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Court of Appeals Upholds Antitrust Conspiracy Claim, Addresses Application of *Twombly*

A recent decision by the United States Court of Appeals for the Seventh Circuit, authored by Judge Richard Posner, underscores that the pleading standard set forth in *Bell Atlantic Corporation* v. *Twombly*, 550 U.S. 544 (2007) – though frequently applied in the lower courts – remains unsettled.

The case, *In re Text Messaging Antitrust Litigation*,[1] reached the Court of Appeals in an unusual way – on an interlocutory appeal from the district court's denial of defendants' motion to dismiss. Over the plaintiffs' objection, both the district court and the Seventh Circuit authorized the appeal to determine whether plaintiffs' complaint satisfied the standard for pleading an antitrust conspiracy set forth in *Twombly*. Among other things, the Circuit Court clarified that to state a claim, plaintiffs need not allege direct, "smoking gun" evidence of a conspiracy; however, the complaint must go beyond merely alleging that defendants engaged in parallel conduct and plead at least sufficient circumstantial facts to render an inference of conspiracy plausible.

In re Text Messaging arose as a class action suit in which plaintiffs alleged that Verizon Wireless, AT&T, Sprint-Nextel and others conspired to fix the price of text messaging services in violation of the Sherman Act. Defendants argued, based on *Twombly*, that plaintiffs' second amended complaint failed to state a valid claim for relief and that the case should be dismissed. The district court denied the motion.

Despite ruling in plaintiffs' favor, however, the court granted defendants' request to file an interlocutory appeal. Such appeals are not permitted as a matter of right; rather, they require authorization of both the district court and the court of appeals, and may only be maintained in cases that involve a "controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). In this case, the district court found that the application of *Twombly* to plaintiffs' antitrust conspiracy claim was a question of law "on which reasonable minds could differ."[2]

The Court of Appeals agreed. A significant factor weighing in favor of an interlocutory appeal was that *Twombly* was "designed to spare defendants the expense of responding to bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit" to move forward. By misapplying *Twombly*, and allowing discovery to proceed in cases of dubious merit, district courts risk causing "irrevocable as well as unjustifiable harm to the defendant that only an immediate appeal can

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[1] No. 10-8037, --- F.3d ----, 2010 WL 5367383 (7th Cir. Dec. 29, 2010).

[2] *Id.* at *1.

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avert."[3] The Court of Appeals also noted that "*Twombly* is a recent decision, and its scope unsettled," and that an immediate appeal could help to clarify the pleading standards for federal cases following *Twombly* and its successor, *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009).[4]

Turning to the merits of defendants' argument for dismissal, the Court acknowledged that plaintiffs had failed to plead any direct evidence of a conspiracy to fix the price of text messaging services, such as an admission by one of the alleged conspirators. The Court held that direct evidence, however, "is not a sine qua non" of a conspiracy claim. Rather, plaintiffs can establish an antitrust conspiracy through circumstantial evidence.[5]

In this case, the plaintiffs had pled sufficient circumstantial evidence to warrant an inference of conspiracy by alleging "a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion."[6] Among other things, plaintiffs alleged that the four defendants controlled 90% of the U.S. market for text messaging services, making it relatively easy to coordinate prices and detect "cheating"; that defendants belonged to a trade association and exchanged price information at association meetings; that, in the face of steeply falling costs, defendants increased their prices – anomalous behavior in the absence of an agreement; and that defendants adopted a uniform pricing structure, and then "simultaneously jacked up their prices by a third."[7] These allegations, the Court held, went beyond the mere parallel conduct that the Supreme Court had rejected as insufficient to state a conspiracy claim in *Twombly.* Here, the plaintiffs had alleged "parallel plus" behavior.[8]

In reaching the conclusion that plaintiffs' allegations were sufficient to satisfy the standards set forth in *Twombly* and *Iqbal*, the Court confirmed that the "test for whether to dismiss a case" at the pleading stage "turns on the complaint's 'plausibility.'"[9] Yet, the Court acknowledged that the meaning of "plausibility" in this context remains "a little unclear because plausibility, probability, and possibility overlap."[10] To save a complaint from being dismissed, the Court held, the plaintiff must "establish a nonnegligible probability that the claim is valid."[11] Plaintiffs need not, however, establish their claims by a "preponderance of the evidence" prior to engaging in discovery.[12]

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3 *Id.* at *2.

4 *Id.* at *3.

5 *Id.* at *5.

6 *Id.* at *4.

7 *Id.* at *4–5.

8 *Id.* at *5.

9 *Id.*

10 *Id.* at *6.

11 *Id.*

12 *Id.*

The Seventh Circuit's interpretation of *Twombly*, and especially its observations regarding the "plausibility" standard, may provide helpful guidance to district courts and litigants. At the same time, the Court's decision highlights some of the ambiguities that are latent in *Twombly* and *Iqbal*, and suggests that these issues will continue to be addressed on a case-by-case basis in the lower courts.

In coming months, other federal courts of appeal are likely to grapple with issues similar to those raised by the *Text Messaging* case, and such other courts may or may not reach uniform conclusions. One example is *Burtch* v. *Milberg Factors, Inc.*, a case that is currently on appeal in the Third Circuit.[13] In *Burtch*, the district court granted defendants' motion to dismiss in a price fixing case involving "factors" – financial services firms that purchase the accounts receivable of manufacturers, primarily in the garment industry. The court held that plaintiff had alleged no more than parallel conduct by the defendants and that, at best, it was just as likely that defendants had engaged in such conduct independently as it was that they were acting pursuant to an unlawful agreement.[14]

On appeal, plaintiff contends, among other things, that the district court improperly applied a "probability" standard that is inconsistent with the Supreme Court's holding in *Twombly*. Defendants counter that plaintiff's complaint fails to raise even a plausible inference of conspiracy because there are obvious alternative explanations for the facts alleged that the complaint fails to rule out.

The crux of plaintiff's complaint in *Burtch* is that defendants exchanged forward-looking credit information in the context of trade association meetings, and thereby violated Section 1 of the Sherman Act. Defendants maintain, and the district court held, that the information sharing alleged in the complaint is not alone sufficient to establish an antitrust claim.

In the *Text Messaging* case, the Seventh Circuit observed that the exchange of price information at trade association meetings was a practice that – in the absence of any direct evidence linking the information exchanged to an effect on pricing – was not unlawful. Nevertheless, the Court held that this practice could facilitate price fixing "that would be difficult for the authorities to detect" and thus, in the context of plaintiffs' other allegations, could serve as circumstantial evidence of a conspiracy.[15]

It is far from certain that the Third Circuit will reach a similar conclusion in *Burtch*. In that case, the district court's decision was based in part on a long line of cases holding that the exchange of credit, rather than price, information is not anticompetitive.[16] Moreover, *Burtch* involved a different industry structure with different pricing dynamics from those at issue in the *Text Messaging* case. And the complaint in *Text Messaging* included allegations of other

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[13] Paul, Weiss represented one of the defendants in *Burtch* – which is no longer a party to the case on appeal – and secured dismissal of plaintiffs' claims in the trial court.

[14] No. 07-556, 2009 WL 1529861 (D. Del. May 31, 2009).

[15] 2010 WL 5367383, at *5.

[16] *See Cement Mfrs.' Protective Ass'n* v. *United States*, 268 U.S. 588, 604–606 (1925); *Michelman* v. *Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1048 (2d Cir. 1976).

conduct – such as simultaneous price increases by defendants in the face of sharply falling costs – that was not at issue in *Burtch*.

The Court of Appeals is scheduled to hear oral argument in the *Burtch* case in early March. In the meantime, district courts across the country will continue to interpret and apply the standards set forth in *Twombly* and *Iqbal* in cases involving antitrust conspiracy as well as other types of claims.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Robert A. Atkins	212-373-3183	Jay Cohen	212-373-3163
Andrew C. Finch	212-373-3460	Kenneth A. Gallo	202-223-7356
Jacqueline P. Rubin	212-373-3056	Moses Silverman	212-373-3355
Joseph J. Simons	202-223-7370	Aidan Synnott	212-373-3213
William B. Michael	212-373-3648		

* * *

NEW YORK
1285 Avenue of the Americas
New York, NY 10019-6064
+1-212-373-3000

BEIJING
Unit 3601, Fortune Plaza Office
Tower A
No. 7 Dong Sanhuan Zhonglu
Chao Yang District, Beijing 100020
People's Republic of China
+86-10-5828-6300

HONG KONG
12th Fl., Hong Kong Club Building
3A Chater Road
Central Hong Kong
+852-2846-0300

LONDON
Alder Castle, 10 Noble Street
London EC2V 7JU
United Kingdom
+44-20-7367-1600

TOKYO
Fukoku Seimei Building, 2nd Floor
2-2, Uchisaiwaicho 2-chome
Chiyoda-ku, Tokyo 100-0011
Japan
+81-3-3597-8101

WASHINGTON, D.C.
2001 K Street NW
Washington, DC 20006-1047
+1-202-223-7300

WILMINGTON
500 Delaware Avenue, Suite 200
Post Office Box 32
Wilmington, DE 19899-0032
+1-302-655-4410