SUPREME COURT CLARIFIES ANTITRUST PLEADING STANDARDS

The Supreme Court's May 21, 2007 opinion in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), addressed a hotly contested issue—the standard for deciding a motion to dismiss in antitrust cases. The Court clarified the pleading standard, explaining that a complaint must allege facts supporting a "plausible" claim to relief. In so doing, the Court rejected both an interpretation of *Conley v. Gibson* that suggested a lesser showing is sufficient and the proposition that such procedural devices as phased discovery are adequate protection against conclusory claims. The Court, with Justice Souter writing for a 7-2 majority, reversed the Second Circuit and ruled that the complaint should have been dismissed for failure to allege facts that demonstrate a "claim to relief that is plausible on its face." *Id.* at 1974. While *Twombly* involved a complaint alleging an antitrust violation through parallel conduct, the Court's guidance in *Twombly* may well apply to a broader range of civil cases.

Decision

Twombly arose from the widespread changes in the telecommunications industry that were mandated by the Telecommunications Act of 1996 which, among other things, required the "Baby Bells," or the "Incumbent Local Exchange Carriers" (ILECs), to share their regional telephone networks with competitors, known as "Competitive Local Exchange Carriers" (CLECs). The CLECs sought to use the existing ILEC networks by purchasing local telephone services from ILECs, leasing portions of ILEC networks, or interconnecting their own facilities with ILEC networks. Plaintiffs alleged that ILECs engaged in parallel conduct to slow the growth of CLECs through unfair access agreements, inferior network connections, and improper billing practices and that the ILECs agreed to refrain from competing among themselves.

The U.S. District Court for the Southern District of New York granted the defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted. While the complaint contained allegations of parallel conduct, the District Court held that such allegations are alone insufficient and that plaintiffs must plead additional facts that "tend to exclude independent self-interested conduct." *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003). The U.S. Court of Appeals for the Second Circuit relied on *Conley* and reversed the dismissal, finding that, to dismiss a complaint alleging an antitrust conspiracy through parallel conduct, a court must 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." *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005).

The Supreme Court "granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1963 (2007). Noting that parallel conduct may allow a fact-finder to infer the existence of the "agreement" necessary for a conspiracy, "it falls short of conclusively establishing agreement or itself constituting a Sherman Act offense." *Id.* at 1964. That is so, the Court explained,

because parallel conduct is consistent with "a wide swath of rational and competitive business strategy." *Id.* at 1964. The Court held that an antitrust plaintiff must plead "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 1965.

The Court explained that its earlier guidance "to be cautious before dismissing an antitrust complaint in advance of discovery" did not require a court to close its eyes to the potentially enormous discovery costs that are inherent in antitrust actions. *Id.* at 1966. Attempts to avoid such expense through case management and summary judgment proceedings, the Court noted, are difficult and frequently ineffective. The Supreme Court thus held that "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support a § 1 claim." *Id.* at 1967 (internal quotation marks omitted).

The Court also addressed its earlier decision in *Conley v. Gibson*, which has been extensively quoted for its language 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 which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Citing to numerous opinions and journal articles critical of a literal reading of the *Conley* passage, the Court stated that "*Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough." *Twombly*, 127 S. Ct. at 1969. Without explicitly overruling that portion of *Conley*, the Court granted "retirement" to the "no set of facts" statement in *Conley*, advising that it was "best forgotten" as an incomplete "gloss" on the accepted pleading standard. *Id*.

Addressing the complaint filed by the *Twombly* plaintiffs, the Court looked for a plausible conspiracy in violation of § 1, and found none. The allegations in support of parallel conduct were equally consistent with self-interested business decisions, and therefore did not plausibly suggest an antitrust conspiracy. The complaint did not plead "enough facts to state a claim to relief that is plausible on its face" and plaintiffs therefore failed to "nudge[] their claims across the line from conceivable to plausible." *Id.* at 1974. The Court held that the complaint must be dismissed for failure to state a Sherman Act claim.

Conclusion

Twombly is an antitrust case, but its holding has important ramifications for civil litigation more broadly. By enunciating a standard requiring complaints to demonstrate a "plausible" entitlement to relief at the motion to dismiss stage, the Court has clarified that conclusory allegations void of a factual foundation will not permit a plaintiff discovery.

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