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ALERT

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The Supreme Court Raises the Bar for Antitrust (and Perhaps Other) Plaintiffs

Corporate antitrust defendants routinely spend millions of dollars fighting unsubstantiated allegations of illegal conduct. Using a bare bones complaint to launch the case, plaintiffs can then fish for evidence by engaging in massive, no holds barred electronic and other discovery. After discovery these cases often settle, for many millions of dollars more, as companies opt to put the litigation behind them — despite very little to suggest they did anything wrong — rather than face the risk of treble damages and joint and several liability. Recently, the United States Supreme Court handed these antitrust defendants a significant victory.

In *Bell Atlantic Corp. v. Twombly*, No. 05-1126, slip op. (U.S. May 21, 2007), the Court, in a 7-2 decision, "retire[d]" the dicta from an earlier decision, *Conley v. Gibson*, used by countless plaintiffs' lawyers and lower courts to escape motions to dismiss. The Supreme Court in *Conley* said that a motion to dismiss should be denied unless there is "no set of facts" under which the plaintiff could recover. This confusing language permitted hundreds of cases to move forward into costly discovery, which lasted months or even years, as the plaintiffs looked for a few documents or facts to use to try to escape summary judgment. Under the standard articulated this month in *Twombly*, however, the "no set of facts" standard has been jettisoned. Now, a plaintiff must plead facts at the outset, in the complaint, and those facts must "plausibly suggest[] (not merely [be] consistent with)" an illegal agreement.

In abandoning *Conley*, and adopting a new "plausibility standard" for judicial review of a plaintiff's allegations, the Court expressly recognized the substantial discovery burdens faced by defendants in antitrust and other complex cases. It also acknowledged the *in terrorem* settlement leverage these discovery costs give plaintiffs — observing that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." The Court concluded that requiring a plaintiff to plead facts establishing a "plausible" basis for the claims is the only way "to avoid the potentially enormous expense of discovery" in cases that have no "founded hope" of ultimate success. Thus, the Court said, a complaint must contain "enough factual matter … to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement."

Under this new standard, "factually neutral" allegations, *i.e.* allegations of conduct as consistent with legitimate and independent business judgment as with an illegal conduct, do not state a claim. Thus, simply alleging meetings among competitors and some seemingly parallel conduct will not suffice. Rather, a complaint must allege facts that cross "the line between the conclusory and the factual" and beween "the factually neutral and the factually suggestive." By way of example, the Court observed that pleading facts that revealed "historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason" would be "suggestive" of illegal conduct and thus would satisfy the new plausibility standard.

The plaintiffs in *Twombly*, however, failed to meet this standard. In *Twombly*, two customers of the so-called Baby Bells, or Incumbent Local Exchange Carriers (ILECs), filed a putative class action suit alleging the ILECs had artificially maintained high prices and market power in violation of § 1 of the Sherman Act by agreeing not to compete against other ILECs and to exclude Competitive Local Exchange Carriers (CLECs) from their areas. The plaintiffs alleged the ILECs conspired in two ways: (1) by engaging in parallel conduct designed to exclude CLECs from competing, and (2) by failing to compete with each other in contiguous markets. Plaintiffs claimed the ILECs failure to compete with each other "would be anomalous in the absence of an agreement among the [defendants]."

The district court dismissed the complaint, holding the Baby Bells' actions made independent economic sense, even in the absence of an agreement, and that the plaintiffs failed to offer additional information (or "plus-factors") tending to exclude the possibility of unilateral action. The Second Circuit reversed, however, on the grounds that the district court was improperly imposing a "heightened pleading standard."

The Supreme Court reversed the Second Circuit, observing that "the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies, [and] the complaint [] furnishe[d] no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place." Absent such factual detail, a "defendant wishing to prepare an answer ... would have little idea where to begin" and would have no notice of the plaintiffs' true claim even under the liberal language of Federal Rule of Civil Procedure 8, governing the sufficiency of pleadings.

In sum, *Twombly* raises key questions for future litigants and courts — in antitrust and other cases — regarding precisely what types of facts must be alleged for a complaint to satisfy the plausibility standard it articulates. It seems clear, though, that the Supreme Court's rejection of *Conley* and adoption of new, stricter pleading requirements will give new vigor to motions to dismiss under Rule 12(b)(6). Further, the Court's expressed concern about the burdens and costs of discovery, and the settlement leverage that litigation expense gives plaintiffs, may send a message to lower courts that plaintiffs' need for discovery must be carefully balanced against — and limited by — the plausibility of their claims for relief.

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