Case at a Glance

Twombly was the named plaintiff in a class of all users of telephone and Internet Services in the continental United States that brought an antitrust suit against Bell Atlantic Company and three other regional telephone carriers. The complaint alleged a conspiracy to restrict entry and foreclose competition in regional telecommunication markets throughout the continental United States. The district court dismissed the complaint for failure to state a claim but the Second Circuit reversed.

How Specifically Must an Antitrust Plaintiff Plead a Conspiracy in Order to State a Claim?

by Shubha Ghosh

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ISSUE

Does a complaint state a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, if it alleges that the defendants engaged in parallel conduct and adds a bald assertion that they were participants in a "conspiracy," without any allegations that, if later proved true, would establish the existence of a conspiracy under the applicable legal standard?

FACTS

The facts of this case are part of the longer saga of telecommunications deregulation that started with the divestiture of AT&T in 1982 into regional telephone carriers and the debundling of local and long distance services. Under the terms of the divestiture, seven regional carriers would provide local telephone service subject to state regulations and franchising that limited entry. Long distance service, however, would be provided on a competitive basis. Since 1982, restructuring of the telecommunications industry and advances in technology precipitated the Telecommunications Act of 1996, which allowed regional carriers to provide long distance service in exchange for competition for regional service. The terms of the Telecommunications Act of 1996 also imposed obligations on regional carriers to share aspects of their network with new entrants. In addition, mergers had transformed the seven regional carriers into the four remaining carriers that are the defendants in this suit. The new regulatory environment created competitive tensions between incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). These tensions gave rise to antitrust concerns that incumbents were engaged in anti-competitive conduct. The current case is the most recent example of such concerns.

Twombly, the named plaintiff in the class action, had initially brought a claim of monopolization under section 2 of the Sherman Act against SBC Communications in 2003. After the Supreme Court ruled in 2004 that the Telecommunications Act of 1996 did not permit monopolization claims in *Trinko v. Bell Atlantic*

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Corp., 540 U.S. 398 (2004), Twombly abandoned his 2003 complaint and pursued the claim of a conspiracy to restrict entry under section 1 of the Sherman Act that is at issue in this case. The complaint alleged a conspiracy based upon "information and beliefs" based on lack of competition in the marketplace and parallel conduct among the incumbent carriers that the defendants had entered into an agreement to restrict entry into the marketplace. The complaint also alleged that competition is possible in the marketplace and that the benefits of competition would be revealed if defendants had not imposed barriers to entry. Furthermore, the plaintiffs alleged that the structure of the industry and the marketplace permitted an anti-competitive agreement to be effective. The complaint noted that the incumbents failed to compete with other incumbents in their regional market, suggesting the existence of an agreement.

Case Analysis

At issue in this case is whether the district court properly dismissed Twombly's complaint for failure to state a claim under Federal Rules of Civil Procedure (FRCP) Rule 12(b)(6). The court held that under FRCP Rule 8(a), the plaintiffs had to allege facts that, drawing all inferences in favor of the plaintiff, would establish the existence of an agreement. An antitrust plaintiff, according to the district court, cannot simply make a "bare bones" allegation of a conspiracy. Instead, a plaintiff must allege facts that, given the nature of the market, render the defendants' parallel conduct, and the resultant state of the market, suspicious enough to suggest that the defendants are acting pursuant to a mutual agreement rather than their individual self-interest. The district court concluded that since it is within the self-interest of each incumbent to stave off competition, the absence of competition is not necessarily the result of an agreement. In addition, the failure of incumbents to enter into the regional markets of other incumbents, in general, might suggest an agreement. But the district court, reviewing the history of telecommunications deregulation, concluded that the absence of competition was the result of the structure of the industry, particularly the creation of regional carriers, rather than the result of an agreement.

The United States Court of Appeals for the Second Circuit reversed, finding that the district court had applied the incorrect standard for dismissal. According to the Second Circuit, a bald assertion of conspiracy coupled with allegations of parallel conduct was sufficient to state a claim under the Federal Rules of Civil Procedure. To dismiss a complaint for antitrust conspiracy, a district court would have to find that there are "no set of facts" that would allow the plaintiff to prove that the parallel conduct was the product of an agreement rather than coincidence. In light of this standard, the Second Circuit did not need to address the district court's analysis that the parallel conduct could be the result of self-interest, rather than agreement. Furthermore, the Second Circuit noted that the plaintiffs had presented the temporal and geographic boundaries of the alleged conspiracy and had identified the key participants. This was sufficient, according to the court of appeals, to state a claim even though specific instances of conspiratorial conduct had not been identified. The Second Circuit concluded that a difficult balance had to be struck between giving the plaintiff access to the courts and the burdens on the defendants and the courts of the discovery process and on the manner in which business is conducted. But if that balance is to be struck differently it is up to Congress or the Supreme Court.

Bell Atlantic and the other petitioners urge the Supreme Court to reverse the Second Circuit. Their argument rests on both an interpretation of the Federal Rules of Civil Procedure and antitrust precedent. Under Rule 8(a), the plaintiff must plead facts and not legal conclusions, the petitioners' argument begins. The sufficiency of the pleading, necessary to withstand a dismissal under Rule 12(b)(6) depends on the substantive legal standards underlying the claim. If the plaintiff is alleging antitrust conspiracy, the petitioners' argument continues, the plaintiff must allege sufficient facts to support a conclusion that the defendants agreed to act anti-competitively. The plaintiff can satisfy this burden by making direct allegations of a conspiracy or by asserting facts from which the court can draw the inference of a conspiracy. A court cannot draw such an inference from an assertion of parallel conduct without further factual allegations, the petitioners contend. The Second Circuit, therefore, was incorrect in sustaining the complaint on the mere possibility that the plaintiff can prove some facts that would support the inference of a conspiracy.

Instead, the petitioners' argument continues, following the Supreme Court's reasoning in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986), the plaintiff must plead facts that would tend to exclude other plausible theories to explain the outcome. Thus the district court was correct to dismiss the complaint because the plaintiff had failed to allege any relevant facts. First, the plaintiff had failed to plead facts that would rule out unilateral conduct by each of

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the independent carriers. Since the Supreme Court ruled that there was no duty to cooperate with new entrants in its 2004 *Trinko* decision, each incumbent carrier would find it in its own interest not to permit entry by new carriers. Therefore, the lack of competition in the marketplace is plausibly the result of unilateral behavior, as opposed to conspiracy. Second, the fact that no incumbent competes in the territory of another incumbent is consistent with unilateral behavior by the carriers. The risks and the technological investments involved in expanding the existing business into new territories would outweigh any gains from such expansion. Consequently, the plaintiff has not alleged any facts that would exclude plausible explanations based on unilateral conduct, rather than conspiracy.

The respondents, consisting of a class of users of telephone and Internet services in the continental United States represented by Twombly, contend that the petitioners (1) are ignoring a nearly 50-year precedent for the review of Rule 12(b)(6) motions and (2) are misreading the Supreme Court precedent in *Matsushita,* which deals with the standard for summary judgment in an antitrust case. As for the standard for Rule 12(b)(6) motions, the respondents cite *Conley v. Gibson,* 355 U.S. 41 (1957), which established the standard used by the Second Circuit in reversing the district court's dismissal. Under *Conley,* the district court can dismiss if there are no set of facts under which a plaintiff's allegations would be plausible. As the Second Circuit's analysis shows, there could exist some set of facts that would support the allegations. The respondent urges that it should be allowed to proceed to discovery to have a chance to develop its case. While Federal Rules of Civil Procedure Rule 9 does require specific allegations of fact in some cases, the rule does not include antitrust cases, and Congress had not decided to include antitrust cases within the specificity requirements of Rule 9. Therefore, the heightened pleading standards advocated by the petitioner are inconsistent with precedent and the Federal Rules.

The respondents also resist the petitioner's move to extend the Supreme Court's precedent in *Matsushita* about summary judgment to a motion to dismiss for failure to state a claim. This argument is framed in terms of creating a context specific standard for heightened pleading requirements supported by the petitioners. The context specific standard would also conflict with the pleading requirements of Rule 9 and the standard in *Conley*. Furthermore, the contention that the *Matsushita* standard should apply to this case must be resisted since that was a case about summary judgment. A refrain in the respondents' argument is that they should be given the opportunity to develop their case through discovery. In addition, the respondents cite the solicitor general's brief in support of resisting the argument to extend *Matsushita*. The respondents, however, do contest the solicitor general's recommendation that simple and concise allegations of fact be dismissed as being too conclusory to support a claim. Such an approach, the respondents conclude, would conflict with the requirement under Rule 8(e)(1) of the Federal Rules of Civil Procedure that allegations be simple and concise.

In conclusion, the respondents urge the Court to uphold the Second Circuit's conclusion that allegations of parallel conduct are sufficient to state a claim. The respondents emphasize that the Second Circuit did recognize that some allegations of parallelism might not be sufficient. In response to the recommendations of some amici that the Court adopt a "plus factor" requirement for pleadings based on allegations of parallel conduct, the respondents reject any formal, rule-like approach to pleadings and recommend a more flexible approach. The respondents conclude that under any plausible standard, they have met the pleading requirement by alleging the absence of competition in the market by new entrants and incumbents. Furthermore, the respondents address the petitioners' insinuation that their complaint is an attempt to circumvent the *Trinko* decision as unfounded and inconsistent with the chronology of the litigation.

SIGNIFICANCE

Almost all the antitrust practitioners I have spoken to view this as the most important Supreme Court case on antitrust since the *Matsushita* decision in 1986. That 20-year period has witnessed several changes in the antitrust and regulatory landscape that are touchstones for this important case.

First, there are the changes in the telecommunications industry, which have attempted to push both telephony and the provision of Internet Services into more competitive environments. As demonstrated by this case, and by the 2004 *Trinko* decision, consumers feel that changes are not fast enough and that there are impediments to the emergence of genuine competition. In *Trinko,* the Court expressed deference to congressional determinations on how to open up the industry and ruled against the consumers bringing a Section 2 claim, essentially on the grounds that such an antitrust claim was not permitted by the Telecommunications Act of 1996. In *Twombly,* the Court once again must decide the relationship

between antitrust and telecommunications, but this time through a procedural lens. If the Court reverses the Second Circuit, it will foreclose a consumer challenge to industry practices which might solicit a response from either Congress or the Department of Justice, or both. If the Court upholds the Second Circuit, consumers might be able to develop a factual record and the claims presented will be revisited at the summary judgment stage. Either way, the decision will have interesting implications for the industry and consumers.

Second, the Supreme Court's decision will have implications for antitrust practice broadly. Because of these broader implications, the antitrust bar is watching this case closely. Section One claims are very common, and they often involve conspiracy based on allegations of parallel conduct. If the Supreme Court reverses and upholds the district court, the decision will make it more difficult for antitrust plaintiffs to bring a Section One claim. The shadow of *Matsushita,* relied upon heavily by petitioners and resisted with equal force by the respondents, looms large over this case. The respondents are correct in pointing out that the *Matsushita* decision was about the standard for summary judgment, and its extension to the Rule 12(b)(6) context would affect how a large group of antitrust cases will be pled. In *Matsushita,* the Supreme Court made it easier for antitrust defendants to win summary judgment in antitrust cases alleging predatory conduct. If the Supreme Court follows the petitioners' argument and applies the high bar of *Matsushita* to Rule 12(b)(6) motions, the antitrust landscape will be changed immensely. But while *Matsushita* affected an important, but narrow, set of antitrust cases (those alleging predatory pricing), the Supreme Court's decision in *Twombly* would affect pleading in all Section One cases. Hence, the concern and close scrutiny by the antitrust bar of this case are well understood. Finally, non-antitrust practitioners are also concerned because a reversal by the Court might signal more strict pleading requirements for civil cases more broadly, potentially restricting access to the courts for plaintiffs with meritorious, but hard to prove, cases.

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