CAHILL GORDON & REINDEL LLP
EIGHTY PINE STREET
NEW YORK, NEW YORK 10005-1702
TELEPHONE: (212) 701-3000
FACSIMILE: (212) 269-5420

MAY 22, 2007

Bell Atlantic v. Twombly: Supreme Court Rejects Decades Old Pleading Formulation

In *Bell Atlantic Corp. v. Twombly*,[1] the Supreme Court rejected language it adopted fifty years ago — in the often-cited 1957 *Conley v. Gibson* case[2] — to lay out the standard for a pleading sufficient to survive a motion to dismiss under Rule 12(b)(6).[3] The decision reversed a Second Circuit decision that had itself overturned an order dismissing an antitrust complaint. The Court ruled that an allegation of parallel conduct by competing businesses and a bare assertion of a conspiracy will not suffice to state an antitrust conspiracy claim. While the opinion dealt specifically with the adequacy of the pleading of an "agreement" under the Sherman Act, it may have broader implications as to pleading in federal civil cases generally.

The Supreme Court's 7-2 decision in *Twombly* dealt with the adequacy of a complaint's pleading of an alleged agreement in violation of Section 1 of the Sherman Act. In an opinion written by Justice Souter, the Court stated that the facts pleaded in a complaint must "raise a reasonable expectation that discovery will reveal evidence of an illegal agreement," and that the facts must suggest that a conspiracy was "plausible."[4] The Court's opinion stressed the enormous costs that antitrust discovery can impose and the need for a pleading standard that allows courts to avoid such expenses in cases with "no reasonably founded hope that the discovery process will reveal relevant evidence to support a § 1 claim."[5] The majority explicitly rejected the contention that judges could suc-

---

1 *Bell Atlantic Corp. v. Twombly*, No. 05-1126, 2007 WL 1461066 (U.S. May 21, 2007).

2 *Conley v. Gibson*, 355 U.S. 41 (1957).

3 Fed. R. Civ. P. 12(b)(6).

4 *Twombly*, 2007 WL 1461066, at *8, slip op. at 9.

5 *Twombly*, 2007 WL 1461066, at *9, slip op. at 13 (internal quotations and citations omitted).

cessfully exercise sufficient control over discovery so as to avoid the unacceptably oppressive burdens that flowed from a meritless antitrust complaint.

Although directed to the pleading of a purported violation of Section 1 of the Sherman Act, the opinion relied on recent pleading cases from other areas such as the Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*[6] and may well be read to suggest a tightening of pleading standards more generally. The Court explicitly noted that it was not requiring a "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."[7] The Court discussed at length the statement in *Conley v. Gibson* that has long been read to bar dismissals of complaints "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."[8] It rejected the phrase as "an incomplete, negative gloss" on the pleading standard and stated that the phrase had "earned its retirement" in light of the number of lower court opinions rejecting its literal application.[9]

The plaintiffs, subscribers to local telephone and Internet services, asserted that incumbent local telecommunications companies (the "Baby Bells") agreed to thwart local competition and refrain from competing in each others' territories. The Court rejected the plaintiffs' argument that the existence of an agreement can be inferred from allegations of the defendants' failure to pursue attractive business opportunities in nearby geographic areas served by their co-defendants. The Court observed that independent motives naturally explained the defendants' parallel behavior and stated that "a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."[10]

Justice Stevens, joined for all but one portion of his opinion by Justice Ginsburg, dissented. He stated that while the standard applied by the majority might well be appropriate on summary judgment, the Court's insistence on pleading facts sufficient to create a plausible claim was a return to fact pleading. He would have allowed limited and judicially controlled discovery to minimize the risks of unacceptable discovery costs, but would have denied the motion to dismiss.

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Dean Ringel at (212) 701-3521 or dringel@cahill.com or Elai Katz at (212) 701-3039 or ekatz@cahill.com.

---

6 *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).

7 *Twombly*, 2007 WL 1461066, at *14, slip op. at 24.

8 *Conley*, 355 U.S. at 45-46.

9 *Twombly*, 2007 WL 1461066, at *11, slip op. at 16.

10 *Twombly*, 2007 WL 1461066, at *8, slip op. at 10.