

Supreme Court Clarifies Pleading Standards For Antitrust and Other Claims

Expressing concern for the plight of corporate defendants faced with expensive litigation based upon ambiguous evidence, on May 21 in *Bell Atlantic Corp. v. Twombly*, the Supreme Court tightened the standards for pleading an agreement or conspiracy under section 1 of the Sherman Act. The Court did so, however, in a way that will have broader application to many commercial claims.

The Claims in *Twombly*

Plaintiffs in *Twombly* alleged that Bell Atlantic (now Verizon) and other incumbent local telephone carriers (three former regional “Baby Bell” companies) conspired to restrain trade: (1) by engaging in parallel conduct in their respective service areas to inhibit growth of competitive carriers, and (2) by agreeing to refrain from competing against one another in or outside of each other’s territory.

It has long been the law in antitrust conspiracy cases that evidence of parallel business behavior is admissible but not sufficient to prove the element of agreement. Something more — which courts have referred to as “plus factors” — is needed. What was not so clear, however, was the degree of detail that a plaintiff needed to allege in order to survive a motion to dismiss and try to develop its case in discovery.

The district court granted defendants’ motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, because plaintiffs did not allege at least one “plus factor,”

such as evidence that the parallel behavior would have been against individual defendants’ economic interests absent an agreement, or that defendants possessed a strong common motive to conspire. The Second Circuit reversed, holding that “plus factors” need not be pleaded to permit an antitrust claim based on parallel conduct to survive a motion to dismiss. The court of appeals relied on the Supreme Court’s 1957 opinion in *Conley v. Gibson* (a labor case), in ruling that to dismiss a claim involving parallel anticompetitive conduct, “a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.”

The Standard for Pleading in Federal Court

The plaintiffs in *Twombly* argued that under Fed.R.Civ.P. 8(a)(2) only “a short and plain statement of the claim showing that the pleader is entitled to relief” is necessary in order to “give the defendants fair notice of what the... claim is and the grounds upon which it rests.” Justice Souter took some care to reconcile the Court’s holding with that provision in Rule 8. First, he observed that it “requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.” Next he opined that “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.” The “plain statement” required by

Rule 8 must “possess enough heft to show that the pleader is entitled to relief,” which means that “factual allegations must be enough to raise a right to relief above the speculative level.”

As Justice Souter summarized the Court’s holding, “we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.” He also contrasted the need for the complaint “*in toto* to render plaintiffs’ entitlement to relief plausible” with the requirement of Rule 9 that certain allegations be particularized.

Conley v. Gibson Put to Rest

Sensitive to the fact that conspirators usually hide their actions, for years many courts have been sympathetic to a plaintiff’s inability to allege supporting facts before the opportunity to take discovery. Paying lip service to its oft-cited statement in *Poller v. Columbia Broadcasting System* from 1962, the Court stated that “it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery... but quite another to forget that proceeding to antitrust discovery can be expensive.” Indeed, Justice Souter noted, “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [discovery or summary judgment].” Corporations will be glad to hear that the Supreme Court feels their pain. Interestingly, the Court dismissed the argument of the dissent that questionable claims could be weeded out through careful case management, noting the courts’ lack of success in checking discovery abuse.

The Court then laid to rest the famous *Conley v. Gibson* pleading standard, the most far-reaching aspect of the *Twombly* opinion. The “no set of facts” language from *Conley*

has been cited in literally hundreds of court opinions and even more plaintiffs’ briefs. The Court declared that “after puzzling the profession for 50 years, this famous observation has earned its retirement.” It is not enough that a claim be “conceivable,” it must be plausible.

Pleading an Antitrust Agreement

A claim under section 1 of the Sherman Act requires a tacit, if not express, agreement or meeting of the minds. Applying the general points reviewed above, the Court held that a complaint must have “enough factual matter (taken as true) to suggest that an agreement was made” or “enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.” There must be “plausible” grounds to infer an agreement, though not a probability.

The Court explained that “it is time to take a fresh look at adequacy of pleading when a claim rests on parallel action.” First it noted that parallel conduct without more is “consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.” Therefore, to make out a section 1 claim, such allegations “must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.”

The Court seemed almost deliberately vague as to what additional facts or circumstances might be enough to point towards a “meeting of the minds.” The Supreme Court did not use the term “plus factors” but it did refer to parallel behavior “that would probably not result from chance, coincidence, independent responses to common stimuli, or mere inter-

dependence unaided by advance understanding among the parties.”

The majority concluded that nothing in the *Twombly* complaint “invests either the action or inaction alleged with a plausible suggestion of conspiracy.” It reasoned that the resistance of the incumbent carriers to the “upstarts” was nothing more than “routine market conduct” and that “there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway....” Turning to the allegation that the incumbent carriers agreed not to compete with each other or enter each other’s territories, the Court readily adopted the “natural explanation

for the non-competition” that the “former government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.”

Ramifications for the Future

Twombly should make it harder for antitrust plaintiffs to allege a section 1 claim that will pass muster on a motion to dismiss, and should encourage judges in antitrust and other commercial cases to be less willing to give a plaintiff the benefit of the doubt that discovery will reveal evidence of a claim. There will still be room, however, for litigation and creative lawyering as to when a pleading crosses the line from possible to plausible.

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