



# Supreme Court clarifies standard for pleading antitrust conspiracy claims

BELL ATLANTIC CORP. V. TWOMBLY

This briefing examines the recent US Supreme Court ruling in *Bell Atlantic Corp. v. Twombly*, which considered the minimum standards for pleading an antitrust conspiracy under Section 1 of the Sherman Act and clarified that a Section 1 complaint must recite more than mere 'parallel conduct' by the defendants to survive dismissal.

The US Supreme Court has held that alleging parallel conduct is not sufficient to sustain a Section 1 conspiracy claim: plaintiffs must also allege facts to place the parallel conduct 'in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action'. In its decision on 21 May in *Bell Atlantic Corp. v. Twombly*, the Court ruled that the plaintiffs' complaint did not contain sufficient facts to survive a motion to dismiss for failure to state a claim because it merely described parallel behavior that, by itself, is not a violation of Section 1. The Court held that a complaint alleging violations under Section 1 must allege facts, beyond mere allegations of parallel conduct, that provide 'plausible grounds' for inferring that the defendants entered into an illegal agreement.

The decision raises the pleading burden of antitrust plaintiffs and is likely to provide relief to defendants seeking to avoid the substantial expense of discovery based on allegations of dubious merit.

## ***Bell Atlantic Corp. v. Twombly***

American Telephone & Telegraph Company (AT&T) was forced to divest its local telephone business in 1984. As a result, a system developed in which regional service companies – referred to as incumbent local exchange carriers (ILECs) or 'Baby Bells' – were granted monopolies over certain sections of the US. While there were originally seven ILECs, after a series of mergers and acquisitions, four remained and are the four named

plaintiffs in this suit: BellSouth Corporation, Qwest Communications International, SBC Communications and Verizon Communications (successor-in-interest of Bell Atlantic Corporation).

In 1996, Congress passed the Telecommunications Act of 1996 (the Act), which required the ILECs to accept certain rules and duties that encouraged market entry. Most notably, it required ILECs to share their networks with entrants (referred to as competitive local exchange carriers (CLECs)). Since the Act, ILECs and CLECs have disputed whether ILECs acted to prevent CLECs from entering the local telephone service market. Notably, while various CLECs have attempted to enter the local telephone service market, no ILEC has attempted to enter another ILEC's market as a CLEC.

The plaintiffs, ILEC customers, filed a claim against the four remaining ILECs seeking treble damages and injunctive relief under Section 1 of the Sherman Act. They alleged that: (1) the ILECs engaged in parallel conduct to prevent the growth of developing CLECs and (2) the ILECs agreed to refrain from competing with each other by not attempting to enter each other's regions as CLECs.

Section 1 of the Sherman Act prohibits 'contract[s], combination[s]..., or conspiracy[ies], in restraint of trade' (15 U.S.C. §1). When filing a complaint under Section 1 (and most other federal statutes), a plaintiff must, under Federal Rule of Civil Procedure (8)(a), offer a 'short and plain statement of the claim showing that the pleader is entitled to relief' to 'give the defendant fair

notice of what the... claim is and the grounds upon which it rests' (*Conley v. Gibson*, 255 U.S. 41, 47 (1957)). To survive a motion to dismiss, a complaint does not need to contain detailed factual allegations, but it must provide more than a mere recitation of the elements of the alleged violation (see *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

The plaintiffs in *Twombly* did not include detailed facts within their complaint describing a specific agreement of the defendants. Instead, they alleged an illegal agreement and offered evidence of the defendants' parallel behavior that the plaintiffs felt indicated an agreement, notably that the defendants: (1) took parallel steps to prevent CLECs from entering their service areas and (2) refrained from entering each other's service areas.

In defending their complaint against the defendants' motion to dismiss, the plaintiffs relied on the 50-year old rule of *Conley v. Gibson* that a complaint can be dismissed for failure to state a claim only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle him to relief'. The plaintiffs argued that they potentially could uncover facts during the discovery process that, coupled with a showing of parallel behavior, would lead to a successful Section 1 claim; thus, the district court should not dismiss their complaint for failure to state a claim.

The US District Court for the Southern District of New York rejected the plaintiffs' arguments and dismissed their Section 1 complaint. The court held that under Section 1 and the Federal Rules of Civil Procedure, a complaint must include more facts than a mere showing of parallel behavior to survive a motion to dismiss.

On appeal, the Second Circuit reversed the district court's decision to dismiss the plaintiff's complaint. The Second Circuit held that it is sufficient under Section 1 and the Federal Rules of Civil Procedure for a complaint merely to couple a description of parallel conduct by the defendants with the allegation of an agreement. The court accepted the plaintiffs' argument under *Conley*, by refusing to dismiss the complaint, because there was potentially a set of facts that would permit the plaintiffs to prove their allegation of an illegal agreement in their complaint.

The Supreme Court granted certiorari to resolve the question of whether a plaintiff's Section 1 complaint

must contain more facts than mere parallel behavior to survive a motion to dismiss for failure to state a claim.

## Supreme Court decision

Justice Souter delivered the opinion of the Court. The Court rejected a literal reading of *Conley v. Gibson* explaining that under such a reading complaints solely containing 'conclusory statement[s]' would survive motions to dismiss under the theory that the plaintiff may later discover some 'set of [undisclosed] facts' that support recovery. The Court, instead, held that a complaint must contain enough factual matter to provide 'plausible grounds' for inferring an agreement. More specifically, a complaint must contain 'enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement'.

The Court observed that the complaint rested on 'descriptions of parallel conduct' without sufficient allegations of an 'actual agreement among the ILECs', noting that 'the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies'. It commented that allegations of parallel conduct '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'.

In explaining its holding, the Court gave great weight to the practical implications of allowing complaints without 'plausible grounds' to infer an agreement. The discovery process in antitrust litigation costs a great deal of time and money. The opinion strongly expressed a general concern with the prospect that, if courts allowed such complaints, numerous plaintiffs would bring frivolous Section 1 claims to force defendants into the expensive discovery process.

In holding that the plaintiffs did not allege sufficient facts, the Court emphasised that if a plaintiff alleges parallel conduct it must also either: (1) allege specific facts as to when an agreement took place or (2) allege facts indicating that the parallel conduct was not in the best independent economic interest of the individual defendants.

Justice Stevens (joined in part by Justice Ginsburg) dissented, explaining that the text of Rule 8(a)(2), the history of the Federal Rules of Civil Procedure and prior

precedent of the Court all justify refusing to grant the defendants' motion to dismiss. The dissent advocated for the literal reading of the Conley decision and in doing so stated that the plaintiffs' straightforward allegation of an illegal agreement, coupled with facts showing parallel behavior, was enough to survive a motion to dismiss. While the dissent acknowledged the practical considerations of the costly discovery process, it felt that 'careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries' would adequately deal with such concerns.

## Implications

Although the Court found that Section 1 complaints containing only facts demonstrating parallel conduct are insufficient to survive a motion to dismiss, it did leave the door open for complaints that allege both parallel conduct and an environment in which parallel conduct does not make independent economic sense. Plaintiffs do not have to allege specific facts regarding an actual agreement if they can demonstrate that such circumstances exist.

The decision in *Twombly* is consistent with other recent Supreme Court decisions that have erected higher hurdles for US antitrust plaintiffs. Defendants will have greater opportunity to persuade lower courts that Section 1 complaints based on conclusory allegations should be dismissed, thereby allowing defendants to avoid the substantial costs of discovery to defend weak or spurious claims.

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