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# Dismissal Standards Following *Bell Atlantic v Twombly* – A One-Year Retrospective

Michael P Lehmann and Christopher L Lebsack

Cohen Milstein Hausfeld & Toll

The Federal Rules of Civil Procedure (FRCP) allow a defendant to challenge the sufficiency of a civil complaint's allegations at the outset of the litigation, before the answer is due and before the defendant is obligated to commit the resources necessary for a full-scale defence of the litigation.<sup>1</sup> This challenge is made by way of a formal noticed motion to the court and is generally referred to as a motion to dismiss.

The purpose of a motion to dismiss is not to resolve disputed factual issues. Thus, for example, in *In re Graphics Processing Units Antitrust Litig*<sup>2</sup> (*Graphics I*) and *In re Graphics Processing Units Antitrust Litig*<sup>3</sup> (*Graphics II*), the court refused to resolve disputed issues concerning which affiliated corporate entities were potentially responsible for the antitrust violation alleged. Rather, for purposes of a motion to dismiss, the court is constrained to resolve the legal sufficiency of the complaint assuming the truth of the facts as pled.<sup>4</sup>

Historically, the FRCP have not imposed highly detailed pleading obligations on the plaintiff. Indeed, FRCP 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief'. Moreover, more than five decades ago the Supreme Court reaffirmed 'the accepted rule that a complaint should not be dismissed for failure to state a claim 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'.<sup>5</sup>

However, in May 2007, in *Bell Atlantic Corp v Twombly*<sup>6</sup> (*Twombly*), the Supreme Court changed course and held that simply pleading an implausible, bare-bones antitrust conspiracy will not satisfy FRCP 8(a)(2) pleading requirements. *Twombly* made clear that an antitrust plaintiff must plead 'enough factual matter (taken as true) to suggest that an agreement was made', explaining that this 'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement'.<sup>7</sup> The Supreme Court emphasised that it was not requiring 'heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face'.<sup>8</sup>

To understand the legal significance of *Twombly*, it is important to understand the factual allegations contained in that complaint. The plaintiffs in *Twombly* claimed that local telephone providers conspired to restrain competition for local telephone and internet service. The defendants, known as the 'Baby Bells', had enjoyed a government-sanctioned regional monopoly until Congress enacted the Telecommunications Act of 1996 to open the local telephone markets to competition from 'competitive local exchange carriers' (CLECs).<sup>9</sup> The complaint did not contain any independent allegations of an agreement among defendants, but instead inferred an agreement from its description of parallel conduct, including allegations that defendants undertook similar measures to frustrate the CLECs' efforts and failed to pursue business opportunities 'in contiguous markets'.<sup>10</sup>

Applying the plausibility standard to plaintiffs' complaint, the Supreme Court determined that the complaint failed to sufficiently state a claim for relief. The Court found nothing in the complaint that suggested 'the resistance to the upstarts was anything more than the natural, unilateral reaction of each [defendant] intent on keeping its regional dominance'.<sup>11</sup> Moreover, the Court observed that defendants

were spawned as monopolists, 'doubtless liked [it]', and thus it was understandable that it was in each of their interests not to compete outside of their established markets.<sup>12</sup> Without additional facts to support the plaintiffs' claims of conspiracy, as opposed to unilateral self-interested conduct, the Court dismissed the complaint, holding that the plaintiffs failed to 'nudge[] their claims across the line from conceivable to plausible'.<sup>13</sup>

A review of the cases decided after *Twombly* suggest that the decision has effectuated some change in the legal landscape by requiring more factual specificity in the pleading of antitrust conspiracy cases than had been the case previously, though not nearly as much as some observers initially believed.

So how have antitrust plaintiffs and their counsel adjusted to *Twombly*'s new pleading requirements? One obvious way has been to plead additional factual detail in the complaint. For example, in one of the first cases decided by a federal district court after *Twombly*, the court in *Graphics I* was confronted with a complaint alleging that the two dominant manufacturers of graphics processing units had coordinated the timing and price of various products during the conspiracy period. The court found that these allegations of parallel conduct did not satisfy *Twombly*, but leave was given to the plaintiffs to replead their claims.<sup>14</sup> Thereafter, the plaintiffs added allegations to the complaint establishing that in the period before the start of the conspiracy, these same competitors released their products on widely scattered dates and at different prices.<sup>15</sup> The additional allegations were found to satisfy *Twombly*. In upholding the amended complaint, the court explained that '*Twombly* did note that "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason would support a plausible inference of conspiracy."<sup>16</sup> Similarly in *Fair Isaac Corp v Equifax Inc*<sup>17</sup> (*Fair Isaac*), the court distinguished *Twombly* by noting that:

*[i]n the instant case, the Second Amended Complaint alleges a close temporal proximity between the Credit Bureaus' agreement to jointly create, own, and control VantageScore, and the beginning of the alleged parallel price manipulation and denial of access to the Credit Bureaus' data.*

Antitrust plaintiffs have also satisfied *Twombly* by alleging facts that are inconsistent with those usually observed in a competitive market. Thus, in *In re Pressure Sensitive Labelstock Antitrust Litigation*,<sup>18</sup> the plaintiffs alleged unusual price increases by competitors during a period of excess market capacity and in close proximity to industry meetings.<sup>19</sup> In *Babyage.com Inc v Toys 'R' Us Inc*<sup>20</sup> (*Babyage.com*) – a case alleging both illegal combinations in restraint of trade as well as monopolisation claims against a division of Toys 'R' Us – the plaintiff satisfied *Twombly* by setting forth allegations concerning the existence of resale price maintenance agreements between a dominant retailer and smaller manufacturers. The plaintiffs further alleged that such agreements were against the unilateral self-interest of the manufacturers and would not have been entered into absent coercion by the dominant retailer.<sup>21</sup>

The foregoing cases, among many others, suggest that district courts are requiring more detailed factual allegations of antitrust violations before allowing the litigation to proceed past the pleading stage. However, the change is one of degree, and as the court noted in *In re Intel Corp Microprocessor Antitrust Litig.*<sup>22</sup> *Twombly* does not impose a rigid formula for resolving motions to dismiss, rather it contains a ‘flexible plausibility standard’ that can be moulded to fit the facts and circumstances of a wide-variety of cases.<sup>23</sup>

In addition to pleading additional factual allegations suggestive of conspiracy, antitrust plaintiffs have also attempted to satisfy *Twombly* by pleading the existence of an underlying governmental enforcement action – at least when such an investigation has been publicly disclosed. The strength of these allegations varies depending on the facts of the particular case, the status of the government investigation, and the proximity of the claims made in the complaint to the subject of the governmental inquiry. Thus, in *Weeks Marine Inc et al v Bridgestone Corporation et al.*<sup>24</sup> the court denied the defendant’s motion to dismiss, holding that plaintiffs satisfied *Twombly* because ‘the claims put forth in the Complaint piggyback from a government antitrust complaint and are legally sufficient, even under the new framework’. Similarly, in *Hyland v Homeservices of America Inc.*<sup>25</sup> the plaintiffs supported their allegations with ‘references to the enforcement actions brought by Department of Justice’. In denying defendants’ motion, the court made a point of referencing the enforcement action by the Department of Justice (DoJ) when finding that the plaintiffs ‘nudged’ their claims across the line from possible to plausible.’ And, in *In re Hydrogen Peroxide Antitrust Litigation*<sup>26</sup> (*Hydrogen Peroxide*), a case that predates *Twombly*, the District Court denied a motion to dismiss in light of ‘the European Union’s regulatory investigation and the United States Department of Justice’s criminal investigation.’<sup>27</sup>

Plaintiffs typically argue that it is reasonable for courts to rely on a criminal governmental investigation as one factor in *Twombly*’s ‘plausibility analysis’ since the DoJ will not open a criminal grand jury proceeding unless there is a reasoned basis for believing that a crime has been committed.<sup>28</sup> Courts, however, will not blindly defer to the existence of a government investigation where it does not substantially overlap the claims made in the complaint, or where the matters under investigation are inconsistent with the complaint’s allegations. Thus, in *In re Parcel Tanker Shipping Services Antitrust Litigation*,<sup>29</sup> the plaintiff asserted a predatory pricing claim against its competitors where at least one of the defendants had previously pled guilty to participating in a cartel to fix prices. On a motion for reconsideration, the court granted the defendants’ motion to dismiss, noting that:

... although the defendants plead guilty to criminal conspiracy charges, those charges involved conduct on a different trade route and amounted to a conspiracy to unlawfully raise prices, while this case involves conspiracy claims of predatory pricing (that is, conspiracy to unlawfully lower prices).<sup>30</sup>

Courts have also expressed reservations about relying on investigations by foreign competition officials where the plaintiff has failed to sufficiently plead that illegal foreign conduct affected or was connected to United States commerce. For example, in *In re Elevator Antitrust Litig.*,<sup>31</sup> (*Elevator Antitrust*), the plaintiffs alleged, inter alia, that the defendants conspired to fix the prices for the sale and continuing maintenance of elevators. The plaintiffs supported their claims by referencing an investigation by certain European competition authorities into the activities of the defendants. The court dismissed the complaint, noting:

Allegations of anticompetitive wrongdoing in Europe – absent any evidence of linkage between such foreign conduct and conduct here

– is merely to suggest (in defendants’ words) that “if it happened there, it could have happened here.” And, regarding the nature of the elevator market, plaintiffs offer nothing more than conclusory allegations: for example, there are no allegations of global marketing of fungible products.<sup>32</sup>

The *Elevator Antitrust* court concluded:

Without an adequate allegation of facts linking transactions in Europe to transactions and effects here, plaintiffs’ conclusory allegations do not “nudge [their] claims across the line from conceivable to plausible”.<sup>33</sup>

Some courts have seemingly rejected any consideration of a governmental investigation. For example, in *Graphics I*, the court refused to assign any weight to a DoJ investigation that had not resulted in an indictment. The court explained this result as follows:

It is unknown whether the investigation will result in indictments or nothing at all. Because of the grand jury’s secrecy agreement, the scope of the investigation is pure speculation. It may be broader or narrower than the allegations at issue. Moreover, if the Department of Justice made a decision not to prosecute, that decision would not be binding on plaintiffs. The grand jury investigation is a non-factor.<sup>34</sup>

It is important to note, however, that not all courts require indictments before the governmental investigation will be factored into a *Twombly* analysis.<sup>35</sup>

In the end, most courts seem to be taking a flexible approach to consideration of underlying governmental investigations. As Chief Judge Vaughn Walker of the Northern District of California recently noted in *In re Tableware Antitrust Litig.*,<sup>36</sup> in denying the defendant’s motion to dismiss:

... a plaintiff may surely rely on governmental investigations, but must also, under FRCP 11, undertake his own reasonable inquiry and frame his complaint with allegations of his own design.<sup>37</sup>

Yet another way antitrust plaintiffs have attempted to overcome *Twombly* is to allege that a defendant has a history of disregarding the law. This argument has met with mixed success, depending on the facts of the particular case. In *In re Travel Agent Com’n Antitrust Litig.*,<sup>38</sup> (*Travel Agent Antitrust*) the court granted defendants’ motion to dismiss where plaintiffs alleged, in part, prior misconduct in unrelated aspects of defendants’ business practices at times prior to the class period. The court stated:

[T]here appears to be “no case law ... where ‘history of collusion’ is used as a plus factor courts consider in cases alleging illegal collusion in an oligopolistic market. The ... ‘history of collusion’ in the industry does not tend to exclude the possibility that defendants were engaged in lawful conduct during” the period relevant to the complaint.<sup>39</sup>

However, where a linkage between prior improper conduct and the current allegations is sufficiently established, courts will factor it into the overall plausibility analysis. Thus, in *SRAM*,<sup>40</sup> the court held that admissions of anti-competitive conduct by individuals responsible for marketing dynamic random access memory (DRAM) was one factor supporting the plausibility of an antitrust complaint involving a second product known as static random access memory (SRAM). The court explained:

Plaintiffs allege that the same actors associated with certain Defendants were responsible for marketing both SRAM and DRAM. Although the allegations regarding the DRAM guilty pleas are not

sufficient to support Plaintiffs' claims standing on their own, they do support an inference of a conspiracy in the SRAM industry.<sup>41</sup>

In the final analysis, *Twombly* does require an antitrust plaintiff to be more attentive to the details and theories underpinning its allegations before a lawsuit is filed than had been the case previously. Antitrust complaints need to be well thought out and contain sufficient facts to demonstrate the conspiracy facially plausible. This new focus puts a premium on undertaking a thorough pre-complaint investigation and highlights the need for antitrust victims to seek out experienced, competent counsel to represent them well before a lawsuit is filed.

**Notes**

- 1 See FRCP 12(b)(6).
- 2 527 F Supp 2d 1011, 1031-32 (ND Cal. 2007)
- 3 540 F Supp 2d 1085, 1101 (ND Cal 2007)
- 4 See *Erickson v Pardus*, 127 S Ct 2197, 2200 (2007).
- 5 *Conley v Gibson*, 355 US 41, 45-46 (1957).
- 6 127 S Ct 1955 (2007)
- 7 127 S Ct at 1965.
- 8 *Id* at 1974.
- 9 *Id* at 1961.
- 10 *Id* at 1962, 1970.
- 11 *Id* at 1971.
- 12 *Id* at 1972.
- 13 *Id* at 1974.
- 14 *Graphics I*, 527 F Supp 2d 1021-22.
- 15 See *Graphics II*, 540 F Supp 2d at 1091-95.
- 16 540 F Supp 2d at 1092.
- 17 2008 WL 623120 at \*6 (D Minn, 4 March 2008)
- 18 \_\_ F.Supp.2d \_\_, 2008 WL 2563358 (MD Pa, 24 June 2008)
- 19 *Id* at \*6-7.
- 20 F Supp 2d \_\_, 2008 WL 2120493 (ED Pa, 20 May 2008)
- 21 *Id* at \*4. With respect to the monopolisation claims under section 2 of the Sherman Act, the court appears to have considered *Twombly*'s pleading standards in its evaluation of plaintiff's allegations of the relevant market, the defendant's monopoly power, the defendant's improper maintenance of monopoly power, and the causal nexus between the defendant's conduct and plaintiff's injury. *Babyage.com*, 2008 WL 2120493 at \*5-6. Nonetheless the

- inquiry appears to have been more abbreviated than the consideration courts have given to horizontal allegations of conspiracy. As an example, the court identified generalised allegations concerning significant barriers to entry in the form of stringent industry regulation and high start-up costs to justify its determination that 'Plaintiffs have alleged grounds suggesting-not merely consistent with-a finding of monopoly power.' *Id* at \*6.
- 22 496 F Supp 2d 404 (D Del 2007)
- 23 *Id* at 408 n2; see also *Twombly*, 127 S.Ct. at 1973-74
- 24 07-cv-6811 (SDNY, 15 October 2007) (Order Denying Motion to Dismiss)
- 25 2007 WL 2407233 at \*3 (WD Ky, 17 August 2007)
- 26 401 F Supp 2d 451 (ED Pa 2005)
- 27 *Id* at 460.
- 28 *Antitrust Grand Jury Practice Manual*, vol 1, ch 1.B.1.
- 29 541 F Supp 2d 487 (D Conn 2008),
- 30 *Id* at 492.
- 31 502 F 3d 47 (2d Cir. 2007)
- 32 *Id* at 52.
- 33 *Id*, citing *Twombly*, 125 S Ct at 1974.
- 34 *Id* at 1024. See also *In re Static Random Access Memory (SRAM) Antitrust Litigation*, 2008 WL 426522, \*6 (ND Cal, 14 February 2008) (*SRAM*) ('Allegations regarding the SRAM investigation do not support Plaintiffs' antitrust claims').
- 35 See, for example, *Hydrogen Peroxide*, 401 F Supp 2d at 460 (reference made solely to government investigation rather than a more formalised enforcement proceeding).
- 36 363 F Supp 2d 1203 (ND Cal 2005)
- 37 *Id* at 1205.
- 38 2007 WL 3171675 (ND Ohio, 29 October 2007)
- 39 *Travel Agent Antitrust*, 2007 WL 3171675 at \*11.
- 40 See n34 above.
- 41 *SRAM*, 2008 WL 426522 at \*5; see also *In re Western States Wholesale Natural Gas Antitrust Litigation*, case no. 2:03-CV-01431-PMP-PAL (D Nv, 19 February 2008) ('Order' at p5) (settlements of wrongful, though not necessarily conspiratorial, conduct by certain defendants with government regulators was one factor in the court's determination that plaintiffs had plausibly alleged antitrust violations); and *In re Korean Air Lines Co, Ltd Antitrust Litig.* Master File No. 07-05107 (CD Cal, 25 June 2008) ('Order Granting In Part And Denying In Part Defendants' Motion to Dismiss' at pp15-16) (motion to dismiss denied, in part, because defendant had 'a history of collusive and anticompetitive behavior in other markets').

**Cohen Milstein Hausfeld & Toll**

1 Embarcadero Center  
Suite 2440  
San Francisco  
CA 94111  
United States

**Michael P Lehmann**  
mlehmann@cmht.com

**Christopher L Lebsack**  
clebsack@cmht.com

www.cmht.com

Cohen Milstein Hausfeld & Toll (CMHT) has been at the forefront of claimant private enforcement of competition in the United States and worldwide for almost 40 years. With almost 30 specialist qualified competition lawyers practising in the US and Europe, CMHT is widely recognised as one of the leading claimants' law firms.

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# About the Authors

## **Michael P Lehmann**

Cohen Milstein Hausfeld & Toll PLLC

Michael P Lehmann is a partner of Cohen Milstein Hausfeld & Toll, PLLC and heads the firm's San Francisco office. Mr Lehmann brings to the firm 30 years of experience as a business litigator, with a practice that ranged from class action litigation to business litigation on behalf of individual clients to extensive regulatory work before federal, state and international bodies to domestic and international arbitration. ■

## **Christopher L Lebsock**

Cohen Milstein Hausfeld & Toll PLLC

Christopher L Lebsock is of counsel with the firm and practises in its San Francisco office. He is a member of the antitrust practice group, though he also has experience litigating a wide array of complex cases. In 2005, Mr Lebsock was one of the primary attorneys representing nearly 119,000 employees in *Savaglio v Wal-Mart*, a class action case in which the jury returned a verdict for the plaintiff class of more than US\$172 million, including US\$115 million in punitive damages. ■