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Supreme Court Reverses 50 Years of Precedent and Strengthens Motions to Dismiss

INTRODUCTION

The United States Supreme Court discarded five decades of precedent and changed its stance on what is necessary for a complaint to survive a motion to dismiss for failure to state a claim in *Bell Atlantic Corporation v. Twombly*. While the decision came in an antitrust case, the ruling marks good news for all businesses facing litigation.

Since 1957, the Court has restricted dismissals to cases where "it appears beyond doubt that the plaintiff can prove **no set of facts** in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 46 (1957) (emphasis added). This relatively low bar for plaintiffs was designed to encourage notice pleading, whereby parties are given only basic information about what a suit is claiming.

For the past fifty years, the "no set of facts" language has been universally relied upon by plaintiffs to survive motions to dismiss for failure to state a claim. In the recent *Twombly* opinion, however, the Court discarded the "no set of facts" language, explaining: "After puzzling the [legal] profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard." __ S. Ct. __, No. 05-1126 (May 21, 2007), at 8.

The new articulation of the pleading standard, on the other hand, requires that "factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 6. The Court further explained the new standard: "Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" sufficient to prove a claim. *Id.* Now, a pleading will be considered insufficient, and dismissed for failure to state a claim, unless it provides facts that "nudge [the claim] across the line from *conceivable* to *plausible*." *Id.* at 10 (emphasis added).

EFFECTS OF THE *TWOMBLY* DECISION

The decision in *Twombly* is extremely important on two fronts, and provides a powerful tool to businesses involved in litigation. First, since *Twombly* itself is an antitrust case, the decision provides businesses with a good example of what type of antitrust complaints will now succumb to 12(b)(6) motions to dismiss. Second, the new rule is not limited to antitrust cases, but appears to apply to all civil litigation.

The specific claim in *Twombly* was brought under § 1 of the Sherman Act, which prohibits unreasonable restraints on trade "effected by a contract, combination, or conspiracy." The key component to a § 1 violation is that the prohibited restraint must be accomplished by an agreement – either by contract, combination, or conspiracy.

The complaint in *Twombly*, however, only alleged facts showing parallel activity, which is insufficient in itself to prove a Sherman Act offense. The Court explained, "While a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." *Id.* at 5 (internal citations omitted). "Without 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.* at 6.

Applying the new rule, "an allegation of parallel conduct is thus much like a naked assertion of

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conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Id.* To avoid dismissal, the allegations in a § 1 complaint "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 held that since parallel behavior, even if proven, is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market," Twombly did not meet the plausibility standard. Under the new rule announced in *Twombly*, it simply is not enough that the alleged cause of action be one of myriad possible interpretations of a fact pattern – there must be enough facts supporting the specific claim in order to survive a motion to dismiss.

FUTURE EFFECTS AND CONSEQUENCES

The creation of a new heightened standard begs the question: how heightened will the pleading requirements become? The *Twombly* decision arguably leaves this question open to some interpretation, and future will litigation struggle to define precisely what amount of factual allegation is sufficient.

However, the Court noted the scope of its new rule, stating, "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* Furthermore, the Court addressed inevitable concerns that the rule will keep legitimate cases out of court, explaining, "We do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 10.

Again, this is good news for businesses, as the Court adopted the new standard largely because of efficiency concerns. Particularly, in complex litigation such as antitrust cases discovery can be an extremely costly and time-consuming process, and the Court explicitly intends to reduce costs by weeding out relatively merit-less claims before reaching discovery. The Court opined, "It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." *Id.* at 7 (internal citation omitted).

Furthermore, the new rule is designed to hedge against plaintiffs' ability to use the prospect of discovery to gain an *in terrorem* increase in settlement. The new rule should prevent claimants from simply reciting the elements of a cause of action and then holding out the threat of expensive discovery to drive up settlement costs. "Something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Id.* at 7 (internal citations omitted).

CONCLUSION

Ultimately, the new standard is good news for businesses facing litigation. No longer should plaintiffs be able to use exceedingly vague or merit-less claims to either force expensive discovery or coerce higher settlements. But in order to take full advantage of the new standard, businesses' legal counsel should act quickly in moving to dismiss cases that do not provide enough supporting facts. Hopefully, *Twombly* will result in more successful use of 12(b)(6) motions, and a related increase in dismissals before the discovery phase, ultimately decreasing *in terrorem* effects on settlement.