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IN THE COURTS

A Changed Standard on Motions to Dismiss

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In *Bell Atlantic Corporation v. Twombly*,[1] the Supreme Court, by a 7 to 2 vote, tightened the standards for pleading an antitrust conspiracy. The Court disavowed its 50-year-old, plaintiff-friendly formulation of the standard to be applied to motions to dismiss antitrust lawsuits in the federal courts and likely many other types of lawsuits as well—a change that warrants attention by any party that is briefing or waiting for a decision on a motion to dismiss. The now-rejected formulation, stated in *Conley v. Gibson*,[2] was 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." The new formulation requires a plaintiff to plead "enough facts to state a claim to relief that is plausible on its face," and not merely "conceivable." This new formulation has implications beyond the antitrust area.

Background

In *Bell Atlantic*, plaintiffs alleged that the former "Baby Bell" operating companies entered into a conspiracy in restraint of trade, in violation of Section 1 of the Sherman Act, by agreeing not to compete in each others' geographical regions and engaging in activities intended to deny potential competitors a foothold. The complaint relied heavily on parallel conduct (the fact that the companies were not in fact competing in each others' regions) as a basis for inferring that they had agreed not to do so. The district court had granted defendants' motion to dismiss, holding that conscious parallelism, in the absence of an actual agreement, is insufficient to violate the antitrust laws. The US Court of Appeals for the Second Circuit reversed that decision, relying on the *Conley v. Gibson* formulation because, in its view, there was a possible set of facts that would entitle a plaintiff to relief—the existence of an agreement—and plaintiffs were therefore entitled to proceed with discovery in their attempt to prove its existence.

The Supreme Court Decision

In reversing the Second Circuit's decision and reinstating dismissal of the complaint, the Supreme Court held that the *Conley* standard "has earned its retirement." The Court said the *Conley* standard "is best forgotten as an incomplete, negative gloss on an accepted pleading standard . . . ." It described the new standard, in the context of a Sherman Act claim:

> [W]e hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability

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> requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

The Court went on to characterize the pleading standard as requiring "enough facts to state a claim to relief that is plausible on its face," and not merely "conceivable." Because lawful conscious parallelism is "just as much in line with a wide swath of rational and competitive business strategy" as unlawful agreement, the Court held that plaintiffs had not "raise[d] a right to relief above the speculative level."

The opinion does not elaborate on how courts are to draw the line between claims that are "plausible" and those that are merely "conceivable," nor does it explain how its ruling will apply outside the setting of the antitrust laws. It is notable, however, that the Court's logic is not limited to antitrust litigation: The expense of defending complex litigation, which the Court identified as an important factor in its decision, is not limited to that area and, indeed, the Court cited its recent securities law decision in *Dura Pharmaceuticals, Inc., v. Broudo*,[3] as supporting authority. The two dissenting justices clearly view the majority's opinion as applying beyond the antitrust context.

The Implications of *Bell Atlantic*

Private securities litigation is often complex and therefore a strong candidate for close judicial scrutiny of pleadings. However the Private Securities Litigation Reform Act of 1995 had already elevated pleading requirements in many respects beyond those traditionally required by the courts under the Federal Rules of Civil Procedure. The decision in *Bell Atlantic* will, nonetheless, be an additional arrow in the quiver of citations available to defense counsel in filing motions to dismiss securities complaints that can be portrayed as failing to articulate a coherent theory of wrongdoing.

In a case involving less complexity, the Supreme Court has already indicted that *Bell Atlantic* does not modify the notice pleading standard of Rule 8(a)(2) of the Federal Rules. "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[4] Thus, the Supreme Court appears to read *Bell Atlantic* not as a change in pleading standards but rather as requiring that the facts that are pleaded plausible support the conclusion the plaintiff asks the Court to infer.

The practical significance of this decision lies in its instruction that courts should not simply accept the conclusion in a complaint because there is some hypothetical set of facts that could justify them. Rather, they should scrutinize the factual allegations to determine whether they provide a plausible basis for plaintiffs' assertion that an actionable violation of law occurred. The old *Conley* formulation is a mainstay of plaintiffs' briefs in opposition to motions to dismiss, as well as judicial opinions denying those motions. Therefore, any defendant that is briefing a motion to dismiss or that has such a motion pending should consider drawing this new decision to the court's attention promptly.

NOTES

1. *Bell Atlantic Corp. v. Twombly*, No. 05-1126.
2. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).
3. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).
4. *Erickson v. Pardus*, No. 06-7317 (June 4, 2007) (per curiam) (*citing* Bell Atlantic).

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