SIMPSON
THACHER

Bell Atlantic Corp. v. Twombly: Raising the Bar for Pleadings by Antitrust Plaintiffs

May 22, 2007

The Supreme Court yesterday raised the bar for pleading antitrust conspiracy claims, providing welcome relief to defendants faced with the prospect of incurring substantial discovery costs to defend spurious claims. In its decision in *Bell Atlantic Corp., v. Twombly*, the Court held that allegations of parallel conduct are not sufficient to sustain an antitrust conspiracy claim; plaintiffs must allege facts to place the parallel conduct "in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. " In articulating this new standard, the Court explicitly disowned a more liberal pleading standard that plaintiffs have relied on for the past 50 years. That liberal standard (announced by the Court in 1957 in *Conley v. Gibson)* permitted cases to proceed 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 declared yesterday that, "after puzzling the profession for 50 years, this famous observation has earned its retirement." The *Twombly* decision will likely have wide effect, increasing pleading requirements in many areas of the law and providing further authority for lower courts to consider the substantial expense and burden of discovery in reviewing the sufficiency of complaints.

BACKGROUND

In *Twombly*, telephone service consumers alleged that Bell Atlantic, BellSouth, Qwest, SBC, and Verizon agreed not to compete with each other for local telephone and high-speed Internet service, and prevented competitors from entering those markets in violation of the Sherman Act. The Telecommunications Act of 1996 ("Telecomm Act") required the defendants to open their local telephone service monopolies to competition, which included allowing competitors to connect to their networks and purchase services wholesale.

The plaintiffs alleged two principal restraints. First, plaintiffs alleged that the defendants engaged in parallel behavior to prevent new competitors from successfully entering the market. Specifically, plaintiffs claimed that each defendant provided poor quality network connections, interfered with customer relationships, and delayed or refused to negotiate with new competitors in good faith.

Second, plaintiffs alleged that the defendants agreed not to compete directly against one another. As factual support for this claim, plaintiffs pointed to the Telecomm Act's expectation of competition among defendants and defendants' failure to actually engage in the expected competition.

The district court concluded that the plaintiffs' allegations did not contain facts sufficient to support a finding of conspiracy. Acknowledging that parallel behavior alone cannot support a Section 1 conspiracy claim, the district court stated that the plaintiffs must plead one or more "plus factors," i.e., factual allegations that would tend to exclude independent, self-interested conduct as an explanation for the parallel behavior. The Second Circuit reversed, holding that the plaintiffs were

not required to plead plus factors. Instead, the Second Circuit held that the plaintiffs need only plead facts that "include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss." Importantly, the Second Circuit stated that, in order to dismiss a conspiracy claim based on an allegation of parallel behavior, "a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism was the product of collusion rather than coincidence."

SUMMARY OF THE DECISION

In a 7-2 decision, the Supreme Court reversed the Second Circuit and held that a Sherman Act Section 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." In an opinion by Justice Souter, the Court stated that an allegation that defendants have engaged in parallel behavior is similar to a naked allegation that defendants have engaged in a contract, combination, or conspiracy in violation of Section 1 of the Sherman Act. But, "without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitlement to relief.'"

The Court further explained that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice . . . and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." At the very least, a complaint alleging parallel conduct must provide "some setting suggesting the agreement necessary to make out a § 1 claim." The Court then turned to the language of *Conley v. Gibson* suggesting a complaint may not be dismissed under Rule 12(b)(6) unless a plaintiff "can prove no set of facts in support of his claim." The Court explained that this statement has been, in many instances, divorced from its context and read to require that a complaint may go forward as long as it contains some statement of the theory of the claim and unless the "factual impossibility" of the claim is evident on the face of the complaint. To avoid any future uncertainty, the Court disowned the phrase as "best forgotten."

Applying its newly articulated standards to the facts of *Twombly,* the Court concluded that the plaintiffs had not alleged any facts that would tend to exclude the possibility that each defendant had engaged in the challenged conduct independently. With respect to the defendants' alleged parallel behavior that interfered with plaintiffs' ability to compete, the Court noted that "resisting competition is routine market conduct, and even if [defendants did what plaintiffs alleged], there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway." With respect to the alleged agreement not to compete, the Court noted that there was "an obvious alternative explanation" for defendants' failure to compete: the defendant former monopolies were sitting tight, expecting their neighbors to do the same thing and that it was in their individual economic interests to do so.

Finally, it is apparent that a concern regarding the high cost of discovery in antitrust suits animated the Court's decision in *Twombly*. The Court discussed at unusual length the problems in allowing "largely groundless" claims to proceed to discovery, citing numerous decisions, commentaries, and studies that have recognized the burden imposed by the high cost of "allowing a potentially massive

factual controversy to proceed." The Court noted that this burden has an *in terrorem* effect, often compelling defendants to settle even weak claims.

IMPLICATIONS

Twombly is consistent with recent Supreme Court decisions that have imposed higher hurdles for antitrust plaintiffs. As a practical matter, the Court's decision in *Twombly* provides a much-needed clarification to the pleading standard for plaintiffs asserting a violation of Section 1 of the Sherman Act. *Twombly* provides clear and forceful authority for lower courts to dismiss complaints that state only conclusory allegations of conspiracy. Of course, it can be expected that plaintiffs will adapt to the *Twombly* standard for conspiracy pleadings by setting forth numerous factual allegations. However, the *Twombly* decision is clear that such allegations must set forth a plausible factual predicate for a conspiracy claim.

Although the standard announced in *Twombly* applies specifically to claims raised under Section 1 of the Sherman Act, it is likely that the decision will have an effect on claims raised in other contexts. The Court's decision fifty years ago in *Conley v. Gibson*, discussed at length by the *Twombly* Court, related to the pleading standard under Federal Rule of Civil Procedure 8(a)(2) in a case involving the Railway Labor Act. Because the *Twombly* decision effectively abrogates the oft-quoted standard in *Conley*, it is apparent that future plaintiffs raising other types of claims will face closer scrutiny of the factual allegations underpinning their complaints.

For further information, please feel free to contact members of the Firm's Antitrust Practice Group, including:

New York City:

Kevin Arquit (212-455-7680, karquit@stblaw.com)

Ken Logan (212-455-2650, klogan@stblaw.com)

Joe Tringali (212-455-3840, jtringali@stblaw.com)

Mark Cunha (212-455-3475, mcunha@stblaw.com)

Joe Wayland (212-455-3203, jwayland@stblaw.com)

Aimee Goldstein (212-455-7681, agoldstein@stblaw.com)

Washington, D.C.:

Peter Thomas (202-220-7735, pthomas@stblaw.com)

Arman Oruc (202-220-7799, aoruc@stblaw.com)

London:

David Vann (44-20-7275-6550, dvann@stblaw.com)