 (1945).

[116] 330 US 501, 503 (1947) ('[T]he defendant, invoking the doctrine of forum non conveniens, claimed that the appropriate place for trial is Virginia where the plaintiff lives and defendant does business, where all events in litigation took place, where most of the witnesses reside, and where both state and federal courts are available to plaintiff and are able to obtain jurisdiction of the defendant.').

[117] *See* Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 355 (2nd Cir. 2005). For further discussion of venue, see Chapter 7 of this *Handbook*.

Rule 12(b)(5) challenges the mode of delivery or the lack of delivery of the summons and complaint.[118]

Service of process – *i.e.*, the delivery of the summons and complaint – may be deficient if the forms are not properly issued or the summons sets forth the wrong name or is not sealed by the clerk of court. Such defects are challenged by way of a Rule 12(b)(5) motion to quash. Unless a party is able to demonstrate actual prejudice, however, courts will often overlook technical defects on the face of the service of process.

Similarly, the mode of delivery may be deficient if it is made at the wrong place, served on an incompetent, minor, or non-agent of the defendant, or not accomplished within 120 days after commencement of the action. Ordinarily, the appropriate defense is a Rule 12(b)(4) or (5) motion to quash for insufficient process or service, rather than a motion to dismiss. Mislabeling the motion under the wrong provision of the rules will ordinarily not be fatal to the defense. Where there is a reasonable chance that service of process is likely to be able to be accomplished on a second attempt, courts are more likely to quash service of process rather than dismiss the action.

In general, objections to service of process will be waived if not raised in a Rule 12(b) pre-answer motion (if one is filed) or else in the responsive pleading. However, where it is shown that the defendants never received actual notice of the complaint, defendants will be able to raise the failure of service of process in opposition to a motion for default. When service of process is challenged, the plaintiff has the burden to demonstrate proper service and process. An executed return of service constitutes *prima facie* evidence that service was properly effectuated, but it is not conclusive if the defendant can adduce evidence challenging the affidavit or return. A well-founded objection to service of process must be specific, must describe any prejudice suffered by the defendant, and must demonstrate how service of process was defective under the requirement of Rule 4. Dismissal for failure of service of process is usually without prejudice to permit the plaintiff to re-attempt service of process.

3. Summary proceedings

Summary proceedings may be non-evidentiary or evidentiary. A defendant may move for dismissal or judgment through a Rule 12(c) motion for judgment on the pleadings, provided the pleadings are closed and the motion is based on admitted allegations or a facial infirmity in the pleadings.[119] The court may also consider matters of which it may take judicial notice, but without reference to any other extrinsic evidence. Where the pleadings must be supplemented by extrinsic evidence in order to demonstrate the defendant's entitlement to dismissal or judgment, such as through affidavits, discovery materials, and other evidence, the appropriate vehicle is a motion for summary judgment.[120]

Parties may seek through summary proceedings to have the court determine specific

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[118] Davies v. Jobs & Adverts Online, GMBH, 94 F.Supp.2d 719 (E.D. Va. 2000).

[119] Rule 12(c). A motion for judgment on the pleadings, provided it is brought 'early enough not to delay trial,' is also the appropriate means by which to raise the defense of failure to state a claim on which relief may be granted, if that defense has not previously been raised in a pre-answer motion or in the pleadings. If a defendant's motion for judgment on the pleadings on these grounds is deemed untimely, the defendant may still raise the defense at trial.

[120] Rule 56; *see also* Rule 12(d).

legal or factual issues, adjudicate a particular claim, or dispose of an entire case. Thus, defendants may raise the affirmative defenses generally not permitted to be raised in a Rule 12(b) pre-answer motion, but which must be alleged in a responsive pleading. Cases that survive a defendant's motion for summary judgment frequently stand considerably improved chances of being voluntarily settled.

a. Motion for judgment on the pleadings

A Rule 12(c) motion is appropriate any time after the pleadings are closed, even before discovery, but must be raised 'early enough not to delay trial.' However, a Rule 12(c) motion made before an answer is filed is premature, and will be treated as a Rule 12(b) pre-answer motion. A Rule 12(c) motion for judgment on the pleadings may not be used to raise defenses that have been waived because they were not raised in a pre-answer motion. The motion is well founded if the movant can demonstrate that no material facts remain for determination at trial based on the pleadings or matters of which the court may take judicial notice. If a Rule 12(c) motion is granted, the prevailing party is entitled to a judgment in its favor.

The legal standard applicable to a Rule 12(c) motion mirrors that of a Rule 12(b)(6) motion to dismiss. Thus, well-pleaded allegations of the non-moving party are accepted as true subject to the stipulations regarding conclusory or factually neutral allegations introduced by the Supreme Court in the *Twombly–Iqbal* modification to the federal civil pleading standards discussed above in connection with Rule 12(b) pre-trial motions.

b. Rule 56 Motions for summary judgment or adjudication of issues

A Rule 56 motion for summary judgment may be brought by either the plaintiffs or the defendants. Rule 56(b) provides that '[a] party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.' Thus, defending parties may move for summary judgment at any time, although the Circuits are split as to whether a Rule 56 motion filed before an answer is filed tolls the time for filing an answer.[121] Rule 56 establishes the procedure by which a party may request or oppose judgment on one, some, or all of the issues in the case, and it allows for an interlocutory determination on liability even where only the amount of damages would remain as a genuine issue.

i. Standard of review The legal standard for summary judgment is similar to the requirements for judgment as a matter of law under Rule 50 (the equivalent of a motion for a directed verdict), which should be granted 'if, under the governing law, there can be but one reasonable conclusion as to the verdict.'[122] The test is whether a reasonable jury could return a verdict in the non-moving party's favor. While a Rule 50 motion is brought during trial and raises the question of whether the case should be submitted to the jury, a Rule 56 motion for summary judgment is brought before trial, and raises the question of whether there is a need to convene a trial at all.

The court may enter summary judgment when no genuine issue exists as to any

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[121] *See*, *e.g.*, Rashidi v. Albright, 818 F.Supp. 1354 (D.Nev. 1993).

[122] Anderson v. Liberty Lobby, Inc., 477 US 242, 250–51 (1986).

material fact, entitling the moving party to judgment as a matter of law. In contrast to a Rule 12(b)(6) pre-answer motion, where the well-pleaded allegations are assumed true and evaluated for their legal sufficiency, the court on summary judgment may consult the pleadings, any affidavits, depositions, interrogatory answers, admissions, Rule 26 disclosures or other material to determine whether a genuine issue exists for trial. The evidence of the non-moving party will be assumed to be true, and doubts about the evidence will be resolved against the moving party. In ruling on a Rule 56 motion for summary judgment, the court's role is never to weigh the evidence, the credibility of witnesses, or to resolve disputed issues of fact, and it should not venture beyond the threshold question of whether a genuine issue exists regarding a material fact that requires a trial.[123]

A 'genuine issue' exists where the evidence submitted could support a finding by a rational factfinder in favor of the non-moving party.[124] A fact is 'material' if, under the applicable substantive law, the fact might affect the outcome of the suit.[125]

ii. Burden of production A moving party may submit a written motion on its own, or supplement it with pleadings, affidavits, discovery materials, transcripts of oral testimony from other proceedings, or matters of which the court may take judicial notice. In general, the evidence must be of a character that is admissible at trial. However, parties frequently rely on affidavits that would not be admissible without the testimony of the affiant, although Rule 56(e)(1) requires that affidavits 'set out facts that would be admissible in evidence.' Similarly, a document referred to in an affidavit must be attached as 'a sworn or certified copy.'

Rule 56(e)(2) provides that a party opposing summary judgment may not rely on allegations or denials in its pleadings, but is required to produce affidavits or other evidence that 'set out specific facts showing a genuine issue for trial.' As the Supreme Court noted in *Matsushita Elec. Indus. Co. v. Zenith Radio, Corp.*,[126] '[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. . . .'[127]

iii. Summary judgment in antitrust cases The Court's *Matsushita* decision in 1986 ushered in a period of more frequent use of summary judgment to dispose of antitrust cases. Prior to that, statements such as the Supreme Court's admonition in *Poller v. CBS*[128] that 'summary judgment procedures should be used sparingly in complex antitrust litigation' led to considerable reluctance by courts to dispose of antitrust cases on summary judgment. But, the *Matsushita* Court's observation that 'antitrust law limits the range of ambiguous evidence in a §1 case,' created a special burden for antitrust

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123 *Id.*
124 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 US 574, 586 (1986).
125 *Anderson*, 477 US at 248.
126 475 US 574, 585 (1986).
127 *Id.*
128 368 US 464, 473 (1962).

plaintiffs seeking to survive summary judgment, particularly in §1 conspiracy cases based on circumstantial evidence. The Court stated:

> To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for violation of §1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently.[129]

It should be emphasized that *Matsushita's* 'more likely than not' standard sets out a limited special rule for what is necessary in §1 cases in addition to ambiguous evidence of conspiracy, such as parallel conduct, for a plaintiff to survive summary judgment, and it should not be read more broadly so as to impinge on the province of the jury or the preponderance of the evidence standard by which a private antitrust plaintiff ordinarily must prove its case. The *Matsushita* decision has given rise to the practice of producing evidence of 'plus factors' in connection with summary judgment motions, evidence that tends to bolster the inference of conspiracy in light of inconclusive or ambiguous evidence of parallel conduct. As described by one court, a plus factor refers to 'any showing . . . that "tend[s] to exclude the possibility of independent action."'[130]

In cases involving direct evidence of a §1 conspiracy or concerning other kinds of antitrust violations, the effect of *Matsushita* is more limited, but it still imposes a requirement that 'the nonmoving party's inferences be reasonable in order to reach the jury.'[131] *Matsushita* remains particularly relevant when there is a question regarding the plausibility of the plaintiff's economic theory. In addition to establishing plus factors to bolster ambiguous evidence, the *Matsushita* Court observed that where 'the factual context renders [the] claim implausible – if the claim is simply one that makes no economic sense – [plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary.'[132] Disclaiming any special burden on antitrust plaintiffs, the Supreme Court in *Kodak* observed that:

> *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.[133]

Procedurally, the moving party carries its *prima facie* burden on summary judgment by demonstrating an absence of evidence supporting the non-moving party's claims or defenses. The burden of production then shifts to the non-moving party to show that a genuine issue of material fact remains for resolution by the jury.

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[129] *Matsushita*, 475 US at 588.

[130] Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1301 (11th Cir. 2003) quoting City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 571 n. 35 (11th Cir. 1998).

[131] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 US 451, 468 (1992).

[132] *Matsushita*, 475 US at 589.

[133] *Kodak*, 504 US at 469.