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Supreme Court Injects New Vitality Into Motions to Dismiss in Complex Litigation

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In a decision likely to encourage the filing of motions to dismiss in many kinds of complex cases, the Supreme Court on May 21, 2007 decided that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice" to allege a violation of Section 1 of the Sherman Act. *Bell Atlantic Corp. v. Twombly*, No. 05-1126, 2007 WL 1461066 at 6 (U.S. May 21, 2007). In reaching its holding, the Court revisited its decision in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) and opined that the often-quoted "accepted rule 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" had "earned its retirement." *Twombly*, 2007 WL 1461066, at 8. The Court explained that "[t]his phrase is best forgotten as an incomplete gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id*. In other words, *Conley* "described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." *Id*. The Court's "retirement" of *Conley's* fifty-year old test for a complaint's sufficiency promises to have implications for all complex litigation, and courts are likely to be deciding *Twombly's* application in non-antitrust cases for years to come.

Twombly itself arose from the reactions of telecommunications companies to 1996 legislation intended to bring competition to local and long distance telephone service. Plaintiffs, who sought to represent a class of all subscribers of local telephone and/or high speed internet services, alleged that the incumbent local exchange carriers ("ILECs") had acted in parallel to forestall competition by competitive local exchange carriers ("CLECs") and by not competing with each other, and that the defendants' allegedly parallel conduct was the product of an unlawful conspiracy. By a vote of 7 to 2, the Supreme Court, in an opinion written by Justice Souter, held that "stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id*. at 6. In particular, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice" because "[w]ithout 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*. Rather, "when allegations of parallel conduct are set out in order to make a Section 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." *Id*.

The Court further held that plaintiffs' complaint could not withstand this standard. The Court explained that plaintiffs' allegations that the defendants had resisted competition from potential new entrants reflected "routine market conduct, and even if the ILECs flouted the 1996 Act in all the ways plaintiffs allege, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a Section 1 violation against almost any group of competing businesses would be a sure thing." *Id*. at 9. In addition, the Court explained that "a natural explanation for the noncompetition [among ILECs] alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing." *Id*. at 10.

The decision appears to have been driven in significant part by the recognition that litigation – particularly antitrust litigation but not limited to it – is a far more expensive and intrusive activity than it was when *Conley* was decided fifty years ago. As the Court explained: "That potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years." *Id*. at 7. The Court concluded that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" summary judgment and that "it is only by taking care to require allegations that reach the level of 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 Section 1 claim." *Id*.

The *Conley* Court could not have envisioned that erring on the side of keeping plaintiffs in court – a mid-20th Century reaction to the injustices visited upon plaintiffs by the strictures of code-pleading – would have the consequences that it does today in terms of cost, burden and the *in terrorem* value that assigns settlement value to even meritless claims as long as conclusory pleadings survive a motion to dismiss. This Court's view that a judicial system needs to better balance the risk of false positives against the need to keep the courthouse doors open to meritorious claims plainly informed the Court's decision to require more at the pleading stage.

A dissenting opinion by Justice Stevens, joined in part by Justice Ginsburg, argues that the standard imposed reaches back too far toward the old code-pleading standards, describing the Court's holding as a "dramatic departure from settled procedural law." *Id*. at 15. According to the dissenters, although it is "no doubt correct that the parallel conduct alleged is consistent with the absence of any [agreement]," the complaint sufficiently stated a claim because "that conduct is also entirely consistent with the *presence* of the illegal agreement alleged in the complaint." *Id*. The dissent offers the view that "the unfortunate result of the majority's new pleading rule will be to invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence." *Id*. at 23.

Perhaps the dissent's most significant contribution to the opinion is its highlighting of the central allegation of conspiracy that the majority found wanting. Rejecting the Court's characterization of it as one of "a few stray statements," the dissent notes plaintiffs' allegation that the defendants "agreed not to compete with each other" and calls it an allegation describing unlawful conduct. The majority's sound rejection of such conclusory allegations of conspiracy makes clear that more is now needed before the courts will permit a plaintiff to engage the expensive and intrusive machinery of discovery.

As a practical matter, *Twombly* plainly presages heightened scrutiny of antitrust complaints at the pleading stage. In light of the Court's repudiation of the oft-cited language in *Conley*, it is likely that complaints in a wide variety of cases – not just antitrust cases – will face motions to dismiss in the coming years.

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