4. Is there a state or local statute governing sexual harassment, and what are its requirements?
5. Does the state jurisdiction permit tort suits against an employer for intentional torts, or are such claims compensable only through the workers' compensation system (if at all)?
6. If the plaintiff has left her job, does the state jurisdiction recognize the tort of wrongful termination?
7. What are the respondeat superior rules in the federal circuit or state whose law will govern your claim?
8. If the suit is of the hostile environment type, are you in a "reasonable woman" or "reasonable person" jurisdiction?
9. Does the state permit respondeat superior liability for punitive damages?

Factual Investigation

1. How many employees in the workplace and the entire firm?
2. Are there other firms under common control with the plaintiff's firm?
3. Is the plaintiff's employer a local government entity?
4. Is the harassing person a government official?
5. Has the defendant engaged in harassing conduct with other employees?
6. What is the history of the firm or workplace with regard to other instances of sexual harassment and remedial measures taken?
7. Did the plaintiff have a prior relationship with the offending individual of a friendly, intimate, or sexual nature?
8. Is there any physical evidence of the harassing conduct?
9. Are there any witnesses to the harassing conduct?
10. Is there a workplace policy against sexual harassment and an established complaint procedure?
11. If so, are the procedures generally followed?
12. Has the plaintiff followed the procedures, or does she have a good reason not to?
13. Is there evidence of any other wrongful conduct by the offending individuals?
14. What is the marital status of the offending individual and the victim? (Adultery remains a crime in many states)

CONCLUSION • Carefully examine the federal and state law of the relevant jurisdiction to determine what peculiar claims or defenses may be available. Your attention to federal and state doctrines may yield innovative arguments. The plaintiff's well-considered choice of forum and causes of action will avoid surprises.

Using Rule 12(b)(6) Motions in Antitrust and RICO Claims (with Form) (Part 1)

Rajiv S. Khanna

Use the Rule without giving your case away.

IN MOST CASES motions to dismiss for failure to state a cause of action under Fed. R. Civ. P. 12(b)(6) are an exercise in futility. These motions are seldom granted. The futility of 12(b)(6) motions has come to be so well accepted that more and more institutional defendants demand that

Rajiv S. Khanna is a partner with McTyre & Ketchie, Arlington, Virginia.

retained law firms seek in-house counsel's approval before beginning work on any such motions.

Nevertheless, motions to dismiss may be very useful against complex causes of action such as antitrust and RICO. To utilize the strategic advantages of Rule 12(b)(6) motions, you need to grasp both the jurisprudence of the Federal Rules of Civil Procedure and their application in practice. Although the Rules elevate substance over form, you should never minimize the role of technicalities.

OBSTACLES • Motions to dismiss seldom work in federal courts for four reasons:

- The federal rules require only notice pleading;
- Amendment of pleadings is liberally permitted;
- Federal courts are reluctant to dismiss any matter without a hearing on the merits; and
- The availability of less drastic alternatives, such as a motion for a more definite statement (Fed. R. Civ. P. 12(e)), makes it unnecessary that any pleadings be dismissed.

Notice Pleadings and Amendment

Notice pleadings and liberal amendments are the foremost obstacles hindering a motion to dismiss. Notice pleading requires that the plaintiff set out "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Very little factual elaboration is necessary, and it does not take much to state a cause of action. Therefore, the likelihood of success of a motion to dismiss is minuscule, at best. In the unlikely event that a complaint fails the de minimis notice pleading requirements, the court will nonetheless allow the plaintiff to amend the complaint in accordance with the liberal allowance of amendments authorized by Fed. R. Civ. P. 15(a).

In addition to these two daunting obstacles, the practical mechanics of presenting a Rule 12(b)(6) motion further curtail their usefulness. In moving for dismissal for failure to state a cause of action, you have to inform the judge precisely what is wrong with the complaint. As counsel for the defendant, typically you would address every defective allegation stating exactly what was wrong with it. In response, the plaintiff may have to do little more than amend the complaint, correcting all of the legal defects as most obligingly pointed out in your Rule 12(b)(6) motion. That amendment (much to the delight of the judge's law clerk) would then render the motion to dismiss moot.

You Lose Twice

It is fairly obvious that you will have accomplished nothing, except successfully doing the plaintiff's homework for it. This puts you in the unenviable position of having to explain to a litigation savvy client the brilliant strategy behind the motion, and why your client is paying you to educate the plaintiff.

WHAT TO DO • What then, one may ask, is the advantage—other than the dubious one of amassing billable hours in a futile pursuit—of a Rule 12(b)(6) motion?

The sample 12(b)(6) motion provided in this article may help answer that question. This motion was filed recently in a case we litigated for an institutional defendant, publisher of a vernacular language newspaper. A rival publisher sued our client, alleging among other things, antitrust and RICO violations. The director of the newspaper, "Dean Doe" was a codefendant in the suit, and was represented by counsel outside our firm. Except for some legal ambiguities, the complaint was a classic textbook pleading containing all the right allegations. Additionally, there were some underlying facts ostensibly in favor of the plaintiff that could well have supported the causes of action stated in the complaint.

Know Your Judge

Upon undertaking the representation, we first researched the decisions of the federal judge assigned to our case. Our own past experience with this judge, input from other colleagues and restricted field searches in legal data bases (LEXIS, WESTLAW) showed that this judge was inclined to be pro-plaintiff, and that he had an excellent command of antitrust and RICO matters. We also obtained all pertinent facts from our client's employees and its records. Armed with all this information, we devised our litigation strategy.

Hunt for the Theme

Looking over the complaint, one idea stood out clearly: the whole complaint was built around a single incident. Other than that, it was obvious that the plaintiff was hoping to fish for facts in discovery to make its case.

It was acutely evident to us that the contours of this action needed to be defined immediately. The plaintiff's allegations, although primarily based upon one incident, encompassed all aspects of our client's business over an extended period of time. Unless brought to heel, the plaintiff would remain in a position to act on its apparent inclination to harass our clients' employees, stockholders, and customers, and to embroil our client in protracted discovery.

Alternatives

We examined the possibility of filing a motion for a more definite statement. If we could get the judge to grant that motion, we would have a more sharply defined controversy. We could then file our answer to the complaint and move for an order restricting the scope of discovery. On the other hand, if the judge did not grant our motion for a more definite state-

ment, we would have no choice but to file our answer and try to get the scope of discovery curtailed, or at least obtain some protective orders regarding our client's confidential business information.

There was one drawback to relying only on a motion for a more definite statement. This motion does not really put the plaintiff on the defensive, as a Rule 12(b)(6) motion would. At worst for the plaintiff and at best for us, upon granting a motion for a more definite statement, the court would direct the plaintiff to give us more facts. Our posture could be a lot more effective if we could combine a motion to dismiss with the motion for a more definite statement. The problem with this combination was that we would end up educating the plaintiff. The disadvantage of revealing our litigation approach in these complex areas of the law would have been greater than the advantage of obtaining more facts from the plaintiff.

Error of Law or Absence of Facts?

Most Rule 12(b)(6) motions are based on an error of law premise: no relief is legally available on the facts pleaded. For instance, a Rule 12(b)(6) motion would be fatal to a complaint when an affirmative defense (e.g. limitation) completely bars relief, or when relief is requested on a legal theory that is not accepted in the forum jurisdiction. There is, however, another possible basis for requesting Rule 12(b)(6) relief: that the plaintiff has failed to recite even the barest underlying facts that would notify the defendant of the cause of action.

Tactics

We decided to establish the absence of facts as the basis of our motion to dismiss. Relying on this basis would absolve us of the responsibility of pointing out the legal infirmities in the complaint. That would cleanly avoid the problem of educating the plaintiff at the expense of our client. Fortunately, the judge assigned to our case was an expert in RICO and antitrust law, and therefore, did not need any education from us.

One factor in our favor was the nature of antitrust and RICO actions. Courts realize that these actions can be massive factual controversies. As a result, many courts are likely to award extraordinary preliminary or interim relief to limit or sharply delineate the real issues.

Strategy

We had no great expectation of succeeding on our motion to dismiss. We were hoping that we could get the alternative relief of a more definite statement, but through a more aggressive posture than a motion for a more definite statement alone would permit. We had planned to then move for limiting discovery to the issues presented, with the burden being on the requester to demonstrate the relevance of the discovery requests. Additionally, we expected to be able to confine the plaintiff to one set of facts and then move for a summary judgment at a very early stage in the litigation.

We are presenting the amended complaint (the plaintiff amended the complaint as of right) and our Rule 12(b)(6) motion in this article. We have divided the complaint into three parts (Introductory, fraudulent concealment, and antitrust); following each part is the relevant response from our motion. Part 2 of this article, appearing in the May *Practical Litigator,* will deal with plaintiff's civil conspiracy and RICO counts. You can observe first hand from the pleading and the motion the strategy that worked well for us. Res ipsa loquitur.

APPENDIX 1

Plaintiff's General Allegations

AMENDED COMPLAINT

Comes now the plaintiff, XYZ Corporation, by and through counsel, and for its complaint against the defendants alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the claims for relief under 15 U.S.C. §15 for violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2; 18 U.S.C. §§1964(a) and 1964(c) for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO); 28 U.S.C. §1331 (federal question); 28 U.S.C. §1332 (diversity); and under the Court's pendent jurisdictional powers for tortious interference with business relationship, and trade libel/slander (also described as "injurious falsehood" and disparagement of property).
2. Venue exists by virtue of 18 U.S.C. §1965(a) and (b); 15 U.S.C. §§15 and 22; and 28 U.S.C. §1391(b). The defendants are residents of, have an agent or agents, or transact their affairs in, or are doing business within the District of Columbia, and the unlawful activities complained of herein were carried out, in whole or in part, within the District of Columbia.

PARTIES

3. Plaintiff XYZ Corporation is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 666 Utopia Street, Utopia. Plaintiff is the publisher of "Plaintiff Newspaper," a vernacular language newspaper.
4. Defendant ABC Inc. is a corporation organized and existing under the laws of the District of Columbia. Defendant ABC Inc., is the publisher of "Defendant Newspaper," a vernacular language newspaper.

5. Defendant Dean Doe at all times mentioned herein was the director of ABC Inc. At all times mentioned herein defendant Doe was and still is a resident of the District of Columbia.

TRADE AND COMMERCE

6. It is estimated that approximately 500,000 people speaking the vernacular language live in Northern Virginia, the District of Columbia, and Maryland (hereinafter, "the Washington Metropolitan Area"). Of these, more than 120,000 live in the District of Columbia. Persons speaking the vernacular language are the fastest growing minority group in the Washington Metropolitan Area and in the entire United States. It is estimated that in ten years, that is, by 2000, persons speaking the vernacular language will be the largest minority group in the United States. In the past years, there has been a growing interest in developing the market comprising the vernacular community, which remains untapped.

7. Through the Washington Metropolitan Area, Defendant Newspaper is the leading vernacular newspaper which is available free to the public. Defendant Newspaper is the oldest vernacular newspaper in the Washington Metropolitan Area and has the largest circulation among the vernacular print media. ABC Inc. (hereinafter "defendant ABC"), was founded July 15, 1960, and was incorporated on the same day in the District of Columbia. Defendant Newspaper is published daily and is reportedly distributed to approximately 350,000 vernacular speaking persons in the Washington Metropolitan Area.

8. Other vernacular publications servicing the vernacular market include "_____," a weekly religious publication published by the _____; "_____," a biweekly newspaper serving primarily the Virginia vernacular community; "_____," a news magazine published irregularly in the District of Columbia.

9. As the leading vernacular newspaper, Defendant Newspaper has for sometime enjoyed virtual monopoly as the primary print media for the advertising of products and services to the vernacular community in the Washington Metropolitan Area.

10. During the relevant times herein, but beginning since May 19___, plaintiff had been engaged in the development, publication, and distribution of Plaintiff Newspaper, a rival newspaper to Defendant Newspaper. Plaintiff Newspaper was published daily and distributed free in the Washington Metropolitan Area. Plaintiff Newspaper usually appeared side-by-side to Defendant Newspaper and competed for the same market. Since its inception, Plaintiff Newspaper became a controversial newspaper for publishing impartial accounts of events affecting the vernacular community in the Washington Metropolitan Area. In less than a year, Plaintiff Newspaper succeeded, despite the unlawful restraint of Defendant Newspaper and defendant Dean Doe, in developing a readership and in awakening the interest of advertisers as an alternative medium for the promotion of their products and services.

Introductory Part of the Motion

In the following introductory part of the motion we have emphasized the theme of our motion that "notice pleading" requires notice of at least some basic facts. Mere paraphrasing of statutes does not satisfy the de minimis requirements of notice pleading under the federal rules. Without some underlying facts, complaints could read "Plaintiff demands $500,000, because Bill Black has violated 18 U.S.C. §§2314 and 2315." That is a ludicrous "pleading." A complaint must contain facts that show violations.

In the motion, we developed that theme a little further. We said that because of the lack of facts we were unable to meaningfully respond to the complaint. That is, our challenge to this complaint was not merely a technical objection—we were unable to formulate an answer to the complaint.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION OF DEFENDANT ABC INC.
TO DISMISS THE COMPLAINT OR
FOR A MORE DEFINITE STATEMENT AND A
RICO CASE STATEMENT

Defendant ABC Inc. ("ABC"), requests this honorable court that pursuant to Fed. R. Civ. P. 12(b)(6), the Amended Complaint ("Complaint") be dismissed for failure to state a cause of action upon which relief can be granted, or in the alternative, pursuant to, inter alia, Fed. R. Civ. P. 9(b), 11, and 12(e), the plaintiff be directed to provide facts sufficient to enable ABC to meaningfully defend this action. The Complaint suggests five counts against ABC. None of those counts alleges the minimal facts required to maintain a cause of action. The Complaint, thus, fails to place ABC on notice of any wrongful act that it committed and should now be defending.

A motion to dismiss for failure to state a claim upon which relief can be granted generally prevails when it appears, beyond a doubt, that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984). A claim for relief has not been stated when a complaint pleads facts insufficient to show that a legal wrong has been committed. Thus, if the complaint omits averments necessary to establish a wrong, or fails to link

parties with a wrong in such a manner as to entitle plaintiff to redress, the complaint must be dismissed. *Sutton v. Eastern Viavi Co.*, 138 F.2d 959 (7th Cir. 1943). ABC adopts this proposition as the essence of this motion. The plaintiff comprehensively pleads abstract legal propositions of private antitrust violations, civil RICO, trade libel, and tortious interference with business relations against ABC. Yet, it fails to allege any facts that would notify ABC of its wrongdoing.

ABC recognizes that when the court rules on a motion under Fed. R. Civ. P. 12(b)(6), pleadings must be construed in the light most favorable to the plaintiff. Nevertheless, if the allegations are conclusory in nature, the court is obliged to measure the allegations against the factual claims actually made. *Wilson v. Lincoln Redevelopment Corp.*, 488 F.2d 339 (8th Cir. 1973). If all allegations in a complaint were to be accepted as true, a plaintiff could just recite textbook legal propositions and statutes to state a cause of action. There must be alleged *some* facts in the complaint showing that a judicially cognizable wrong has been committed.

To protect against abuse of judicial redress, it has been held that the court is not required to accept as true the complaint's conclusions of law, but rather, it may make its own determination regarding their merit. *Solis-Ramirez v. U.S. Dept. of Justice,* 758 F.2d 1426 (11th Cir. 1985). The complaint, at a minimum, should clearly indicate the basis upon which relief is sought. *Browne v. N.Y.S. Court System,* 599 F.Supp.36 (E.D. N.Y. 1984). In the absence of this protection of threshold pleading, blameless defendants could be embroiled in baseless litigation.

In the case at bar, the plaintiff has very carefully and artfully included in its Complaint all the necessary legal mandates that would, if violated, constitute a redressable wrong. For instance, in its statutory causes of action (antitrust and RICO), plaintiff has complained of every possible violation described by the statutes. A valid complaint, however, must set forth sufficient information to suggest that there is some recognized theory upon which relief can be granted. *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077 (D.C. Cir. 1984). That is, merely stating the elements of a legal theory cannot qualify as a properly stated cause of action. The complaint must contain *information* that suggests a cause of action.

If plaintiff had suffered from any acts or omissions, the Complaint should have articulated them in such a manner as to place ABC on notice of the basic facts that support the cause of action. Having failed to do so, plaintiff should be denied this court's time and attention. The plaintiff should not be allowed to launch a fishing expedition to search for a wrongdoing at the expense of ABC and of the court.

APPENDIX 2

Claim of Fraudulent Concealment

The next set of allegations in the complaint claimed that the defendan had fraudulently concealed their wrongful acts from the plaintiff. This seeme to be an attempt by the plaintiff to toll the limitation period. These allegatio did not appear to have been pleaded as a cause of action. We knew that th plaintiff had neither alleged nor could allege the existence of any special dut owed by the defendant to the plaintiff. There was no fiduciary or other rel tion between the plaintiff and the defendant. Their only relationship was com petitive.

At this time, we were not seriously concerned with the period of limit tions. That, being an affirmative defense, could be dealt with when (or if) w filed our answer to the complaint. Accordingly, we impugned these allegatio summarily in our motion. We indicated that the time period of alleged concea ment, among other facts, was missing in the allegations in the complaint Therefore, not knowing what was alleged, the defendant could not respond t this section of the complaint.

FRAUDULENT CONCEALMENT

11. The acts and practices described herein were inherently self-concealing an were fraudulently concealed by defendants and their co-conspirators throug the use of deceptive practices and techniques which prevented their detection b plaintiff. The plaintiff suspected for some time that defendants were trying t destroy and eliminate Plaintiff Newspaper as a competitor newspaper in th vernacular community. The plaintiff, with the exercise of due diligence, coul not have determined with certainty the nature and existence of the unlawfu schemes and practices which are the subject of this complaint until Februar 19___. Such acts, practices, and techniques included but were not limited t circumstances surrounding the publication of false disparagement of plaintif and Plaintiff Newspaper, and the replacement of Plaintiff Newspaper wit Defendant Newspaper in the various distribution centers. Because of a conspir- acy to conceal the existence of these devious acts from the plaintiff, actua proof of such acts was not made available to plaintiff until February 19___, when the defendants were caught with the booty in their hands. Such acts, practices, and techniques also included but were not limited to the dealings between the owners of Defendant Newspaper, who own and operate various enterprises in the vernacular community, and plaintiff's prospective and exist- ing customers, such dealings including secret inducements to remove, conceal, and destroy Plaintiff Newspaper so it would not be available to the public, and

publication of misstatements of facts and other disparagements about XYZ Corporation, its owners, and its products and services, all to the detriment of plaintiff.

12. The owners of ABC Inc., knew or had reason to know that the unlawful and corrupt activities described herein engaged in by the defendants, their associates, employees, and co-conspirators were perpetrated for financial gains, to lessen competition, and to destroy plaintiff as a competitor.

Response to Fraudulent Concealment Claim

ARGUMENTS: THE COMPLAINT FAILS TO PROPERLY ALLEGE FRAUDULENT CONCEALMENT

The Complaint fails to plead with particularity the elements of fraudulent concealment. Such particularity is a requirement arising from both Fed. R. Civ. P. 9(b), and the federal equitable tolling doctrine. *See, e.g., Corson v. First Jersey Securities, Inc.,* 537 F. Supp. 1263, 1268 (D.N.J. 1982). It is incumbent upon the plaintiff to plead fraudulent concealment with specificity. *Hupp v. Gray,* 500 F.2d 993, 996 (7th Cir. 1974).

In the case at bar, the Complaint dutifully offers a pleading replete with axiomatic statements. But, in stating any facts to support those legal axioms, the Complaint sets out nothing except conclusory allegations. As such, the Complaint fails to sufficiently allege fraudulent concealment. *Hill v. Der,* 521 F. Supp. 1370, 1387 (D.Del. 1981). At best, ABC can only try to guess which incidents occurred during which time period.

APPENDIX 3

Antitrust Allegations

COUNT I: COMBINATION AND CONSPIRACY IN RESTRAINT OF TRADE AND TO MONOPOLIZE

13. Plaintiff realleges and adopts each of the allegations previously set forth herein and those set forth from this point on.

14. Various other persons, firms, and corporations have participated as co-conspirators with defendant ABC in the offenses charged in the complaint and have performed acts and made statements in furtherance thereof. These co-conspirators include but are not limited to each owner of ABC and the various enterprises and firms under their management, control, or ownership, Dean Doe, former director of ABC, Fred Fictitious, director of ABC Inc., Joe Blow and John Smith, who are associated with defendant ABC Inc., among others.

15. Beginning at a time presently unknown to plaintiff, but as early as Ma 19___, and continuing thereafter until December 19___, defendant ABC, de fendant Dean Doe, and co-conspirators have engaged in an unlawful combina tion and conspiracy unreasonably to restrain and to monopolize interstat commerce in the newspaper industry in the District of Columbia, Northern Virginia, and Maryland in violation of Sections 1 and 2 of the Sherman Act, 1 U.S.C. §§1 and 2.

16. ABC has for some time possessed virtual monopoly power in the vernacu lar newspaper market in the Washington Metropolitan Area.

17. ABC has for some time enjoyed the power to control the prices of newspa per advertising in the vernacular community and to exclude competition such as that of Plaintiff Newspaper.

18. ABC presently accounts for approximately 80 per cent of annual sales in advertising among vernacular newspapers in the Washington Metropolitan Area.

19. In carrying out the combination and conspiracy described above, defendant ABC, its owners, Dean Doe, and co-conspirators deliberately and intentionally engaged in various acts, behavior, and practices, including but not limited to those set forth below:

(a) Defendant ABC has caused and permitted its reputation and power as the oldest and "only weekly vernacular independent newspaper in Washington" to be perverted and influenced by its owners and defendant Dean Doe to promote unfairly Defendant Newspaper and to discourage the development, marketing, and distribution of Plaintiff Newspaper;

(b) Defendant ABC, as presently constituted, organized, and operated, is inherently anticompetitive and therefore constitutes a continuing combination and conspiracy in violation of antitrust laws;

(c) Defendant ABC has conspired with its owners, defendant Dean Doe, and other vernacular enterprises in the unlawful, deliberate acquisition and maintenance of its monopoly power in the vernacular newspaper industry in the Washington Metropolitan Area;

(d) Defendant ABC and defendant Dean Doe have denied plaintiff equal access to and foreclosed it from marketing Plaintiff Newspaper without undue and unlawful restraint during the relevant times herein;

(e) Defendant ABC and defendant Dean Doe have utilized the power and reputation of ABC in the vernacular community to publish the representation and to otherwise create the impression that Plaintiff Newspaper was a radical newspaper that fostered disunity in the vernacular community.

(f) Defendant ABC and defendant Dean Doe have induced customers to refrain from purchasing space or placing advertisements in Plaintiff Newspaper by (i) publishing disparaging and false statements about the impact and services of plaintiff, such publication being accompanied by an intent to cause competitive injury, personal hostility, and bad faith, (ii) creating the impression and belief that the placement of advertisements in Plaintiff Newspaper would jeopardize such customer's status in the community; and (iii) creating the impression and belief that the purchase of space in Plaintiff Newspaper would be a waste of money because Plaintiff Newspaper had no readership and appeals to the radical elements of the community.

(g) Defendant ABC and defendant Dean Doe have purposely induced or otherwise caused third persons not to enter into or continue business relations with plaintiff XYZ Corporation.

(h) Beginning at a time presently unknown to plaintiff, but more prevalent since July or August 19___, defendant ABC and defendant Dean Doe have purposely and intentionally sabotaged the distribution of Plaintiff Newspaper to prevent its circulation in the vernacular community in Virginia, Maryland, and the District of Columbia;

(i) Defendant ABC and defendant Dean Doe were caught on January 22, 19___, by Sergeant Stephen Smart and Inspector James Eagle of the _____ Police, with over 700 issues of Plaintiff Newspaper which they had surreptitiously taken to eliminate or destroy Plaintiff Newspaper as a competitor.

(j) As reported by the _____ Police Department, defendant ABC and defendant Dean Doe used their vehicles to transport and remove hundreds of copies of Plaintiff Newspaper, a rival newspaper, and replaced them with their own newspaper. Upon information and belief, the defendants have been engaged in such unlawful and corrupt activities as early as January 19___.

(k) As reported by the _____ Police Department, defendant ABC and defendant Dean Doe engaged in an unlawful combination and conspiracy unreasonably to restrain the plaintiff "thereby depriving Plaintiff Newspaper with advertising to their customers and financial loss."

(l) After conducting his own investigation into defendant ABC's and defendant Dean Doe's unfair trade practices, Inspector James Eagle reported that such practices demonstrate the "fear of competition" that defendant ABC has toward plaintiff.

(m) Defendant ABC has threatened plaintiff with the filing of frivolous lawsuits to further intimidate and run plaintiff out of business, and did, in fact, cause plaintiff to discontinue publication of Plaintiff Newspaper in August 19___.

(n) Defendant ABC has used its power and reputation as the leading ver nacular newspaper with the largest circulation in the Washington Metropolita Area unfairly to destroy Plaintiff Newspaper by means of agreements with co defendant and co-conspirators to sabotage, coerce, and intimidate, and b sabotage, coercion, and intimidation did in fact destroy the competition pre sented by the plaintiff.

20. Defendant ABC and defendant Dean Doe committed the above describe acts willfully to acquire and or maintain possession of monopoly power in th print media market in the vernacular community in the Washington Metropoli tan Area.

21. By purposely eliminating Plaintiff Newspaper as a rival newspaper, defend ant ABC succeeded in enhancing its market power.

22. By purposely destroying Plaintiff Newspaper as a rival newspaper, defend ant ABC has significantly reduced competition among the print media in th vernacular community and has secured an increase in its market share.

23. Defendant ABC has used its monopoly power to foreclose competition gain a competitive advantage, and to destroy competitors such as Plaintif Newspaper.

24. Defendant ABC's and defendant Dean Doe's conduct constitute an unlaw ful abuse of their monopoly power in the publishing and marketing of vernacu lar newspapers.

25. Plaintiff received regular inquiries from advertisers and readers, but mor frequently since July through December 19___, regarding the absence of Plain tiff Newspaper in the various distribution centers, a situation that contribute also to the decline of Plaintiff Newspaper.

Response to Antitrust Allegations

In attacking the antitrust allegations, we introduced various extrinsi pieces of information in our motion. For example, we emphasized the uniqu nature of the newspaper industry and the "thrust-upon monopoly" defens integrating them into arguments about the factual deficiency of the complain rather than as the affirmative defenses that they really are. To illustrate, w stated in the motion that in the newspaper industry, market forces have a ter dency to create monopolies. In view of these natural monopolies, could th plaintiff possibly allege any facts that would tend to show that the defendant monopoly was not natural or thrust upon the defendant? Hence, the plaintif should be required to allege specific facts beyond monotonous incantation c monopoly.

Two more points are noteworthy in this part of our motion. First, we quoted statistics only from case law precedents. This makes these extrinsic facts more palatable in Rule 12(b)(6) motions, since judicially noted facts seem to become almost matters of law rather than of fact. Second, using the defense of thrust-upon monopoly to attack the paucity of facts in the complaint has an additional advantage: it eliminates the stigma of a monopoly, and its accompanying negative presumptions.

We had to use the extrinsic information cautiously. Under Fed. R. Civ. P. 12(b)(6), intemperate use of extrinsic information could lead to either exclusion of that information or treatment of the 12(b)(6) motion as a motion for summary judgment. We did not want the court to treat our motion as one for summary judgement. Chances were that as a motion for summary judgment, our motion would be defeated as premature, because discovery had not yet started. Discovery is especially important when a claim of conspiracy is raised. Courts adopt the view that in matters involving alleged conspiracy, the defendants uniquely hold the necessary information. The plaintiff should be allowed to elicit that information before a ruling on any dispositive motions. Accordingly, we had to be cautious in our use of extrinsic information in the 12(b)(6) motion.

In this part of the motion, we also started making some gentle suggestions regarding sanctions under Rule 11. These suggestions were introduced for two reasons: first, to remind plaintiff's counsel of his duty to investigate; and second, to prepare the court for a Fed. R. Civ. P. 11 motion that we were planning to make orally before the court. One significant point is that the Fed. R. Civ. P. 11 suggestion was invoked in the context of plaintiff's allegation of price manipulation, which we knew was a frivolous allegation and could not be proved at trial.

ARGUMENT: ALLEGATIONS OF COMBINATION AND CONSPIRACY IN RESTRAINT OF TRADE AND TO MONOPOLIZE ARE INSUFFICIENT

The Complaint, in paragraph 14, alleges that "[v]arious other persons, firms and corporations have participated as co-conspirators with defendant ABC in the offenses charged in this complaint and have performed acts and made statements in furtherance thereof." ABC is completely mystified as to who these "other persons" are. It cannot possibly be determined what the expression "offenses charged under this complaint" refers to, because no offenses have been alleged. Similarly, the Complaint fails to state what "acts" were committed or what "statements" were made and what are the factual bases and legal effect of all these allegations.

Additionally, paragraph 14 further compounds the mystery by including as co-conspirators "each owner of ABC, and the various enterprises and firm under their management, control or ownership, Dean Doe, former director o ABC Inc. . . . ." The same paragraph further lists three employees of ABC a being the co-conspirators.

As a fundamental principle of antitrust law, an entity and its wholly owned subsidiaries, its parent corporation, or its employees cannot be co conspirators for the purposes of 15 U.S.C. §1. Under the rationale articulate in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), if ther exists a "complete unity of interest" the components representing that unity ar legally incapable of conspiring for the purposes of 15 U.S.C. §1. *Copperwela* at 771. This rationale has been expanded to include those situations in whicl conspiracy under 15 U.S.C. §2 is alleged. See, e.g., *H.R.M., Inc. v. Tele Communications, Inc.*, 653 F. Supp. 645 (D.Col. 1987).

General allegations claiming a conspiracy to restrain trade, such as th Complaint alleges, are considered to be insufficient to state a cause of action *Nelson Radio & Supply Co. v. Motorola,* 200 F.2d 911 (5th Cir. 1952). Ther must be a statement of facts constituting the conspiracy to restrain trade, it object, and accomplishment. Without such, the mere allegation of a legal con clusion is insufficient to state a cause of action. *Id.* at 914.

Furthermore, the bare allegations that a statute has been violated or mer recitation of the statutory language fails to pass muster under Fed. R. Civ. I 12(b)(6). *See, e.g., Webber v. White,* 422 F. Supp. 416 (N.D. Tex. 1976). I Count I, as is the case with the allegation of Fraudulent Concealment, th Complaint offers mere conclusory statements and provides no factual basis.

ABC will endeavor to lead this honorable court through each of the rele vant allegations under Count I of the Complaint to demonstrate why, despite seemingly well-pleaded Complaint, ABC has no notice about this cause c action.

Paragraph 15 of the Complaint alleges that "defendant ABC, defendar Dean Doe, and co-conspirators have engaged in an unlawful combination an conspiracy unreasonably to restrain and to monopolize interstate commerc . . . in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. As stated earlier, as a matter of law, there cannot be a combination or conspi acy between an entity and its employees for the purposes of the Sherman Ac The remainder of the allegation in paragraph 15 sets forth nothing but th language of the statute itself. There is not even a hint of what the "combinatio and conspiracy" was or what was "unlawful" in the combination or conspirac ABC has no notice as to what allegedly "unreasonable" restraint of trade ha injured the plaintiff. As a result of the Complaint's baseless pleadings, ABC ha

no information about what it is that ABC is supposed to defend. In *Lombard's, Inc. v. Prince Mfg., Inc.*, 583 F. Supp. 1572 (S.D.Fla. 1984), *aff'd*, 753 F.2d 974 (11th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986), the court dismissed a similar complaint that was based only on conclusory allegations regarding "conspiracy to restrain trade." The court held that the complaint did not contain a short plain statement sufficient to place the defendant on notice of what the claim was and the grounds on which it rested. *See, also, Association of Retail Travel Agents, Ltd. v. Air Transport Ass'n. of America*, 635 F. Supp. 534 (D.D.C. 1986).

In paragraph 16, the Complaint merely states that "ABC has for some time possessed virtual monopoly power in the vernacular newspaper market in the Washington Metropolitan Area." The plaintiff seems to have ignored another fundamental principle of antitrust law: mere possession of monopoly power is no offense. It is well recognized that in the newspaper industry only four per cent of the cities in the United States have any meaningful competition. Background paper, Alfred Bolk, Twentieth Century Fund Task Force Report for National News Council, A Free and Responsive Press 18. Quoted in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 249 n.13 (1973). Antitrust laws censor the wrongful acquisition and maintenance of monopoly power, not a monopoly that is thrust upon an entity by the market forces. The Complaint does not allege any factual basis for its statement that ABC *wrongfully* obtained, or maintained, such status. In fact, the Complaint appears to concede that ABC possessed such status long before the Plaintiff Newspaper came into existence.

Paragraph 17 of the Complaint alleges that ABC had the power to control prices. Conspicuously missing in the Complaint, however, is any allegation that ABC did, in fact, exercise such power to the detriment of the competitors in the market place. This paragraph is meaningless unless, within the ambit of Fed. R. Civ. P. 11, the plaintiff can allege that ABC has engaged in some type of price manipulation.

In paragraph 18, the Complaint alleges that ABC accounts for approximately 80 per cent of the annual sales in advertising. Again, the Complaint states no offense or violation of the Antitrust laws, and therefore, fails to state a cause of action upon which relief can be granted.

Paragraph 19 begins by stating "[i]n carrying out the combination and conspiracy described above . . . ." Such acts are not "described above." The Complaint states only that ABC and others did combine and conspire—nothing is described. The Complaint further alleges in the numerous subparagraphs of paragraph 19, some "acts, behavior, and practices" of the named defendants, owners of ABC, and co-conspirators, all of which are equally vague.

In subparagraph (a), the Complaint suggests that ABC "has caused and permitted its reputation and power as the oldest and 'only weekly vernacular independent newspaper' to be perverted by its owners and defendant Dean Doe to promote unfairly Defendant Newspaper and to discourage the development, marketing and distribution of Plaintiff Newspaper." There is no mention of what this "perversion" is and how it can rationally be linked to unfair promotion or unlawful competition. There is not even a hint of how this transgression was committed or what facts led plaintiff to this conclusion. ABC is placed, once again, in the position of guessing how it has permitted its newspaper to be promoted unfairly and to illegally discourage the competition. At best, this allegation is meaningless rhetoric.

Assuming, arguendo, that the plaintiff could allege some facts to substantiate its Complaint, there is, however, immense difference between intent to run a competitor out of business and the intent to provide vigorous competition. "Courts must be on guard against efforts of plaintiffs to use the antitrust laws to insulate themselves from the impact of competition." *Buffalo-Courier Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 54-55 (2d Cir. 1979). The Complaint must draw the distinction clearly or suffer dismissal. Therefore, the facts must show that there was competition between the plaintiff and the defendant, and that the defendant exceeded the bounds of vigorous competition. It is entirely possible that these allegations reflect a desperate effort, by plaintiff, to blame its competitors for its own failures.

Subparagraph (b) states only that ABC is organized in such a manner as to be "inherently anticompetitive." This subparagraph also offers nothing to which ABC can meaningfully respond.

It is alleged in subparagraph (c) that "ABC has conspired with its owners, defendant Dean Doe, and other vernacular enterprises in the unlawful, deliberate acquisition of its monopoly power . . . ." This nebulous allegation contains no factual information regarding the identity of the owners and other vernacular enterprises with which ABC allegedly conspired. It fails to indicate how the monopoly power was acquired unlawfully, and does not state the skeletal facts of this conspiracy.

As submitted above, it has been held that conclusory allegations of conspiracy and statutory violations are insufficient to state a cause of action. In *Commonwealth of Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173 (3rd Cir. 1988), it was noted that no cause of action was stated in the conclusory allegation that the defendant violated the Soft Drink Inter-brand Competition Act by maintaining a "horizontal conspiracy" between bottlers and wholesaling re-sellers. That is, merely because a plaintiff pins a label of "conspiracy" in a complaint, does not render the complaint sufficient under the

law. Similarly, in *Sadler v. Rexair, Inc.*, 612 F. Supp. 491 (D.Mont. 1985), the court held that the plaintiff could not salvage a defective complaint alleging a conspiracy under 15 U.S.C. §1 between a corporation and its own subsidiary, by adding unidentified "other debtors" as co-conspirators, because the complaint would not give the new defendants fair notice of the plaintiff's claim. Numerous cases have held that general allegations of conspiracy without underlying facts do not state a cause of action under 15 U.S.C. §1, because these allegations amount to mere legal conclusions. *See, Nelson*, supra.; *C. R. Bard, Inc. v. Medical Electronics Corp.*, 529 F. Supp. 1382 (D.Mass. 1982); *Vermilion Foam Products Co. v. General Electric Co.*, 386 F. Supp. 255 (E.D.Mich. 1974); *Bougeois v. A. B. Dick Co.*, 386 F. Supp. 1094 (E.D.La. 1974), *aff'd*, 507 F.2d 1278 (5th Cir. 1975).

In the case at bar, the allegation of conspiracy to monopolize is particularly meaningless. It is made in the context of the newspaper industry, in which the market forces may not be conducive to supporting more than one newspaper in a given market. *Citizen Publishing Co. v. U. S.*, 394 U.S. 131 (1969); *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125, 129 (D.Mass. 1959), *aff'd*, 284 F.2d 582, *cert. denied*, 365 U.S. 833 (1961); *U.S. v. Harte-Hanks Newspapers, Inc.*, 170 F. Supp. 227, 228 (N.D. Tex. 1959). Hence, either the plaintiff must plead facts with particularity or suffer a dismissal.

In subparagraph (d) the Complaint alleges that defendants have "denied plaintiff equal access to and foreclosed it from marketing Plaintiff Newspaper." There is no indication as to how ABC denied or foreclosed the market to the plaintiff.

Subparagraph (e) seems to indicate that ABC has disparaged Plaintiff Newspaper by creating the impression that Plaintiff Newspaper "was a radical newspaper that fostered disunity in the vernacular community." By itself, or in conjunction with the remainder of the Complaint, this allegation does not factually state a cause of action for violation of antitrust laws. If the plaintiff intends this allegation as factual support for a claim of trade libel, it is deficient in the details that are required for such allegations. *See,* the discussion of trade libel count, *infra.*

The Complaint further alleges, in subparagraph (f), that ABC has induced "customers to refrain from purchasing space or placing advertisements in Plaintiff Newspaper . . . ." There are no named customers, and as a matter of fact, there are no such customers known to ABC, who have been induced as alleged by the plaintiff. ABC cannot respond to this allegation as stated because it is completely devoid of any factual basis.

Subparagraph (g) complains of ABC causing "third persons" to not ent into or continue business relations with plaintiff. This subparagraph is as vag and lacking in informative value as all the preceding allegations.

The allegations of subparagraphs (h) through (l) recite the only actu incident on which this Complaint could be based. This incident concerns t efforts of defendant Dean Doe to prevent sabotaging of the circulation Defendant's Newspaper by the plaintiff. In fact, it was the plaintiff who ha been persistently trying to palm-off its newspaper in the Defendant Newsp per's racks. Be that as it may, alleging a solitary incident does not, as a matter law, amount to antitrust and RICO violations. Unless there is reason to pro erly allege these violations, the plaintiff should not be permitted to drag AB into a complex, protracted, and expensive litigation.

In subparagraph (m), the plaintiff claims that ABC has harmed the plai tiff by threatening "filing of frivolous lawsuits" and has, thus, caused the plai tiff to cease business operations. The plaintiff cannot plead this with specificit for to do so would disclose to the court that the "threat" was made by ABC corporate counsel. The counsel advised plaintiff that if the plaintiff did n cease using ABC's newspaper racks, ABC would have no alternative but to fi suit. The plaintiff has neither alleged nor can it allege how any lawsuit ev "threatened" was "frivolous." Additionally, the causal connection between t alleged threats and the injury complained of (collapse of business) is so tenuo as to beg the imposition of Rule 11 sanctions.

The final allegation in this paragraph, subparagraph (n), implies that d fendant ABC destroyed Plaintiff Newspaper "by means of agreements with t co-defendant and co-conspirators to sabotage, coerce, and intimidate . . . This provides no notice as to either the content of these agreements or t identity of the co-conspirators. These are just more vague, conclusory stat ments that fail to provide notice of any wrongdoing.

It appears on first impression that the Complaint has successfully stated complex series of causes of action. In fact, however, several attempts to r spond have left ABC at a loss as to which antitrust violation was being claim and what factual basis of wrongdoing ABC was required to defend. I *H.R.M.*, supra, at 647, the court held that an alleged conspiracy with so named entities and "others" was too vague and did not give the defendant fa notice about the factual basis of a claim. The Complaint in the case at b appears to be very similar to the complaint in *H.R.M.* It follows the boilerpla language for alleging a conspiracy, but fails to add any substance to its alleg tions.

Paragraphs 20 through 25 of the Complaint are similarly bare and conclusory statements of antitrust law with ABC's name thrown in to introduce some semblance of stating a cause of action. These paragraphs also fail to state a cause of action.

While purportedly stating a cause of action under the Sherman Act, Count I of the Complaint fails to allege any cause of action, in fact or under the law. Antitrust laws are for the protection of competition, not for redress of every real or illusory grievance by a competitor. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, at 488 (1977). ABC cannot respond to the Complaint because it contains nothing but conclusory statements of antitrust law. The general trend of judicial thought regarding such "antitrust" complaints was well summed by the court in *H.R.M.*, supra. The court noted that antitrust complaints were liberally construed, but "conclusory allegations which merely recite the litany of antitrust will not suffice. This court retains the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." 653 F. Supp. at 647.

(To be continued)

[Appellant] contends that the order of dismissal should be reversed because the district court did not follow proper procedure when it dismissed his complaint. In support of this claim, he argues that the district court did not apply the appropriate standard in its consideration of the motion to dismiss. Appellant correctly states that when considering a motion to dismiss, the court must accept all allegations of fact as true and should only dismiss when it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proven in support of his claim. *Holt Civic Club v. City of Tuscaloosa,* 439 U.S. 60, 65-66, 99 S.Ct. 383, 387-388, 58 L.Ed.2d 292 (1978). But, in this case, even when all of appellant's factual allegations are accepted as true, [Appellant] would not be entitled to relief unless the court adopts his asserted interpretation of the savings clause. However, the statutory interpretation issues raised by appellant are questions of law. The district court is not required to accept as true appellant's conclusions of law when considering a Rule 12(b)(6) motion to dismiss. *Associated Builders, Inc. v. Alabama Power Co.,* 505 F.2d 97, 100 (5th Cir. 1974).

Solis-Ramirez v. U.S. Dept. of Justice,
758 F.2d 1426, 1429 (11th Cir. 1985)

Help Commercial Lend Avoid Forfeiture Litiga

Sheldon M. Finklestein

What you don't know can hurt you.

THE CONCEPT of forfeiture dates back to the Bible. It may more commonly be remembered from high school American history courses as England's notorious tax enfo tool against the colonies: The tion Act of 1660. History r pears to be repeating itself.

Sheldon M. Finklestein is a partner with Hannoch Weisman, of Nev