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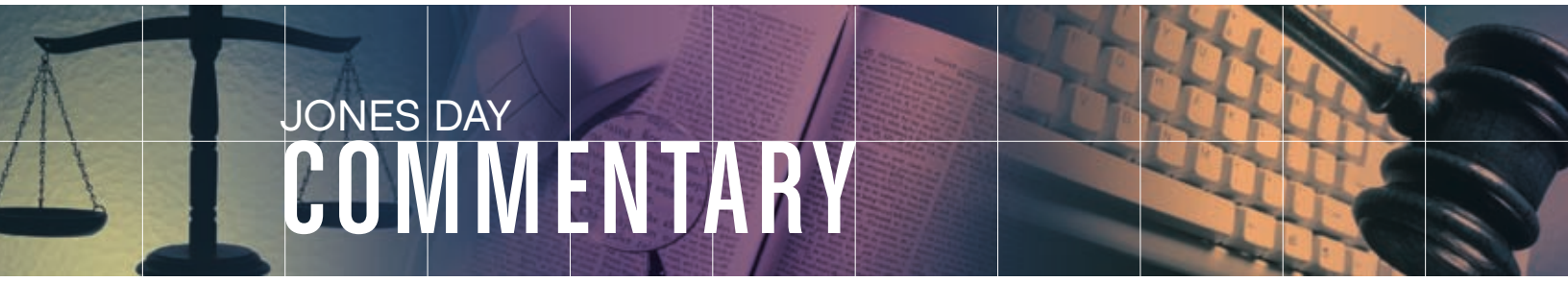

ANTITRUST PLEADING STANDARDS AFTER *TWOMBLY*

In antitrust, the Supreme Court is on a roll. After giving scant attention to antitrust cases over the last two decades, the Supreme Court has now issued five substantive antitrust decisions in the last 17 months—one of the most intense periods of antitrust activity in the Court's history. And the trend of these decisions is clear: Without exception, each has made it tougher on antitrust plaintiffs in some way. The aggregate net effect on future antitrust litigation may well be quite significant.

The most recent decision, *Bell Atlantic Corp. v. Twombly,* has the potential to have the most practical importance of all these recent decisions, with potential implications for all federal civil actions. If the lower courts seize on the freedom that the Supreme Court has given them to require plaintiffs to actually plead facts that support a plausible theory of liability, many—maybe most—frivolous antitrust claims (a nontrivial fraction of all antitrust claims) should be defeated at the pleading stage, thus avoiding the cost and expense of discovery and reducing the incentives for extortionate settlements. But note the qualifiers here—the lower courts have to (1) take advantage of this new freedom, (2) insist on facts, rather than just wishes, hopes, and assumptions, and (3) interpret "plausible" as something close to "realistic," and not just "conceivable." If all these things come to pass, antitrust plaintiffs' lawyers will have a lot harder job than they have today.

It is not really impossible to get a competently drafted antitrust complaint dismissed today, but it sure seems that way. The reality is that even complaints that are based on nothing more than a newspaper story about a dawn raid in Europe, with absolutely no other facts relating to the U.S., are regularly upheld as sufficient to permit discovery. As a result, the vast majority of antitrust complaints filed today, regardless of merit, result in discovery. Some fail at the summary judgment stage, but only after what is frequently millions of dollars in legal fees and discovery costs. On the other hand, many others result in settlements that, while small in relation to theoretical exposure, are still big money, both to the companies involved and, just as important, to the plaintiffs' lawyers, who receive the bulk of the economic benefits from these cases. *Twombly* opens the door to the possibility of a dramatic change in this picture.

Twombly announced a new threshold for Section 1 pleading, requiring antitrust plaintiffs to provide "plausible grounds to infer an agreement" and to plead a "context that raises a suggestion of a preceding agreement." And what is perhaps even more important, the Court explicitly abandoned the pleading standard it had articulated 50 years earlier in *Conley v. Gibson*, where the Court held that a complaint was sufficient unless there was "no set of facts" that could support its allegations. This widely inclusive standard had become embedded in decisions about the sufficiency of pleadings, especially in antitrust cases. As others have noted, perhaps this approach was acceptable in the days before massive class actions, but today the stakes are enormous. For example, the putative class in *Twombly* included hundreds of millions of telephone consumers across the country over a long period of time, so the theoretical damage liability was a very big number indeed. Allowing such a case to proceed without any real recitation of an actual antitrust violation simply encourages legal extortion. That is exactly what happens in many cases, where it is cheaper (and far safer) to settle, rather than to litigate and accept even the baseline risks that are inherent in any litigation, however baseless.

Used aggressively, *Twombly* could potentially eliminate a nontrivial percentage of all antitrust cases being filed today. If that is in fact how the lower courts use it, over time we will see fewer such cases filed, since the market works here too—plaintiffs' lawyers will not invest in sure losers. But today this is hope rather than reality. What is certain is that *Twombly* provides an important new tool for defendants in antitrust litigation.

In some ways, *Twombly* was an easy case. The *Twombly* complaint essentially alleged that the large local telecommunications companies (Baby Bells) had agreed among themselves to stay out of each other's markets and to resist new entry into their local markets by other telecom companies. But the complaint alleged no direct evidence of such an agreement. Instead, it was based on observations that none of them had entered each other's markets and all had resisted new entry, and on a conclusory allegation that this conduct was inconsistent with their individual economic interests. In other words, the plaintiffs asked the court to infer that but for an agreement, the phone companies should have invaded each other's markets, and the fact that they had not was sufficient to imply an illegal agreement, at least for purposes of getting to discovery. The allegations of parallel conduct filled the bulk of the complaint, and there were no factual allegations about the alleged agreement itself.

Of course, antitrust jurisprudence has long recognized that parallel conduct is a perfectly normal circumstance in industries with few competitors, so plaintiffs are required to prove "plus factors" in response to demonstrate that the conduct resulted from collusive activity, rather than interdependent but unilateral decisions to similar market conditions. The *Twombly* trial court dismissed the complaint, finding that it alleged "nothing more than parallel conduct that appears to accord with the individual economic interests of the alleged conspirators." The Second Circuit reversed, holding that although "the pleaded factual predicate must include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss[,] … a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy." The Second Circuit decision relied heavily on *Conley*, asserting that to grant defendants' motion to dismiss, the "court would have to 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." It recognized that there was a relationship between its application of the notice pleading standard of Rule 8(a) and the "colossal expense of undergoing discovery," and that discovery costs themselves "likely led defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims," but it nevertheless concluded that if "that balance is to be re-calibrated, … it is Congress or the Supreme Court that must do so."

The Supreme Court did just that, in a decision that was clearly affected by the burgeoning cost of civil discovery in antitrust cases. Citing its own prior opinions and a variety of other courts and commentators, the Court reasoned 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." In the absence of such a rule, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings" because "[j]udges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves." Illustrating how to look at

a complaint once *Conley* is put aside, the Court concluded that the claims were not sufficient because the defendants' conduct was not demonstrated to be anything other than the "natural, unilateral" behavior of companies facing similar market situations. As a result, while the Court asserted it was not requiring "heightened fact pleading of specifics," plaintiffs had failed to allege "enough facts to state a claim to relief that is plausible on its face."

Twombly's potential impact can be summarized as follows:

Provides a basis for early dismissal of Sherman Act Section 1 claims that do not contain specific factual pleadings. For claims that rest on mere parallel conduct, the Court's decision in *Twombly* will likely be fatal. This alone is a significant development because claims that rest in whole or in part on such parallel behavior are not uncommon. But the real impact of *Twombly* depends on how aggressively it is applied to the full range of antitrust complaints. Successful motions to dismiss in antitrust cases have become increasingly rare. In most circuits, the case law that had relied on *Conley* virtually eliminated consideration of dismissal strategies. It also encouraged plaintiffs to immediately file civil antitrust actions at the first sniff of a government investigation or potential concern. After *Twombly*, trial courts may struggle initially to determine whether a complaint includes "enough factual matter … to suggest that an agreement was made," as the Court's opinion in *Twombly* puts it. But at a minimum, the decision eliminates *Conley* as the end of the discussion and provides an opportunity for courts to apply a plausibility/reality screen to antitrust complaints generally. If that happens in the lower courts and, more important, is accepted in the courts of appeals, *Twombly* could have enormous practical significance, perhaps as much as the *Monsanto/Matsushita* line of cases has had at the summary judgment stage.

Extends the critical reasoning of *Monsanto/Matsushita* to an earlier stage of litigation. The Supreme Court has already shown a disinclination to draw "false inferences from identical behavior." The 1984 *Monsanto* and 1986 *Matsushita* decisions resulted in the creation of the principle, as expressed in *Matsushita,* that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Under this standard, it has long been the rule that to survive a motion for summary judgment, a Section 1 plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." But this standard has not generally been applied to date in motions to dismiss, because plaintiffs have successfully argued that the *Monsanto/Matsushita* reasoning had no place at the early stage of the litigation before discovery and factual development had taken place. *Twombly* will eliminate that argument, since the Court specifically relied on *Matsushita* at the pleading stage in requiring that "when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."

"Retires" *Conley* and may require all civil plaintiffs to meet this threshold. Finally, the Court's "retirement" of the "no set of facts" standard in *Conley* may well have implications for all civil cases, as foreshadowed by Justice Stevens' dissent. *Conley* was a discrimination case, and its formulation of the "no set of facts" pleading standard has been applied broadly in civil litigation. The *Twombly* court did not limit its "retirement" of *Conley*'s general pleading standard to antitrust cases, and *Twombly*'s requirement that a complaint include "enough facts to state a claim to relief that is plausible on its face" is not in any way limited to claims brought under the Sherman Act. Civil defendants in all types of matters will undoubtedly rely on *Twombly* in Rule 12 motions where the factual allegations render a plaintiff's claims merely "conceivable" and not "plausible."

If aggressively employed by the lower courts, *Twombly* could dramatically change the realities of antitrust, and potentially all civil, litigation. Once a case is allowed to proceed beyond the pleadings stage, it unleashes the potential for massive cost and resource expenditure. This is especially true in antitrust actions, where broad conspiracy allegations can be used to justify intrusive and expansive discovery. Often, the cases are little more than a theory looking for a factual predicate. The reality has long been that discovery is seldom controlled or seriously constrained by the trial courts, which are already overburdened by substantive motions and criminal dockets. Trial lawyers are all too familiar with judges' admonitions about bringing discovery motions, and the Supreme Court has now recognized that reality.

The Court also recognized that the sheer weight of an antitrust case—even one that has little factual support—can lead to settlements that may be minimal in terms of potential liability but are significant in an absolute dollar sense and wholly unrelated to the question of actual culpability. Companies that face antitrust litigation are confronted with the prospect of treble damages, attorneys' fees, and joint and several liability. The latter aspect is particularly important because the plaintiffs' bar has honed its game strategies for settlement, isolating settlement holdouts that face larger and larger risks as their codefendants succumb to these pressures.

And even after incurring the expense of discovery, the prospects for a resolution on summary judgment are also not particularly heartening. First, vast amounts of company information are made available in discovery. It is a very unlucky or incompetent plaintiffs' lawyer who cannot seize upon some handful or more of documents from which he can claim "evidence" of a conspiracy. For example, even the most diligent compliance training may fail to prevent the occasional e-mail that details knowledge of a competitor's prices but fails to attribute the source, even though it may have been perfectly legitimate, such as from a customer. Likewise, casually written notes and electronic correspondence will often present a plaintiff with a potential treasure-trove of ambiguous statements from which they will claim that a conspiracy can reasonably be inferred. Those alone may be—and frequently are—sufficient to dodge summary judgment. Second, because a summary judgment decision is often the last step before trial, waiting until it is decided means that defendants will often spend a great deal of time preparing for trial before learning the results of the motion. Settlement pressures can intensify well before the court reaches a decision, and the sad fact is that some judges simply sit on summary judgment motions after they are fully briefed and argued in order to increase the pressure for settlement and thus reduce the chances that they will have to manage a long and complicated trial. The reality here is that the costs of litigation and settlement are ultimately borne by consumers of the products or services at issue. The only net beneficiaries of frivolous antitrust complaints are the lawyers.

Finally, businesses take the legal environment into account when making business decisions. If management tempers its market responses out of concern that merely following a competitor's actions will subject it to antitrust risk, the antitrust laws have been turned on their head. It becomes a double whammy if company records document a decision *not* to follow a competitor's actions, such as a price increase, out of concern that customers may question the independence of a decision to follow the increase. That document then becomes plaintiffs' Exhibit A to "explain" all other actions taken in parallel with a competitor. If the *Twombly* decision resonates in future trial-court decisions, it will enable antitrust counselors to confidently advise clients that parallel conduct, by itself, can be undertaken without putting the company's future at risk.

Still, all these possibilities are just that—possibilities, not yet the reality. *Twombly* must still be applied by the lower courts, and it will be several years before enough cases are decided by various courts of appeals to clearly see its impact. What is clear today is that the hard brick wall of *Conley* has been knocked down, and the holding and language of *Twombly* give every antitrust defendant a new tool in fighting frivolous complaints. *Twombly* will have no impact on antitrust or other complaints that actually set forth a sufficient factual basis for relief under a plausible theory of liability, but there is now some real hope that the "wing and prayer" complaints that are filed way too often these days will get the short shrift they deserve. Time will tell how powerful a tool this is, but its potential impact is very hard to overstate.

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