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ANTITRUST LAW

'Bell Atlantic v. Twombly'

IT HAS LONG BEEN established that a plaintiff seeking to prove the existence of a collusive agreement violating § 1 of the Sherman Act must provide evidence of more than just parallel conduct by the defendants. Absent actual evidence of certain "plus factors" that tend to exclude the possibility that each company engaged in the challenged conduct based on unilateral decision-making, defendants are entitled to summary judgment. See, e.g., *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The standards applicable at the pleading stage, however, have been less clear. Are allegations of parallel conduct by the defendants, coupled with a simple allegation that the plaintiff believes the parallel conduct was the result of an agreement among the defendants, sufficient to provide a "short and plain statement of the claim" under Fed. R. Civ. P. 8? On May 21, the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), answered "no" to this question and, in the process, rendered a decision that will likely become hornbook law not only with respect to the standards for pleading a § 1 claim, but also with respect to pleading many other types of complex commercial causes of action.

Case arose over regional Bell operating companies

Twombly arose against the backdrop of the break-up of AT&T in 1982 and the enactment of the Telecommunications Act of 1996. The

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break-up resulted in a system of regional Bell operating companies, referred to by the court as incumbent local exchanges carriers (ILECs), which obtained regional local

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phone service monopolies. The ILECs were barred from providing long-distance services to customers, and, under the legal regime that followed, competitors in the long-distance market, such as AT&T, MCI and Sprint, could not provide local service.

The Telecommunications Act of 1996 fundamentally restructured these markets. It ended the sanctioned regional monopolies held by the ILECs, opening local service to competition from long- distance providers as well as ILECs from a different region, and permitted ILECs to expand their business into long-distance service. In an effort to stimulate local competition, the act required each ILEC to share its local network with competitors seeking to provide local service, in return for reasonable wholesale rates. According to the complaint in *Twombly*, however, the ILECs were not quick to enter into one another's regions to offer local service. Additionally, the ILECs resisted efforts by competitors to market local service in their territories, and vigorously litigated the scope of their obligations under the act to share their local networks.

The *Twombly* action was brought against four ILECs on behalf of a putative class of consumers of local phone and high-speed Internet services. The plaintiffs alleged that the ILECs had violated § 1 by engaging in conduct, in a parallel fashion and out of a "common motivation," that inhibited the growth of rival local service providers; and by agreeing not to compete in each other's service areas. The complaint did not contain any factual basis for the alleged agreement not to compete in each other's service areas, or the specifics of how, when or where the defendants entered into such an agreement. While the complaint contained some factual detail on the parallel efforts by the defendants to resist entry in their own service areas by

competitors, the allegations of "agreement" were essentially conclusory.

The district court granted the motion to dismiss for failure to allege properly an unlawful agreement, but the 2d U.S. Circuit Court of Appeals reversed, holding, inter alia, that the complaint satisfied the flexible pleading standards set forth in *Conley v. Gibson*, 355 U.S. 41 (1957). The Supreme Court reversed the 2d Circuit and granted the motion to dismiss. In considering the proper standard for evaluating a § 1 claim on a motion to dismiss, the court held that, to avoid dismissal, the complaint must include "enough factual matter (taken as true) to suggest that an agreement was made." In other words, enough facts must be pleaded to create "plausible grounds to infer an agreement" and, specifically, "to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Factual allegations that fail to raise the inference "above the speculative" level, are insufficient.

The court then held that factual allegations of parallel conduct, coupled with a conclusory assertion of the existence of an agreement, were inadequate to state a claim for relief under § 1. It noted that the plaintiffs' allegations of parallel conduct were consistent with perfectly lawful unilateral conduct by the ILECs, and thus failed to raise a plausible suggestion of a conspiracy. It further stated that if "decisions to resist competition were enough to imply an antitrust conspiracy, pleading a §1 violation against almost any group of competing businesses would be a sure thing."

The court also stressed that the need to expose deficiencies at the pleading stage was driven in part by the "enormous" costs of discovery in modern antitrust litigation. Indeed, such costs could allow a plaintiff to sue based on a largely groundless claim, secure in the knowledge that the defendants would likely pay significant settlement amounts merely to avoid the high defense costs. The court found no comfort in suggestions that "careful case management" could help weed out baseless cases without imposing full discovery burdens on defendants, noting that judicial success in curbing discovery abuses has been limited.

In addressing the plaintiffs' argument that their complaint was adequate under the long-cited *Conley* standard—that a complaint will survive a motion to dismiss "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"—the court made new law that is sure to be cited in defendants' briefs for years to come in all areas of commercial litigation. The court stated that *Conley*'s "no set of facts" language had frequently been criticized by lower courts and concluded that this phrase had "earned its retirement" and was "best forgotten as an incomplete, negative gloss on an accepted pleading standard." The court explained that the *Conley* standard, properly understood, merely described "the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."

Perhaps unsurprisingly given the breadth of the holding, the court did not provide much detail as to what quantum of facts is required to "nudge [a] claim across the line from the [merely] conceivable" to "plausible," and thus provided incomplete guidance to lower courts. It will likely take time for a consensus to emerge on how to implement *Twombly*. The court was clear that detailed factual allegations are not required, reaffirming its prior holdings that the courts should not adopt particularized pleading requirements where they are not authorized by the Federal Rules of Civil Procedure. See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U. S. 506 (2002).

Decision marks a major shift in pleading standards

Twombly is a landmark decision that may represent one of the most significant pronouncements on pleading by the Supreme Court in the past half-century. It marks a clear and visible departure from the liberal federal pleading standards. *Twombly* underscores the court's sensitivity to the high costs of discovery in modern commercial litigation, and the need to evaluate the viability of claims before substantial discovery costs are incurred.

The practical impact of *Twombly* will likely be significant, especially in § 1 cases in which the plaintiffs have no direct evidence of an agreement. Federal courts will be more receptive to defendants' motions to dismiss at the pleading stage. Because the details of conspiracies are frequently solely in the hands of the defendants (or government investigators), *Twombly* poses a fundamental and strategic challenge to plaintiffs seeking to bring claims based on suspicions—but no concrete facts—of an unlawful agreement among the defendants. Indeed, given the increasing frequency of "follow-on" litigation by class action plaintiffs that know little more than the existence of a U.S. Department of Justice investigation, one issue that may arise is whether the mere existence of a government investigation—or a publicly announced plea agreement—can be sufficient (along with parallel conduct) to make conspiracy allegations against multiple defendants "plausible." It seems hard to believe that a court would allow the mere receipt of a government subpoena to constitute enough to make conspiracy allegations "plausible," but courts may be reluctant to dismiss claims outright against parties that are under government investigation.

Moreover, *Twombly*'s significance is not limited to antitrust claims. While much of the court's reasoning relates to antitrust litigation, the standard itself is described by the court merely as the application of Fed. R. Civ. P. 8. Indeed, it seems likely that its standards will become the new guideposts used by federal courts in evaluating motions to dismiss in all types of commercial litigation.

Regardless of how *Twombly* is applied in practice, one thing is clear: Defendants in complex federal cases, especially antitrust actions, now have an important new precedent behind them when they seek to dismiss complaints. Those motions will be particularly strong when the plaintiff's complaint relies upon a mere recitation of the elements of the cause of action, accompanied by factual allegations that are as consistent with lawful conduct as unlawful conduct. NLJ

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