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Just over a year ago, the U.S. Supreme Court issued its decision in *Bell Atlantic Corp. v. Twombly*¹ which arguably changed the pleading standards required for all complaints filed in federal court. *Twombly* has particular relevance to antitrust class actions, however, because the complaint at issue in *Twombly* was an antitrust class action. While it is too early to assess the full impact *Twombly* will have on antitrust class actions, we believe that, as a result of *Twombly*, economic analysis now matters at the earliest stages of an antitrust class action. It is no longer sufficient for plaintiffs to file complaints with bare bones Sherman Act Section 1 allegations, and await summary judgment to proffer a coherent economic theory after learning the facts through discovery.

It is well-settled that economics play a critical role at the summary judgment stage of an antitrust class action. In *Matsushita*,² the Supreme Court held that if defendants “had no rational economic motive to conspire, and if their conduct is

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¹ *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007).

² *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596-97 (1986).

consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.” To survive a motion for summary judgment, “a plaintiff seeking damages for violation of § 1 must present evidence ‘that tends to exclude the possibility’ that the alleged conspirators acted independently.”³

In *Twombly*, the Supreme Court makes it clear that economics now matters from day one of a Section 1 antitrust class action. Using language which mirrors the summary judgment standard set forth in *Matsushita*, the Supreme Court held that to survive a motion to dismiss a complaint alleging a Section 1 violation must provide “plausible grounds” to infer an agreement and that the complaint must contain “some factual enhancement” to “cross the line between possibility and plausibility of ‘entitle[ment] to relief.’”⁴ Indeed, Justice Stevens laments in his dissent that “[e]verything today’s majority says would ... make perfect sense if it were ruling on a Rule 56 motion for summary judgment.”⁵

As we go forward under this new *Twombly* paradigm for evaluating complaint allegations, it will be interesting to see the degree to which the concern expressed by Justice Stevens in his *Twombly* dissent plays out in reality. In his dissent, Justice Stevens laments, “I fear that the unfortunate result of the majority’s new pleading rule will be to invite lawyers’ debates over economic theory to conclusively resolve

³ *Id.* at 588.

⁴ 127 S.Ct. at 1965-66.

⁵ *Id.* at 1983.

antitrust suits in the absence of any evidence.”⁶

If the Supreme Court’s own analysis in *Twombly* is any indication, an antitrust class action complaint must provide an economic theory which truly hangs together based on plaintiff’s factual allegations in order to survive a motion to dismiss. While in the past, the parties to an antitrust class action might wait until after the start of fact discovery to enlist the help of an expert economist, plaintiffs may want to consider involving an expert economist to assist in formulating complaint allegations that will advance a coherent economic theory suggestive of a Section 1 conspiracy. Likewise, defendants may want to consider engaging an expert economist at the outset of an antitrust class action to assist in framing for a motion to dismiss any deficiencies with the economic theories advanced in the plaintiff’s complaint.

The *Twombly* Decision

All lawsuits filed in federal court are impacted by *Twombly* because the Supreme Court appears to have implemented a new pleading standard. In order to survive a motion to dismiss, a plaintiff’s complaint must satisfy Federal Rule of Civil Procedure 8(a)(2) which requires a “short and plain statement of the claim showing that the pleader is entitled to relief.” In *Twombly*, the Supreme Court “retired” the “no set of facts” language from *Conley v. Gibson* which for over fifty years had served as the standard for evaluating whether a complaint satisfied Rule 8(a)(2).⁷ In *Conley*, the Supreme Court held that “a complaint should not be dismissed for failure to state a

⁶ *Id.* at 1988.

⁷ 127 S.Ct. at 1969.

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.”⁸ In its place, the Supreme Court announced in *Twombly* that courts should apply a “plausibility” test. Namely, a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face” such that if a plaintiff fails to plead facts sufficient to “nudge[] their claims across the line from conceivable to plausible, their complaint must be dismissed.”⁹

With regard to antitrust class actions assertion Section 1 violations, however, arguably, *Twombly* may be viewed as an opinion in which the Supreme Court merely states the obvious and does cover any new ground. At bottom, the Supreme Court holds in *Twombly* that allegations of conspiracy primarily premised on parallel conduct are not sufficient to survive a motion to dismiss. But this principle was already well-established in the case law prior to *Twombly*. Specifically, in *Twombly* the putative class alleged that defendant Baby Bells or “incumbent local exchange carriers (‘ILECs’)” engaged in parallel refusals to deal with “competitive local exchange carriers (‘CLECs’)” and that this was evidence of a conspiracy among the defendants. The Supreme Court summarized its holding in *Twombly* as follows:

The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.¹⁰

⁸ Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

⁹ 127 S.Ct. at 1975.

¹⁰ *Id.* at 1961.

The Supreme Court further opined:

[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.¹¹

In footnote 4, the Supreme Court offered plaintiffs a road map of “several examples of parallel conduct allegations that would state a § 1 claim under this standard.”¹²

Indeed, as pointed out by a group of economists who filed an amicus curiae brief with the Supreme Court in *Twombly*, “it has long been established that conscious parallelism, even if it results in parallel behavior, does not violate Section 1 of the Sherman Act or any other rule of U.S. antitrust law.”¹³ As these economists argued, the U.S. Court of Appeals for the Second Circuit in the *Twombly* opinion was on its own advocating a “parallel behavior is enough” standard for Section 1 complaint allegations.¹⁴ These economists pointed out that all other courts of appeals addressing the issue had adopted a “plus factors” approach requiring that “a claim of conspiracy can survive a motion to dismiss only if the allegations in the complaint, if proven to be true, tend to exclude the possibility that the claimed conspirators acted independently.”¹⁵

Yet, there is more to *Twombly* than the obvious. In reality, the Supreme Court

¹¹ *Id.* at 1966.

¹² *Id.* at 1966, n.4.

¹³ Brief of Amici Curiae Economists In Support of Petitioners, 2006 WL 2506633 (U.S.) at 16 (citing *Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984); and *Theatre Enterprises, Inc. v. Paramount Film Distribution Corp.*, 346 U.S. 537 (1954)).

¹⁴ *Id.* at 3-4.

¹⁵ *Id.*

engaged in a highly critical evaluation of the economic theories being advanced by plaintiffs in *Twombly*, particularly in its evaluation of the “second conspiracy theory” advanced in plaintiffs’ complaint.¹⁶ As described by the Supreme Court, plaintiffs’ second theory alleged that it would have been profitable for the ILECs to enter each others’ service areas after 1996 Telecommunications Act, but that the ILECs did not do so.¹⁷ If, with discovery, the ILEC’s could have been shown to have a strong profit incentive to expand sales into other territories but did not expand, then this would tend rule out independent actions and support the alleged conspiracy.¹⁸ However, the Supreme Court quashed this second theory without affording plaintiffs any discovery on the ground that the facts alleged in the complaint did not support this theory.¹⁹

In evaluating plaintiffs’ second theory, the Supreme Court acknowledged that in a “traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement.”²⁰ However, the Supreme Court reasoned that in the case of the ILEC’s there existed “an obvious alternative” lawful explanation for the conduct.²¹ According to the Supreme Court, since the ILEC’s were “born” in a

¹⁶ 127 S.Ct. at 1972.

¹⁷ *See id.*

¹⁸ *See* Gregory Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 ANTITRUST L.J. 719-80, 767 (2004); James Langenfeld & James Morsch, *Refining the Matsushita Standard and The Role Economics Can Play*, 38 (3) LOYOLA UNIV. CHICAGO L.J. 507-12 (Spring 2007).

¹⁹ 127 S.Ct. at 1973.

²⁰ *Id.* at 1972.

²¹ *Id.*

world where “monopoly was the norm” (i.e., in the decade preceding the Telecommunications Act of 1996 which withdrew approval of the ILEC’s monopolies), “a natural explanation” for their non-competition was that “the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same.”²² Accordingly, the Supreme Court did not find plaintiff’s conspiracy theory to be plausible.²³

Thus, in the context of Section 1 claims, the Supreme Court’s “plausibility” test appears to demand that lower courts critically evaluate whether the economic theory advanced in plaintiff’s complaint is logical and, if so, whether the alleged facts truly support that economic theory. District courts are being asked to assume a gatekeeper role that previously did not exist.

Motions to Dismiss Antitrust Class Actions Post-*Twombly*

While we need more time for a body of opinions in antitrust actions interpreting *Twombly* to develop, there are several post-*Twombly* opinions by federal district courts in antitrust class actions which merit discussion.

After being reversed by the Supreme Court in *Twombly*, the Second Circuit changed its tune in *In re Elevator Antitrust Litig.*²⁴ and affirmed dismissal of an antitrust class action on ground that the complaint allegations did not provide

²² *Id.*

²³ *Id.* at 1973.

²⁴ *In re Elevator Antitrust Litig.*, 502 F.2d 47 (2d Cir. 2007).

“plausible grounds” to infer a conspiracy.²⁵ Clearly, this result would not have occurred but for *Twombly*. Significantly, this was a lawsuit brought by seasoned plaintiff antitrust class action lawyers. The Second Circuit reasoned that the complaint provided nothing more than “a list of theoretical possibilities” alleging “every type of conspiratorial activity that one could imagine.”²⁶ The Second Circuit rejected plaintiffs’ assertion that their claims of a U.S. conspiracy were rendered plausible by virtue of plaintiffs’ anticompetitive misconduct in Europe: “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.’”²⁷

The opinion in *In re Flash Memory Litig.*²⁸ raises questions about how post-*Twombly* a plaintiff can develop factual assertions capable of surviving a motion to dismiss. In that case, in the wake of a criminal investigation by the Department of Justice (DOJ) into alleged price-fixing in the flash memory industry, several different plaintiff groups filed putative class actions alleging price-fixing in the flash memory industry. The cases were consolidated before a single federal district judge, who ordered plaintiffs to file a consolidated complaint. Lead counsel for the plaintiffs requested permission from the court for plaintiffs to conduct discovery prior to filing their amended consolidated complaint. In particular, plaintiffs wanted to obtain all of

²⁵ *Id.* at 50.

²⁶ *Id.* at 50-51.

²⁷ *Id.* at 51-52.

²⁸ *In re Flash Memory Litig.*, 2008 WL 62278 (N.D. Cal. 2008).

the documents that defendants had submitted to the DOJ in connection with its investigation. The court noted that “[g]iven the Supreme Court’s recent decision in *Twombly*, ... the plaintiffs presumably seek enough facts to survive the inevitable motion to dismiss....”²⁹ The court denied plaintiffs’ request for pre-complaint discovery.³⁰

An amended complaint in *In re Graphics Processing Units Antitrust Litig.*³¹ survived a motion to dismiss. After the court dismissed plaintiffs’ initial complaint for failure to satisfy *Twombly*, plaintiffs apparently took to heart footnote 4 of *Twombly* and refashioned their complaint to allege historically unprecedented change in the parties’ behavior due to the alleged conspiracy.³² With these changes, the court opined that plaintiffs’ head pleaded allegations that “if true would make an antitrust conspiracy plausible.”³³

Finally, *In re OSB Antitrust Litig.*³⁴ provides another example of an antitrust class action complaint that withstood attack post-*Twombly*. The district court distinguished *Twombly* noting that plaintiffs in *Twombly* “alleged virtually no specific wrongdoing” by defendants whereas in *OSB Antitrust Litig.* plaintiffs alleged facts that “strongly suggest- and are ‘not merely consistent with’ a price-fixing conspiracy.”³⁵ In particular, the court

²⁹ *Id.* at 2.

³⁰ *Id.* at 5.

³¹ *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085 (N.D. Cal. 2007).

³² *Id.* at 1091-95.

³³ *Id.* at 1096.

³⁴ *In re OSB Antitrust Litig.*, 2007 WL 2253419 (E.D. Pa. 2007).

³⁵ *Id.* at 2.

pointed out that plaintiffs identified the “mechanism” by which the defendants allegedly fixed OSB prices.

While the full impact of *Twombly* remains to be seen, it seems clear that as we proceed post-*Twombly* more antitrust class action cases will require introducing economic analysis at the early stages.