

High Court Ruling May Facilitate Early Dismissals

Tuesday, June 05, 2007 --- On May 21, 2007, the United States Supreme Court in *Bell Atlantic Corp. v. Twombly* (No. 05- 1126) dismissed a Sherman Act antitrust conspiracy claim brought in a putative customer class action against various "Baby Bell" telephone companies as not having been pled with sufficient facts to sustain the claim.

The decision was notable not just for the antitrust principles being applied to an important segment of the telecommunications industry, but also because the Court's ruling potentially may signal a desire to impose more restrictive requirements on the pleading of complaints that could create a more favorable atmosphere for obtaining early dismissals of many types of seemingly weak or speculative claims.

The antitrust conspiracy claim in *Bell Atlantic* was based upon the allegation that the defendant "Baby Bell" companies had engaged in certain parallel conduct in the marketplace to inhibit the growth of competitors.

Because the complaint alleged only parallel conduct by the companies—which under longstanding antitrust precedent is insufficient by itself to evidence an unlawful Sherman § 1 conspiracy—the Supreme Court in a 7-2 ruling reversed the Second Circuit ruling and dismissed the complaint, notwithstanding the complaint's express allegations of an unlawful conspiratorial agreement among the defendant Baby Bells.

The Court indicated that the complaint's allegations of a conspiratorial agreement were merely an inference being drawn from allegations of parallel conduct. While the alleged parallel conduct was not inconsistent with there being an unlawful conspiracy, the Court noted that it was equally consistent with there being no such conspiracy, particularly since there existed logical economic reasons other than conspiracy that could account for the alleged parallel conduct in the circumstances of this case.

As the complaint failed to allege any basis for concluding that the parallel conduct was the product of unlawful conspiracy as opposed to other causes, the Court held the complaint to be insufficient and dismissed it before even an answering pleading was filed or any discovery was taken.

* Standard for Pleading Claims *

The Supreme Court's ruling was based not simply on application of antitrust law principles but also on the Court's revisiting of some of the most basic principles of "notice pleading" that are applied in civil cases. In particular, the Court notably took issue with well-known and frequently cited language from

a famous 50-year-old Supreme Court precedent which held that a complaint should not be dismissed "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."

The Court commented that "after puzzling the profession for 50 years, this famous observation has earned its retirement," and that "[t]he phrase is best forgotten." The Court noted that this language could be read to permit "wholly conclusory" claims to "survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery."

In view of the high costs of discovery in complex litigations like this putative antitrust class action, and the difficulty in meaningfully constraining such costs even through the usual tools of judicial supervision and management, the Court held that, to survive a motion to dismiss, it is necessary for a complaint to set forth "enough facts to state a claim to relief that is plausible on its face." The Court concluded that because the plaintiffs in this case had "not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."

The Court's focus on "plausibility" as the basis for its dismissal ruling drew a strong reaction from the dissent, which argued that the Court's new formulation had transgressed the longstanding principle that an initial motion to dismiss is designed to test only the legal sufficiency of the complaint's factual allegations, but not to assess whether the facts alleged are true, probable or ultimately provable.

The dissent argued that discovery and ultimately summary judgment, rather than early dismissal motions, were the proper arenas in which those kinds of issues should be tested, and that since this complaint did in fact expressly allege that the defendants had entered into an illicit conspiratorial agreement with each other, the case should be permitted to proceed into the discovery phase even if the Court viewed that allegation of an actual agreement skeptically.

* Potential for Broader Application *

The extensive focus by both the majority and the dissent in Bell Atlantic on long-established and seemingly noncontroversial pleading principles raises questions about just how far-reaching this decision may be for civil litigation generally. Specifically, the question obviously posed by Bell Atlantic is whether it will now open up new avenues and a more liberal atmosphere for getting claims dismissed at an early stage as being based upon self-serving surmise rather than actual facts.

Such a possibility could be of significance to business litigants who are faced with weak but opportunistically pled claims that will entail lengthy and expensive discovery burdens if they are permitted to proceed.

The majority opinion in Bell Atlantic insisted that it was merely clarifying existing pleading principles but not changing them. The majority likewise insisted that it was not creating a special heightened pleading standard for Sherman § 1 antitrust conspiracy claims.

By contrast, the dissent argued—perhaps not unpersuasively—that the decision’s abandonment of longstanding pleading principles effectively marked a fundamental change that would permit a wide range of cases, including cases involving "profoundly serious factual allegations" to be dismissed at the outset based upon little more than a judge’s "independent appraisal of...plausibility."

Comments posted by readers in response to a report of the decision on the Wall Street Journal’s Law Blog revealed support for all these various possible interpretations of the decision. Bell Atlantic thus seems poised to provide fertile ground for a new wave of challenges to get seemingly weak or speculative cases dismissed at an earlier stage than had been possible in the past. The true implications of Bell Atlantic will be determined as aggressive defendants probe and push the limits of this new decision.

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