



# CPI Antitrust Chronicle

May 2013 (1)

**A Cost-Cutting Solution to the  
Discovery Burdens of Antitrust  
Disputes**

**James Bo Pearl & J. Hardy Ehlers  
O'Melveny & Myers**

## A Cost-Cutting Solution to the Discovery Burdens of Antitrust Disputes

James Bo Pearl & J. Hardy Ehlers<sup>1</sup>

Litigating an antitrust case has always been a costly endeavor for all parties involved. Just in the last 30 years, sprawling cases such as *Microsoft*, *Intel*, and price-fixing cases involving LCDs, vitamins, and memory have chewed up hundreds of millions of dollars in fees and expert costs. There are myriad reasons for the staggering expense: The scope of these cases often comprises all aspects of a defendants' business, a searching inquiry of the relevant markets at issue, and battles between pricey economists who conduct vast econometric market studies to support their side's view of the case. And while the unrelenting explosion of electronic data has affected all litigation segments to some extent, it has impacted antitrust litigation in a particularly profound way. Rapidly expanding discovery costs now force settlements in situations where, in the past, defendants might make the pragmatic business decision to litigate when they believed they did nothing wrong.

The costs do not impact only defendants. Plaintiffs' lawyers who in the past may have worked a case from the ground up may be more hesitant to invest in a multi-year discovery battle. Such attorneys may be more likely to simply trail government investigations in which a plea deal portends a higher likelihood of a success.

As it stands now, the law is not well situated to rein in the mushrooming discovery costs. Instead, the jurisprudence has something for everyone when it comes to properly defining the scope of discovery. An experienced antitrust practitioner can safely predict they will see the same case excerpts on any motion to compel. When moving to compel production, plaintiffs regularly point to *Callahan v. A.E.V. Inc.*'s statement that "discovery in an antitrust case is necessarily broad because allegations involve improper business conduct [and] [s]uch conduct is generally covert and must be gleaned from records, conduct, and business relationships."<sup>2</sup>

Defendants typically respond with an appeal to *Bell Atlantic Corp. v. Twombly*'s description of antitrust discovery as a "sprawling, costly, and hugely time-consuming undertaking" often unsuccessful in "reveal[ing] relevant evidence to support a \$1 claim," thereby characterizing the plaintiff's motion as an abuse of discovery to extort a settlement.<sup>3</sup> Depending on whether the court grants or denies the motion to compel, it will adopt one of these competing norms of antitrust discovery and cite either *Callahan* or *Twombly* back at the litigants.

In *Twombly*, the Supreme Court rejected "careful case management" as a tool to check discovery abuses; supervising magistrates cannot define, detect, or prevent discovery abuse because they cannot know the expected productivity of a given request.<sup>4</sup> In the absence of such

---

<sup>1</sup> Respectively, Partner and Associate in the Los Angeles office of O'Melveny & Myers, specifically as members of the Business Trial and Litigation Practice.

<sup>2</sup> *Callahan v. A.E.V. Inc.*, 947 F. Supp. 175, 179 (W.D.Pa. 1996).

<sup>3</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559, 560 n.6 (2007).

<sup>4</sup> *Id.* at 560, n.6.

knowledge, courts adjudicate discovery motions by endorsing either plaintiff's or defendant's normative characterization of antitrust discovery, as described above.

The *Twombly* Court held that raising the pleading standard was the only way to prevent defendants from incurring enormous discovery expenses defending meritless antitrust claims or from settling anemic cases before summary judgment.<sup>5</sup> But the *Twombly* Court's solution has not worked as intended; data shows that the raised pleading standard has had a minimal effect, if any, on the dismissal rates of antitrust complaints. In 2010, the Federal Judicial Center analyzed motion activity across substantive areas of law in 23 federal district courts in 2006 and 2010, and found *Twombly* to have had no meaningful effect on 12(b)(6) litigation.<sup>6</sup> And a 2010 practitioners' guide examined nearly 170 post-*Twombly* federal antitrust cases and found only a 4 percent increase in the disposition percentage of motions to dismiss.<sup>7</sup>

Nor are needless discovery costs necessarily limited to unmeritorious cases. As a practical matter, of the millions of documents reviewed and produced in large antitrust cases, only a few thousand, if that, are eventually used in litigation. It is physically impossible to use all but a fraction of the documents that cost millions to review and produce. Rule 30's seven-hour deposition limit imposes a practical cap on the number of documents that can be used in depositions—a few hundred at most.<sup>8</sup> And only a subset of these become trial exhibits. So, while the parties spend millions to produce gigabytes—and sometimes terabytes—of data, even the most complicated case will get distilled down to a few thousand documents.

Thus, plaintiffs and defendants alike are spending massive sums to review millions of documents that will never see the light of day. A better balance can be struck, however. The balance would not seek to limit the number of documents to be produced, as has been proposed in many quarters.<sup>9</sup> Limiting that production to only a few custodians may, in some cases, impede the search for the truth if the roles of the parties' employees are not well known.

Instead, this article proposes limiting the number of documents that can be used in the litigation—like a trial exhibit list. Under this protocol, the requesting party is entitled to receive a broad production of documents (after the producing party has reviewed for privilege or run an electronic privilege screen to reduce costs) in native format to run whatever searches it deems appropriate. The requesting party must then declare a subset of that broad production to be “in play.” For instance, a party may be limited to designating only 500 documents per custodian to be “in play.” Alternatively, the number “in play” might be 1 percent of all documents produced.

---

<sup>5</sup> *Id.* at 559 (raising pleading standard to require enough factual allegations to show that plaintiff is plausibly entitled to relief, which in antitrust context means facts that exclude independent self-interested conduct).

<sup>6</sup> Joe S. Cecil, et al., Fed. Judicial Ctr., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (2011), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publications/motioniqbal.pdf>.

<sup>7</sup> See Heather Lamberg Kafele, et al., Antitrust Digest, DEVELOPING TRENDS AND PATTERNS IN FEDERAL ANTITRUST CASES AFTER *BELL ATLANTIC CORP. V. TWOMBLY* AND *ASHCROFT V. IQBAL 2* (2010), available at <http://www.shearman.com/files/upload/AT-041910-Antitrust-Digest.pdf>.

<sup>8</sup> FED. R. CIV. P. 30(d)(1).

<sup>9</sup> Advisory Committee on Civil Rules, Meeting Notes (November 1-2, 2012), at 334, 531-32, 534, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2012-10.pdf>.

Substantially limiting the number of documents in play drastically reduces the costs to the producing party, because it needs to review a document only after it has been designated as “in play,” rather than reviewing every document before it goes out the door for responsiveness, privilege, and confidentiality—a choking expense in almost every case in the electronic age.

In short, the protocol meets litigants halfway by allowing plaintiffs access to a broader corpus of documents on the condition that they stipulate to a smaller universe of documents to be used at depositions—a number to be determined on the basis of plaintiffs’ own review of the large document set. Obviously, the protocol can be effectuated differently in each case, but would contain the following elements:

- The responding party makes available to the requesting party all non-privileged documents that are responsive to custodian lists and/or search terms designed to capture potentially relevant documents. This is a comprehensive collection of data, meant to provide the requesting party with access to all the documents it needs to evaluate its case. The documents are produced in their “native” format, meaning the files retain the same format in which they were created and stored on a computer.
- The parties agree: (i) that the producing party may apply an electronic privilege screen prior to producing any documents; (ii) that inadvertently providing access to privileged documents in the inspection set does not waive privilege; and (iii) that the responding party is entitled, without limitation, to claw back any inadvertently produced documents or information.
- The requesting party reviews the document collection. This review can be accompanied by controls designed to mitigate the risks of the initial broad production. The native files are not to be used in the litigation. At some interval (usually monthly or bi-monthly), the requesting party notifies the responding party of the documents that are “in play.” The parties agree in advance to limit the number of files that may be periodically requested. The requested files are converted to TIFF format so that they may be branded with a confidentiality designation, and are then considered produced and can be used for any purpose in the litigation. To the extent that the responding party intends to use its own documents not designated for production in TIFF format by the requesting party, those documents must also be identified, produced, and reduced to TIFF image.

The beauty of the regime is that the producing party need only review documents designated for production out of the broad inspection set. This alone can save a party hundreds of thousands of dollars in review costs. Meanwhile, plaintiffs get access to a broad corpus of information to find the facts needed to prove their case. Both parties avoid reviewing excessive numbers of irrelevant documents that will never see the light of day.

To be sure, there are downsides to the proposal:

1. The requesting party must show some of its cards in advance. This reduces the chances of surprising a witness at deposition with a document the witness has never seen. Given that trial by ambush is not a concept encouraged in the Federal Rules, this seems like a minimal downside.

2. Producing a broader corpus of information (even if it does not have to be reviewed prior to inspection) increases the costs of privilege logging; a cost center that, even now, is largely ignored. Here, the Rules should be amended to allow electronic privilege logs that can be generated to show only bibliographic information. The requesting party could then demand substantive descriptions of the privilege basis for a subset of the documents withheld, rather than for all documents captured by an electronic privilege screen.
3. Finally, the proposed protocol could force a producing party to produce irrelevant information that might be sensitive for other reasons. With such a broad production, the requesting party will see more information than they are arguably entitled to under the current regime.

But the enormous cost savings this protocol can accomplish would seem to outweigh such risks. Moreover, a strong protective order should prohibit the use of any irrelevant material for a purpose outside of the present litigation (and the rules of evidence should effectively police its use within the litigation).

Use of this protocol will not eliminate discovery disputes. But it will make the process much less expensive. And when disputes do arise, they will not be focused on the general burdens or obligations inherent to antitrust discovery, but on the exclusion or inclusion of specific subject matters—a question that courts are much better equipped to adjudicate. By cutting down the costs of antitrust discovery, this protocol shifts the pre-litigation focus of an antitrust dispute back to its merits.