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Bell Atlantic v. Twombly:

Supreme Court Tightens Standards for Pleading Antitrust Conspiracies

The United States Supreme Court's decision yesterday in *Bell Atlantic Corp. v. Twombly* imposes a strict standard for antitrust complaints that rely on allegations of parallel conduct to satisfy the element of conspiracy or agreement. In a 7-2 decision, the Court held that the inference of agreement must be "plausible"; so long as the parallel behavior is consistent with independent action, the complaint is subject to dismissal for failure to state a claim upon which relief may be granted. *Bell Atlantic Corp. v. Twombly*, No. 05-1126 (May 21, 2007).

In *Twombly*, the essence of the complaint was the contention that the "Baby Bells" had acted in parallel in avoiding entering each others' territories and in resisting new entrants' efforts to enter their respective territories. The District Court granted the defendants' motion to dismiss, ruling that the plaintiffs had not pleaded facts that would suggest the "defendants are acting pursuant to a mutual agreement rather than their own individual self-interest." The Second Circuit reversed, holding that a motion to dismiss should be granted only if the court concludes that "there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted with the product of collusion rather than coincidence."

The Supreme Court reversed, holding that stating a Section 1 claim

requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

In this case, the complaint did not include facts that made the inference of conspiracy "plausible"; the Court identified various reasons why the challenged conduct could have been in each defendant's independent interest. The Court (as had the district court) relied on economic theory and industry history to make its own assessment of whether an inference of agreement was "plausible."

In reaching this holding, the Court adopted a new reading of *Conley v. Gibson*, an early pleading case often cited for the proposition 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" that would entitle him to relief. 355 U.S. 41, 45-46 (1957). The *Twombly* Court reads *Conley* as applying to what a plaintiff could do to prove adequate complaint claims, rather than as setting forth a pleading standard.

Justice Stevens (joined in part by Justice Ginsburg) dissented, writing that the Court was essentially imposing a summary judgment standard at the pleading stage. He disagreed with this approach both because proof of conspiracy is often hard to come by without access to the alleged conspirators themselves and because Congress intended there to be vigorous private enforcement of the antitrust laws. He wrote, "It is therefore more, not less, important in antitrust cases to resist the urge to engage in armchair economics at the pleading stage."

In some respects, the Court's decision is a narrow one. It is narrow to the extent that, as far as antitrust goes, it applies only to Section 1 complaints that rely entirely on parallel conduct to support the conspiracy element of the claim. Most such cases are price-fixing and market division cases that are brought without the benefit of a government indictment setting out direct evidence of conspiracy. Complaints containing direct evidence of conspiracy, such as those based on contracts (e.g., cases challenging distribution methods, like exclusive distributorships, tying, and exclusive territories), will not be affected. Nor will cases challenging unilateral conduct under Section 2.

In other respects, however, *Twombly* is potentially a very broad ruling because the Court's decision was influenced by its perceptions of the costs of discovery. The majority viewed these costs as very high and was dismissive of trial courts' ability to manage the discovery process effectively. These concerns are equally applicable to a variety of cases, including, for example, RICO and securities fraud cases. Whether the *Twombly* approach to complaints will spread beyond Section 1 cases remains to be seen, but in the short run, it will certainly require that plaintiffs relying on parallel conduct include more facts and economic theory in their complaints.

If you have any questions regarding the foregoing, please feel free to contact one of the attorneys listed below.

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