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MAY 21, 2007

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Supreme Court Raises the Pleading Bar on Sherman Act Section 1 Claims to Avoid Enormous Discovery Expense

The United States Supreme Court today tightened federal pleading standards, allowing courts to dismiss implausible antitrust claims before the parties engage in costly discovery. In *Bell Atlantic Corp. v. Twombly,* No. 05-1126 (May 21, 2007), the Court held that plaintiffs asserting an antitrust conspiracy claim must allege facts sufficient to demonstrate that their claim is "plausible" rather than simply "conceivable."

The plaintiffs in *Bell Atlantic* alleged that regional bell operating companies had conspired to inhibit the growth of local exchange carriers and to refrain from head-to-head competition. The district court held that the plaintiffs' complaint alleged only lawful parallel business conduct, rather than an unlawful conspiracy, and dismissed the complaint. The court of appeals reversed, concluding that federal pleading rules require only allegations sufficient to give notice of the claim and allow plaintiffs an opportunity to obtain additional facts in discovery.

The Supreme Court, in a decision written by Justice Souter, ruled that the court of appeals had been too lenient. The Court announced that claims pleaded in federal court must allege factual statements that, if proved, would provide the grounds for the plaintiffs' entitlement to relief. Applying that principle in the context of an antitrust conspiracy claim, the Court held that a complaint must contain "enough factual matter (taken as true) to suggest that an agreement was made." *Bell Atl.,* slip op. at 9. Mere allegations of parallel conduct, the Court reasoned, are insufficient.

The Court held that pleading legal conclusions could not save a claim from dismissal, and on that basis disregarded the plaintiffs' allegations that defendants entered into a "contract, combination, or conspiracy" not to compete. The Court further reasoned that plaintiffs' allegations that the defendants had failed to compete with one another and had each similarly acted to exclude competing carriers insufficiently suggested coordinated conduct "when viewed in light of common economic experience." *Id.* at 19.

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In announcing its new plausible-suggestion pleading standard, the Court retreated from *Conley v. Gibson*'s statement that the "accepted rule [is] 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." 355 U.S. 41, 45-46 (1957). About the "no set of facts" language, the Court pronounced that "the phrase is best forgotten as an incomplete, negative 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." *Bell Atl.*, slip op. at 16.

In addressing the contention that claims based on implausible allegations could be weeded out through discovery and summary judgment, the Court emphasized the costly nature of that process. Recognizing that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before summary judgment," the Court explained, "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 to support a § 1 claim." *Id.* at 13. (internal quotation marks omitted).

Justice Stevens, joined by Justice Ginsburg, dissented. In their view, the plaintiffs' allegations that defendants had each similarly taken a pass on competition and had communicated amongst themselves should suffice at the pleading stage. Among other objections, the dissent accused the Court of revising Rule 8's well-established pleading standard without going through the rules amendment process.

As a practical matter, *Bell Atlantic* will provide defendants facing thinly-pleaded claims with a more secure basis on which to seek dismissal. Lower courts are likely soon to face increasing numbers of dismissal motions requiring them to sort the "plausible" from the "speculative" in light of "common economic experience."