

ANTITRUST ALERT

SUPREME COURT RULING PORTENDS CHANGES IN MOTIONS PRACTICE



On Monday, May 21, 2007, the U.S. Supreme Court issued a decision in *Bell Atlantic Corp. v. Twombly* that may portend dramatic changes in motions practice in federal courts, particularly in antitrust cases. The Court's decision opens the door substantially to closer scrutiny of the adequacy of a complaint's allegations supporting a cause of action.

In *Twombly*, Justice Souter determined that the plaintiff had failed to set forth a sufficient factual context to support the allegation of an agreement among the defendants, a necessary element in the plaintiff's claim under §1 of the Sherman Act, 15 U.S.C. §1. The plaintiff had specifically alleged the existence of the agreement but had not alleged facts that made the existence of the agreement "plausible." The complaint alleged that major telecommunications companies had failed to take certain competitive actions, such as entering each other's territory, which was consistent with a conspiracy; that the CEO of one of the defendant companies had made public statements seeming to recognize a benefit to the industry if they refrained from competing; and that the defendants had ample opportunity to meet and enter into an agreement. The Court held, however, that this was insufficient. While these facts supported an inference of an agreement as one plausible possibility for the state of competition in the markets, it was not a more likely explanation than other explanations. Before such a charge could proceed into discovery, the Court admonished that a plaintiff must provide enough facts to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.

The *Twombly* opinion has substantial implications for pleadings and motion practice in federal district courts – certainly in antitrust matters but not limited to them. Justice Souter specifically grounded his reasoning in the Federal Rules and directly limited the Court's seminal Rule 12(b)(6) decision, *Conley v. Gibson*, 355 U.S. 41, 47 (1957). The Court held that a plaintiff does not satisfy the requirement of a short and plain statement of the claim for relief by pleading mere labels and conclusions and a formulaic recitation of the elements of a cause of action.

The Court clearly wants the federal courts to exercise the authority it was recognizing in the *Twombly* decision in order to protect against the filing of "largely groundless" complaints giving rise to an automatic right to conduct discovery and thus raising the settlement value of those actions. Justice Souter discussed the inadequacy of other mechanisms to protect against such abuse and concluded, "So, when the allegations in a complaint, however true, could not raise

a claim of entitlement to relief, ... this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court.” To protect against such abuse, “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”

Federal court litigants are well-advised following *Twombly* to consider carefully the amount of factual background alleged in complaints and the inferences those allegations support. In the antitrust field, the *Twombly* case makes clear that courts should look carefully at allegations of an inferred conspiracy so that the mere conclusory allegation of an agreement among the competitors in any industry did not give rise to a right to discovery. And, while the Court’s decision arose in the context of an allegation regarding a conspiracy, the Court’s reasoning would seem to apply equally to other aspects of antitrust pleading. For example, an antitrust complaint might be deemed infirm if allegations of anticompetitive effect relied on theories of causation or harm that were only one among a number of plausible outcomes from some conduct challenged in the complaint. As the *Twombly* decision takes root, similar issues will undoubtedly arise in other areas of federal practice as to whether the allegations of the complaint adequately support the reasoning and inferences underlying the cause of action.

While clearly significant, the *Twombly* decision should not, naturally, be read too broadly. The Court itself pointed out that a well-pleaded complaint may proceed even if actual proof of those facts is improbable and the likelihood of recovery is very remote. For example, in an antitrust case, the Court’s opinion definitely raises the bar (or protects against the lowering of that bar) for pleading an antitrust conspiracy under section 1. But, *Twombly*, according to Justice Souter, does not authorize a judge to dismiss a complaint under Rule 12(b)(6) based on a judge’s disbelief of the factual allegations. In summing up, Justice Souter stated that the rules do not “require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”

CONTACT INFORMATION

If you have questions about the Supreme Court’s ruling in *Twombly*, please contact:

Mark J. Botti.....	202.887.4202	.....	mbotti@akingump.com.....	Washington, D.C.
Michael A. Fitzpatrick.....	202.887.4178	.....	mfitzpatrick@akingump.com.....	Washington, D.C.
Orrin L. Harrison.....	214.969.2860	.....	oharrison@akingump.com.....	Dallas
R. Dewitt “Kyle” Kirwan.....	310.229.1050	.....	kkirwan@akingump.com.....	Los Angeles
Daniel F. McInnis.....	202.887.4359	.....	dmcinnis@akingump.com.....	Washington, D.C.
Edward F. Mannino.....	215.965.1340	.....	emannino@akingump.com.....	Philadelphia
Reginald D. Steer.....	415.765.9520	rsteer@akingump.com.....	San Francisco

Austin	Beijing	Dallas	Dubai	Houston	London	Los Angeles	Moscow
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