

The Expert's Corner

SUPREME COURT ROUND-UP

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During the Term that just ended, the Supreme Court did not decide any cases involving class action attorney fees, *per se*, but it did decide a number of cases about *class actions* and some concerning *attorney fees*. The three most significant cases are likely to cut back on class action practice and narrow the ability for plaintiff's counsel to secure fees in fee shifting cases.

Class Action Cases

The three most important class action cases arose in the context of pleading. While they therefore involve a mundane aspect of civil practice, their importance is far more than technical.

In *Tellabs Inc., v. Makor Issues & Rights, Ltd.*, the Court interpreted a portion of the Private Securities Litigation Reform Act of 1995 (PSLRA) that requires that plaintiffs "state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind."¹ In an 8-1 decision,² Justice Ginsburg, writing for the majority, stated that a key aspect of deciding whether an inference of scienter is "strong" is that it must be compared to other inferences that can be drawn from the available facts: "A complaint will survive," the Court held, "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs*, slip op. at 12-13.

Securities fraud class actions filings have declined nearly 50% over the past two years – down to 118 in 2006 from 182 in 2005 and 235 in 2004.³ *Tellabs's* new uniform national standard, while not as strong as that urged by some business groups, is nonetheless likely to make securities class actions

1 15 U.S.C. §78u-4(b)(2) (emphasis supplied). The required state of mind is one of scienter, or the intention to "deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194, n.12 (1976).

2 Only Justice Stevens dissented from the outcome.

3 The data are available here: <http://securities.stanford.edu/companies.html>.

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more difficult to maintain in many circuits⁴ and hence perpetuate this decline in securities filings.

In *Bell Atlantic Corp. v. Twombly*, an antitrust class action, the Court narrowed its own prior interpretation of the more general pleading standard contained in the Federal Rules of Civil Procedure. Rule 8(a) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." At least for the past fifty years, Rule 8 has been interpreted to do little more than "give the defendant fair notice of what the . . . claim is and the grounds upon which its rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). The laxness of Rule 8's pleading standard is famously reflected in *Conley's* statement 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." *Id.* at 45-46.

In *Twombly*, Justice Souter, writing for seven members of the Court,⁵ explicitly rejected this portion of *Conley*, writing that "this famous observation has earned its retirement." *Twombly*, slip op. at 16. In its place, the Court repeated familiar formulations such as: "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 8 (citation and internal punctuation omitted). Rather, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* As applied to the antitrust claim at issue, the Court held that "stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement [on restraint of trade] was made," *id.* at 9, referring to this as asking for "*plausible* grounds to infer an agreement," "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* (emphasis supplied).

If there were any doubt about what this "plausibility" standard meant, the Court first squelched that doubt by reversing the Second Circuit and dismissing *Twombly's* complaint. It thus appeared fair to presume that *Twombly* signals to lower courts that they should take a closer look at the pleading stage and that the decision will likely yield an increase in early, pleading-based, dismissals.

4 In *Tellabs*, for example, the Seventh Circuit had declined to consider competing inferences, expressing concern that such standards "could potentially infringe upon plaintiffs' Seventh Amendment rights." *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 602 (7th Cir. 2006).

5 Justices Stevens and Ginsburg dissented.

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But lo and behold, precisely two weeks later in *Erickson v. Pardus*, the Court issued a *per curiam* decision reversing the Tenth Circuit's "departure from the liberal pleading standards set forth by Rule 8(a)(2)" and hence reinstating a prisoner's Eighth Amendment-based §1983 action. *Erickson*, slip op. at 6. In *Erickson*, a prisoner filed a complaint against prison officials concerning the improper denial of medical treatment and the cost of such treatment, asserting first individual and then later class claims as to the cost issue. The lower court dismissed his complaint as conclusory and denied as moot his motion for class certification on the cost issue. The Supreme Court rejected the notion that the prisoner's allegations were "too conclusory to put these matters at issue," *id.*, and remanded the case for further proceedings. The Court never referenced the fact that in *Twombly* it had done pretty much the opposite of what it was doing here, namely find a complaint too conclusory.

For class action practice, the distinction between *Twombly* and *Erickson* could be quite profound. In *Twombly*, the Court noted that the complaint need be examined with particular care precisely because of the stakes of a large national class case, writing that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Twombly*, slip op. at 11 (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n.17 (1983)). By contrast, in *Erickson*, the Court noted that the complaint should be forgiven because it had been pleaded by a prisoner *pro se*, writing that "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson*, slip op. at 6 (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

These passages suggest that if *Twombly* signals closer review of pleadings at the motion to dismiss stage, this heightened standard is particularly likely to be employed in significant class suits. Together, *Tellabs's* emphasis on heightened pleading in securities class actions and *Twombly's* in antitrust class actions are likely to make plaintiffs' plight more difficult in these types of cases in the coming years.

Attorney Fees

Sole v. Wyner, the Court's single pronouncement on fees this Term, also presents something of a setback for plaintiffs' lawyers. *Sole* was a First Amendment case brought on behalf of an artist who, on Valentine's Day, wanted to create an artwork on a public beach in Florida consisting of nude individuals arranged into a peace sign. Florida law prohibited nudity on the beach. Plaintiff secured a preliminary injunction permitting her display to go forward. Her quest for a permanent injunction was ultimately denied, however, meaning that

"Florida's Bathing Suit Rule remained intact, and [plaintiff] gained no enduring 'change in the legal relationship' between herself and the state officials she sued." *Sole*, slip op. at 10 (quoting *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792 (1989)). Both the District Court and Eleventh Circuit awarded her counsel fees for having prevailed on the preliminary injunction, but the Supreme Court reversed.

Justice Ginsburg, writing for a unanimous Court, reiterated that fees are available under 42 U.S.C. §1988 only to a "prevailing party" and that the touchstone of the "prevailing party" inquiry is "the material alteration of the legal relationship of the parties in the manner which Congress sought to promote in the fee statute." *Sole*, slip op. at 6 (quoting *Texas State Teachers Assn.*, 489 U.S. at 792-793). While acknowledging the plaintiff's "fleeting success," the Court emphasized that she had not "prevailed on the gravamen of her plea for injunctive relief." *Id.* at 7. "Prevailing party status," the Court held, "does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." *Id.* at 7-8. In this case, the Court found "of controlling importance" the fact that the "eventual ruling on the merits for defendants, after both sides considered the case fit for final adjudication, superceded the preliminary ruling." *Id.* at 9. Deeming her initial success "ephemeral," *id.* at 10, the Court denied fees on the theory that plaintiff had won a battle but lost the war. *Id.*

Despite the plaintiff's loss in *Sole*, the Court did acknowledge the narrowness of its ruling: specifically, it left open the question of whether a plaintiff who secures a preliminary injunction in a case in which there is never later a ruling on final injunctive relief may be a prevailing party entitled to fees. *Id.* at 10-11.

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In sum, the 2006-2007 Supreme Court Term produced no rulings on class action attorney fees themselves. It did, however, produce two decisions making pleading more difficult for plaintiffs in class action cases and one decision making attorney fees more difficult for prevailing parties; balanced against this is a short *per curiam* decision that will assist *pro se* prisoners in pleading Eighth Amendment claims. These decisions suggest a pro-defendant trend consistent with the growingly conservative make up of the Court; however, it is important to note that in these procedural decisions, the Court generally did not split along ideological lines and that not one of the aforementioned cases had more than two dissenters. The cases have not therefore generated much public attention, but the hurdles they produce for plaintiffs may well be important in coming years.