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Client Alert

Antitrust

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Supreme Court Decision Signals a Major Victory for Antitrust Defendants in a Variety of Industries

On May 21, 2007, the Supreme Court issued its decision in *Bell Atlantic Corp. v. Twombly*, holding that an antitrust complaint alleging parallel conduct cannot survive a motion to dismiss unless the plaintiff provides "enough factual matter (taken as true) to suggest that an agreement is made." It is no longer enough simply to identify parallel conduct which may be the result of independent decision-making and claim that the conduct resulted from a conspiracy which will be proved later; instead, a plaintiff must, in its complaint provide allegations "plausibly suggesting (not merely consistent with) agreement." *Twombly* is an important decision that will significantly narrow the range of multi-firm conduct that can form the basis for an antitrust complaint under Section 1 of the Sherman Act.

Twombly arose in the context of a lawsuit against several large telecommunications providers. The Telecommunications Act of 1996 requires regional telecommunications monopolies, known as incumbent local exchange carriers (ILECs), to share their local telephone markets and networks with long-distance carriers, known as competitive local exchange carriers (CLECs). Plaintiffs, a putative class consisting of "90 percent of all subscribers to local telephone and high-speed Internet service in the continental United States," sued a group of ILECs alleging that they engaged in a "combination" or "conspiracy" in restraint of trade in violation of Section 1 of the Sherman Act. Plaintiffs claimed that the ILECs engaged in a "parallel course of conduct" to "prevent competition from CLECs," agreed not to compete against one another, and conspired to prevent competitive entry into their markets. The Supreme Court granted certiorari to decide whether these allegations survive a motion to dismiss.

By a vote of 7-2, the Court held that to survive a motion to dismiss, a Section 1 complaint must allege "enough factual matter (taken as true) to suggest that an agreement was made." A complaint's allegations must go beyond "labels" and "conclusions" that an agreement existed, raising instead "a right to relief above the speculative level." It must provide "plausible grounds to infer an agreement" and create "a reasonable expectation that discovery will reveal evidence of illegal agreement"—not just be "consistent with" agreement. Therefore, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice"; the allegations "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct." On these standards plaintiffs' complaint alleging parallel conduct and making conclusory assertions of agreement—in circumstances in which the Court discerned "an obvious alternative explanation" for defendants' conduct in the ILECs' natural economic incentive to resist market entry by competitors—failed to pass muster.

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In reaching this decision the Court emphasized the high cost of discovery in antitrust cases and the fact that "the success of judicial supervision in checking discovery abuse has been on the modest side." The heavy burden of discovery, the Court observed, pushes defendants to settle even meritless suits. The Court concluded 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" and forced settlement in cases in which there is no reasonable prospect that discovery will produce evidence of conspiracy.

The Court's ruling brings Section 1 pleading rules into line with previous decisions that, at later stages of the litigation, a plaintiff's proof must tend to exclude the possibility that defendants were acting independently. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). And it finally inters the oft-cited statement in *Conley v. Gibson*, 355 U.S. 41, 47 (1957), that a complaint should not be dismissed 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"—a statement that some courts have held to permit highly speculative pleading revealing only "the theory of a claim." Stating that this "famous observation has earned its retirement," the Court concluded that it is "best forgotten as an incomplete, negative gloss" on standards that apply only once a claim has been stated adequately.

The Court's decision has wide-reaching implications for federal antitrust litigation and signals a victory for antitrust defendants in a variety of industries. Paired with *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), this case reflects the Court's sensitivity to the pressures of settlement prior to discovery and its concomitant willingness to interpret strictly the Rule 8 entitlement requirement.

Mayer, Brown, Rowe & Maw LLP was counsel to one of the defendants in this case.

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