ARNOLD & PORTER LLP

CLIENT ADVISORY

Supreme Court Clarifies Standards for Pleading an Antitrust Conspiracy

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Washington, DC
+1 202.942.5000

New York
+1 212.715.1000

London
+44 (0)20 7786 6100

Brussels
+32 (0)2 517 6600

Los Angeles
+1 213.243.4000

San Francisco
+1 415.356.3000

Northern Virginia
+1 703.720.7000

Denver
+1 303.863.1000

On May 21, 2007, the Supreme Court overturned the Court of Appeals for the Second Circuit's ruling in *Twombly v. Bell Atlantic Corp.*, holding that the District Court correctly dismissed a complaint that made conclusory allegations of conspiracy and alleged parallel conduct that harmed competition, but did not allege additional facts sufficient to support a conspiracy allegation. *Bell Atlantic Corp. v. Twombly*, (U.S. May 21, 2007) ("Slip Op."). The decision is significant because it plainly holds that a mere conclusory allegation of conspiracy or agreement is insufficient to survive dismissal in an antitrust case. Although the opinion disclaims any intention to impose a higher-than-ordinary pleading standard for antitrust cases, the effect is to require antitrust plaintiffs to allege not only a "conspiracy," but also sufficient underlying facts to support the allegation. In a parallel-conduct case, the complaint must contain factual allegations of so-called "plus factors" that make the allegation of conspiracy plausible. In short, the Court required dismissal because, in its view, the plaintiffs "[had] not nudged their claims across the line from conceivable to plausible." Slip Op. at 24.

A. BACKGROUND

Twombly was a putative class action in which plaintiff purchasers of local telephone and high-speed Internet services alleged that the defendants, major telecommunications providers, violated Section 1 of the Sherman Act by conspiring to prevent competitive entry in their respective local service areas and by agreeing not to compete with one another. Slip Op. at 3-4. The Telecommunications Act of 1996 ("1996 Act") provided the factual backdrop for the complaint. The 1996 Act revoked the regional, local telephone monopolies of the "Baby Bells" or "Incumbent Local Exchange Carriers" ("ILECs") and required each ILEC to share its network with competitors, "competitive local exchange carriers" ("CLECs"). Slip Op. at 1-2. The plaintiffs alleged that the defendant ILECs violated Section 1 by conspiring to restrain trade in two ways. First, the plaintiffs alleged that the ILECs "engaged in parallel conduct" to prevent CLECs from effectively competing in the ILECs' respective territories.

The alleged actions included making unfair agreements with the CLECs for access to the ILECs' networks, providing inferior connections to their networks to the CLECs, overcharging, and billing in a way designed to sabotage the CLECs' relations with their own customers. Slip Op. at 3. Second, the ILECs allegedly agreed to refrain from competing with each other. *Id.* at 4. Based on this parallel behavior of the ILECs, the plaintiffs alleged "on information and belief" that the ILECs had entered into a contract, combination, or conspiracy to prevent competitive entry and to refrain from competing with one another. *Id.* at 4.

The United States District Court for the Southern District of New York dismissed plaintiffs' complaint for failure to state a claim. It held that plaintiffs could not rely entirely on parallel business behavior to infer the existence of a conspiracy. *Twombly v. Bell Atlantic Corp.*, 313 F.Supp.2d 174, 179 (S.D.N.Y. 2003). Instead, the court held, to survive a motion to dismiss plaintiffs must allege additional facts that "ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." *Id.* at 179. The court found that the ILECs' parallel actions to discourage entry could be fully explained by each ILEC's interest in defending its own territory. *Id.* at 183. As to the lack of competition between ILECs, the court refused to infer a conspiracy because the complaint did not allege facts suggesting that refraining from competing outside its own territory was contrary to an ILEC's self interest. *Id.* at 188.

The Court of Appeals for the Second Circuit reversed, holding that plaintiffs need only plead facts that "include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss." *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d Cir. 2005). The Court of Appeals held "to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a 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." *Id.*

B. THE COURT'S OPINION

The Court began its analysis by reviewing the longstanding rule that parallel business behavior that results from independent decision-making does not violate Section 1. Slip Op. at 6-7. Such behavior is admissible as circumstantial evidence from which an agreement may be inferred, but it cannot alone establish a Section 1 violation. *Id.* at 6. The question before the Court was not the validity of this rule, but rather to what extent a Section 1 plaintiff is required to plead facts that tend to exclude the possibility of independent action to survive a motion to dismiss. The Court held that stating a Section 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." Slip Op. at 5. In other words the plaintiff must identify "facts that are suggestive enough to render a § 1 conspiracy plausible." *Id.* at 9. When pleading an antitrust conspiracy, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 10.

In finding that the plaintiffs had not plead facts to render their allegations of conspiracy plausible, the Court addressed the Second Circuit's reading of the pleading standard set out in *Conley v. Gibson*, where the Court noted that "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. 41, 45-46 (1957). The Court suggested that the Court of Appeals may have read this language "as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings." Slip Op. at 14. The Court noted that such a standard would allow "a wholly conclusory statement of claim" to survive a motion to dismiss and

observed that the Court of Appeals had allowed the plaintiffs to continue "even though the complaint does not set forth a single fact in a context that suggests an agreement." *Id.* at 15. The Court concluded that the "no set of facts" language "had earned its retirement" and "is best forgotten." *Id.* at 16.

After establishing the standard for surviving a motion to dismiss, the Court examined whether the plaintiffs had met their burden of stating facts sufficient to render a Section 1 conspiracy plausible. The Court "agree[d] with the District Court that nothing in the complaint intimates that the resistance to the [CLECs] was anything more that the natural, unilateral reaction of each ILEC intent on keeping its regional dominance." Slip Op. at 19. Rejecting the plaintiffs' second theory, the Court observed that "a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing." Slip Op. at 21. Thus, the Court agreed with the District Court that "antitrust conspiracy was not suggested by the facts under either theory of the complaint, which thus fails to state a valid § 1 claim." *Id.* at 22-23.

C. CONCLUSION

The *Twombly* decision continues the Court's trend to allow courts to weed out meritless antitrust cases at increasingly early stages of litigation. The Court made clear its view that the burden and cost of proceeding to discovery is unjustified when an antitrust plaintiff cannot allege facts suggesting a conspiracy. The Court cited its recent decision in *Dura Pharmaceuticals Inc. v. Broudo*, 544 U.S. 336 (2005), in which it expressed concern that a plaintiff's "largely groundless claim" could "take up the time of a number of other people" based on nothing more than "the mere possibility of loss causation." Slip Op. at 11.

The Court's decision raises the bar for plaintiffs in antitrust cases to survive a motion to dismiss. Although plaintiffs need not allege in detail all the evidence that supports their conspiracy allegation, they cannot rest on mere conclusory allegations that the defendants conspired. Although *Twombly's* holding should extend to all antitrust cases and not just to those concerning parallel conduct by competitors, it is now clear that plaintiffs in such parallel conduct cases must allege not only parallel conduct, but also additional facts that make the allegation of conspiracy plausible in light of the competing inference of independent action.

If you would like more information about the Twombly decision, please contact your Arnold & Porter attorney or:

David Eggert
+1 202.942.5133
David.Eggert@aporter.com

Jonathan Gleklen
+1 202.942.5454
Jonathan.Gleklen@aporter.com

Matthew Turnell
+1 202.942.6624
Matthew.Turnell@aporter.com