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# CONSUMER NEWS

## Plaintiffs' Attorneys Wince as Second Circuit Applies Tough *Twombly* Standard to Antitrust Suits

By Thomas A. McCann\*

The United States Court of Appeals for the Second Circuit set a high bar this September for plaintiffs alleging industry-wide conspiracies to block competition in violation of U.S. antitrust laws.<sup>1</sup> The appellate court's per curiam decision provides an early insight into the new pleading rules set out by the United States Supreme Court's May 2007 decision in *Bell Atlantic Corp. v. Twombly*.<sup>2</sup>

The Second Circuit applied *Twombly* to dismiss a highly detailed complaint regarding a price fixing scheme among elevator companies that would have easily passed muster in the pre-*Twombly* era, according to experts in the field.<sup>3</sup> The appellate court's strict application of the new pleading rules has corporate defendants breathing a sigh of relief and plaintiff's lawyers scrambling to adapt their pleadings to survive a motion to dismiss.<sup>4</sup>

In the Second Circuit case, a putative class of consumers who purchased elevators and elevator repair and maintenance services filed a complaint in U.S. District Court for the Southern District of

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<sup>1</sup> *In re Elevator Antitrust Litig.*, 502 F.3d 47, 48-9 (2d Cir. 2007).

<sup>2</sup> *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

<sup>3</sup> Posting of Anik Banerjee to Antitrust Law Blog, *Second Circuit Applies Twombly To Dismiss Detailed Allegations Of Antitrust Conspiracy*, <http://antitrustlawblog.com> (Oct. 8, 2007) [hereinafter Anik Banerjee].

<sup>4</sup> *Id.*

New York alleging that four major elevator companies engaged in a conspiracy in the United States and Europe to monopolize the elevator market.<sup>5</sup> Specifically, the plaintiffs alleged that the companies conspired to fix prices for the sale and continuing maintenance of their elevators in violation of Section 1 of the Sherman Act;<sup>6</sup> that the companies tried to monopolize the market for their elevator products in violation of Section 2 of the Sherman Act;<sup>7</sup> and that they tried to monopolize the maintenance market for their individual elevator products by making it difficult for independent maintenance companies to service each defendant's elevators.<sup>8</sup>

To support these allegations, the plaintiffs asserted that the defendant elevator companies participated in meetings in the United States and Europe to discuss pricing and market divisions, agreed to fix prices for elevators and elevator services, rigged bids for sales and maintenance, exchanged price quotes, "collusively" required customers to enter long-term maintenance contracts, and collectively took actions to drive independent repair companies out of business.<sup>9</sup> In their complaint, the plaintiffs also made specific reference to government investigations by Italy and the European Union into the defendants' alleged antitrust violations, as a result of which the European Commission raided each defendant's offices and levied "extraordinary fines" on the companies after they admitted wrongdoing.<sup>10</sup>

The district court, however, dismissed the complaint. The appellate court upheld the dismissal, holding that the complaint's conspiracy allegations provided "no plausible ground to support the inference of an unlawful agreement."<sup>11</sup>

The court wrestled with the U.S. Supreme Court's new mandate set down in *Twombly*, acknowledging that there is still "considerable uncertainty" as to how broadly it should be applied.<sup>12</sup> In *Twombly*, a class of plaintiffs alleged that four major telephone

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<sup>5</sup> *In re Elevator Antitrust Litig.*, 502 F.3d at 48-9.

<sup>6</sup> *See* 15 USC § 1.

<sup>7</sup> *See* 15 USC § 2.

<sup>8</sup> *Id.* at 49.

<sup>9</sup> *Id.* at 51; Anik Banerjee, *supra* note 3.

<sup>10</sup> *In re Elevator Antitrust Litig.*, 502 F.3d at 49, 51.

<sup>11</sup> *Id.* at 48-9.

<sup>12</sup> *Id.* at 50.

local exchange carriers colluded to frustrate new competitors from entering the market pursuant to the 1996 Telecommunications Act, which required the established carriers to sell local telephone services at wholesale rates, lease unbundled network services and permit interconnection to the fledgling new competitors.<sup>13</sup> The plaintiffs' allegations consisted of claims that the defendants agreed not to enter each other's territories and to work jointly against the new competitors.<sup>14</sup> However, the complaint had no independent factual allegations of a negotiated agreement by the defendant companies, such as a specific meeting.<sup>15</sup> After the complaint was dismissed, the Second Circuit revived the lawsuit, saying that an inference could be drawn that an illegal agreement must have taken place at some time if collusion in fact occurred.<sup>16</sup>

The U.S. Supreme Court reversed the ruling, holding that to survive a motion to dismiss, it is not enough to make allegations of an antitrust conspiracy that are consistent with an unlawful agreement; to survive, the complaint must contain "enough factual matter (taken as true) to suggest that an agreement [to engage in anticompetitive conduct] was made."<sup>17</sup> While the new standard did not require heightened fact pleading of specific events, it did require enough facts to "nudge the [plaintiffs'] claims across the line from conceivable to plausible."<sup>18</sup> The decision meant that, at least for some types of antitrust violations, courts could no longer apply the general federal pleading standards of *Conley v. Gibson*, where a court cannot dismiss unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.<sup>19</sup>

In reaching its decision, the Supreme Court cited the potentially enormous discovery costs in antitrust cases, and it explained that district courts must "retain the power to insist on some

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<sup>13</sup> *Twombly*, 127 S. Ct. at 1962.

<sup>14</sup> *Id.* at 1962-3.

<sup>15</sup> *Id.* at 1962.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1965.

<sup>18</sup> *Twombly*, 127 S. Ct. at 1974.

<sup>19</sup> *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957).

specificity in pleading before allowing a potentially massive factual controversy to proceed.”<sup>20</sup>

In the elevator litigation, the plaintiffs argued that three parts of their complaint met the Supreme Court’s new “plausibility” standard in *Twombly*: 1) Averments of agreements made between the defendant companies at some unidentified place and time; 2) averments of parallel conduct; and 3) averments suggesting anticompetitive wrongdoing by several of the defendants in Europe.<sup>21</sup>

However, the Second Circuit called the allegations about agreements between the companies merely conclusory and that they amounted to “basically every type of conspiratorial activity that one could imagine.”<sup>22</sup> The court went on to agree with the district court that “[t]he list is in entirely general terms without any specification of any particular activities by any particular defendant[; it] is nothing more than a list of theoretical possibilities, which one could postulate without knowing any facts whatsoever.”<sup>23</sup> The court said that simply alleging meetings or agreements at some unidentified time and place, with nothing more, is not enough, implying that plaintiffs must have concrete knowledge of the meetings for the allegation to get past the complaint stage.<sup>24</sup>

The plaintiffs then alleged that parallel conduct by the companies, such as “similarities in contract language, pricing, and equipment design,” stated enough facts to prove there was an antitrust conspiracy.<sup>25</sup> However, the court reasoned that while this alleged conduct was consistent with a conspiracy, it is “just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”<sup>26</sup> The court went on to say that similar contract terms can reflect “similar bargaining power and commercial goals (not to mention boilerplate),” and similar contract wording can reflect “copying of documents that may not be secret.”<sup>27</sup> Furthermore, the

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<sup>20</sup> *Twombly*, 127 S. Ct. at 1967.

<sup>21</sup> *In re Elevator Antitrust Litig.*, 502 F.3d at 50.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 50-1.

<sup>24</sup> *In re Elevator Antitrust Litig.*, 502 F.3d at 51.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

court said that similar pricing can mean effective competition just as much as it can mean an anticompetitive conspiracy, and similar equipment design can just reflect state of the art design.<sup>28</sup> *Twombly* squarely addressed the problem of alleging parallel conduct, and the U.S. Supreme Court stated that:

[p]arallel conduct. . . gets the complaint close to stating a claim, but without some further factual enhancement, it stops short of the line between possibility and plausibility of entitlement to relief.<sup>29</sup>

The plaintiffs next asserted that the extensive allegations of misconduct in Europe were enough to prove the plausibility of an antitrust conspiracy among the elevator companies.<sup>30</sup> The plaintiffs alleged that the incriminating evidence from Europe reflected the existence of a “worldwide conspiracy”; and that even though the misconduct was not in the United States, the market for elevators is a global one, and the prices charged abroad affect the prices in the United States and vice versa.<sup>31</sup> Still, the court declared that the plaintiffs pleaded insufficient facts, reasoning that “anticompetitive wrongdoing in Europe, absent any evidence of linkage between such foreign conduct and conduct here – is merely to suggest . . . that ‘if it happened there, it could have happened here.’”<sup>32</sup> The court scolded the plaintiffs for including nothing in their allegations about global marketing strategies or fungible products, no assertions that the companies monitored prices in multiple markets, and no proof that the actual prices of elevators or maintenance in the United States were affected by the actions in Europe.<sup>33</sup>

Finally, the plaintiffs suing the elevator companies alleged that the defendants unilaterally engaged in “exclusionary conduct” to create or attempt to create a monopoly in the maintenance market for its own elevators.<sup>34</sup> The plaintiffs alleged the defendants designed their elevators to prevent servicing by any other providers, including

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<sup>28</sup> *Id.*

<sup>29</sup> *Twombly*, 127 S. Ct. at 1966.

<sup>30</sup> *In re Elevator Antitrust Litig.*, 502 F.3d at 51.

<sup>31</sup> *Id.*

<sup>32</sup> *In re Elevator Antitrust Litig.*, 502 F.3d at 52.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

the other defendants; refused to sell to competitors the parts, tools, software programs and blueprints necessary to repair their elevators; and obstructed competing companies' attempts to purchase elevator parts.<sup>35</sup> However, the appellate court dismissed this section of the complaint as well, reasoning that the Sherman Act allows companies in an entirely private business to deal with whatever third parties they choose, and that refusing to do so is not an antitrust violation.<sup>36</sup> The only exception the court recognized was that companies are prohibited from terminating "a prior (voluntary) course of dealing with a competitor," because "the unilateral termination suggest[s] a willingness to forsake short-term profits to achieve an anticompetitive end."<sup>37</sup> The court implies that only this type of conduct would violate § 2 of the Sherman Act because it would drive businesses out of a pre-existing market and raise prices for repair work that had previously been offered for a lower price.<sup>38</sup> The court said a plaintiff would have to prove the terminations were part of a "scheme of willful acquisition. . .of monopoly power."<sup>39</sup> However, because the plaintiffs alleged no such terminations, they failed to state a claim.<sup>40</sup>

The Second Circuit's exacting interpretation of the *Twombly* standard has driven home the tough new playing field for antitrust lawsuits, according to plaintiffs' lawyers.<sup>41</sup> The case also shows that the *Twombly* standards may affect a much broader range of antitrust suits than previously thought.<sup>42</sup> J. Douglas Richards, the attorney who argued and lost the *Twombly* case before the U.S. Supreme Court, has contended that the impact of the holding, even in antitrust conspiracy cases, would be very small, and that to survive a defendant's motion to dismiss, a plaintiff need only point to a meeting that could have occurred shortly before the alleged antitrust

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *In re Elevator Antitrust Litig.*, 502 F.3d at 53.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Anik Banerjee, *supra* note 3.

<sup>42</sup> Steve Lash, *Reach of Antitrust Ruling Debated*, CHI. DAILY L. BULL., Nov. 15, 2007, at A1.

violation, such as price fixing.<sup>43</sup> However, many defense attorneys have “declared open season on plaintiffs,” aggressively citing *Twombly* to dismiss a wide range of business cases where plaintiffs’ claims are short on facts and long on inferences of illegal meetings.<sup>44</sup> The Second Circuit’s elevator litigation ruling provides further ammunition to the defense bar in dismissing expensive antitrust cases early.<sup>45</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Anik Banerjee, *supra* note 3.