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Twombly Update: Navigating the Flurry of Decisions in 2010-11

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March 24, 2011

TWOMBLY'S IMPACT FOUR YEARS LATER

- *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
- Decided on May 21, 2007.
- Since then, federal courts have cited *Twombly* in more than 40,000 published opinions.
- The Supreme Court rejected the "no set of facts" pleading standard from *Conley v. Gibson.*
- But what exactly replaced the *Conley* standard?

THE "PLAUSIBILITY" STANDARD FROM *TWOMBLY*

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- Did *Twombly* announce a "heightened" pleading standard or just a return to Rule 8(a)?
- Must a plaintiff always plead the footnote 10 details about specific conspiracy meetings?
- Is conscious parallelism ever enough to survive a motion to dismiss?
- Must a plaintiff allege facts showing plus factors to survive a motion to dismiss? If so, which ones?
- What is the difference between the standard for deciding motions to dismiss and the standard for deciding motions for summary judgment?

RECENT SUPREME COURT ACTIVITY

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- On January 10, 2011, the Supreme Court denied cert in two antitrust cases specifically raising *Twombly* issues.
- The Court let stand the Second Circuit's decision denying a motion to dismiss in *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010), *cert denied*, 2011 WL 55814 (2011).
- The Court let stand the Sixth Circuit's decision granting a motion to dismiss in *In re Travel Agent Commission Antitrust Litig*., 583 F.3d 896 (6th Cir. 2009), *cert denied sub. nom.*, *Tam Travel, Inc. v. American Airlines, Inc*., 131 S. Ct. 896 (2011).
- On March 22, 2011, the Supreme Court rejected a *Twombly* motion in a securities fraud case, unanimously holding that plaintiffs had alleged facts sufficient to support a "cogent and compelling" inference of scienter. *Matrixx Initiatives, Inc. v. Siracusano*, No. 09-1156 (U.S. March 22, 2011).

THE EXISTENCE OF A GOVERNMENT INVESTIGATION

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- Courts that deny a *Twombly* motion often cite the existence of a government investigation as one factor making the existence of a conspiracy plausible.
- For example, in the *Starr* case, the Second Circuit cited the following facts to support its holding that the plaintiff had alleged enough facts to make its conspiracy theory plausible:
  - Defendants controlled 80% of the market for Internet music sales;
  - Defendants agreed to launch two joint ventures that charged high prices and imposed unpopular terms for customers;
  - No defendant decreased the price for its Internet songs despite a dramatic drop in cost;
  - All defendants acted against their own economic interests by refusing to sell to the second-largest Internet music retailer;
  - Defendants increased prices in lock-step; and
  - Defendants' conduct was the subject of a renewed Department of Justice investigation after a previous investigation closed with no action.

THE EMERGENCE OF A GOVERNMENT INVESTIGATION

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- In May of 2009, the court granted a *Twombly* motion and dismissed without prejudice all claims against all defendants in *Hinds County v. Wachovia Bank N.A*., 620 F. Supp. 2d 499, 513 (S.D.N.Y. 2009).
- Over the next several months, the federal government filed criminal charges against one defendant broker and several of its officers and announced guilty pleas by other individuals.
- The amended complaints in the class action and the tag-alongs cited those events.
- In early 2010, the court denied the renewed *Twombly* motion filed by all defendants in the class action and denied the separate *Twombly* motions filed by most defendants in the tag-alongs. *Hinds County v. Wachovia Bank N.A*., 708 F. Supp. 2d 348 (S.D.N.Y. 2010); *Hinds County v. Wachovia Bank N.A*., 700 F. Supp. 2d 378 (S.D.N.Y. 2010).

THE EXISTENCE OF A GOVERNMENT INVESTIGATION

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- Other recent decisions citing the existence or results of a government investigation in rejecting a *Twombly* motion include:
- *In re Packaged Ice Antitrust Litig.,* 723 F.3d 987 (E.D. Mich. 2010) (stating that an investigation and guilty pleas, standing alone, would not make a conspiracy plausible, but in combination with other facts, there was an enhanced expectation that discovery would reveal evidence of a conspiracy); and
- *In re Insurance Brokerage Antitrust Litig*., 618 F.3d 300 (3d Cir. 2010) (citing a bid rigging investigation in holding that narrow antitrust claims against certain defendants survived a *Twombly* motion).

THE EXISTENCE OF A GOVERNMENT INVESTIGATION IS NOT DETERMINATIVE

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- *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 2011 WL 782049 (N.D. Iowa March 8, 2011): “The plaintiffs' pleading of an antitrust conspiracy is woefully lacking in factual allegations that would make their claim plausible. While it is entirely possible that the plaintiffs have pleaded sufficient factual basis for claims against subsets of defendants for separate antitrust conspiracies, they have expressly relied on an ‘overarching’ conspiracy among all of them that simply is not supported by any factual allegations in the present Amended Consolidated Complaint.”
- *In re Insurance Brokerage*, 618 F.3d at 341 n.44 (affirming the dismissal of antitrust claims asserted against defendants not alleged to have been involved in the bid rigging that was the subject of the government investigation).

COURTS HAVE CITED A DEFENDANT'S PUBLIC STATEMENTS IN DENYING *TWOMBLY* MOTIONS

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- "Collusive communication can be based upon circumstantial evidence and can occur in speeches at industry conferences, announcements of future prices, statements on earnings calls, and in other public ways."
- The court also stated that inferences of collusive communications are strengthened when the communications are followed by dramatic changes in pricing practices.

Delta/AirTran Baggage Fee Antitrust Litig., 733 F. Supp. 2d 1348 (N.D. Ga. 2010).

See also In re Plasma-Derivative Protein Therapies Antitrust Litig., 2011 WL 46248 (N.D. Ill. Feb. 9, 2011) (denying a *Twombly* motion based upon, *inter alia*, defendants' public statements that were alleged to be signals to competitors, actions against interest, and false statements to the government to conceal the conspiracy).

COURTS DENYING *TWOMBLY* MOTIONS OFTEN CITE A SIMULTANEOUS, RADICAL CHANGE IN PRICING BEHAVIOR OCCURRING AFTER A MEETING AMONG DEFENDANTS

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- *In re Text Messaging Antitrust Litig.,* 630 F.3d 622 (7th Cir. 2010).
- *Starr,* 592 F.3d 314.
- *In re Delta/AirTran*, 733 F. Supp. 2d 1348.
- *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907 (N.D. Ill. 2009).
- *In re Rail Freight Fuel Surcharge Antitrust Litig*., 587 F. Supp. 2d 27 (D.D.C. 2008).
- *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363 (M.D. Pa. 2008).

COURTS CONTINUE TO GRANT *TWOMBLY* MOTIONS WHEN PLAINTIFFS FAIL TO ALLEGE FACTS SHOWING AN AGREEMENT OR SUPPORTING AN INFERENCE OF AN AGREEMENT

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The court in the *Travel Agent Commission* case granted the *Twombly* motion because the following two key factors were missing:

- Plaintiffs' allegations did not allege actions against "*independent* economic interests;" and
- Allegations of meetings between defendants "aver only an opportunity to conspire, which does not necessarily support an inference of illegal agreement."

See also Kendall v. VISA USA, Inc., 518 F.3d 1042 (9th Cir. 2008) (stating that *Twombly* requires the plaintiff to also plead "evidentiary facts" rather than merely the ultimate fact of a conspiracy); *In re California Title Ins. Antitrust Litig*., 2009 WL 3756686 (N.D. Cal. Nov. 6, 2009) (finding that mere opportunity to conspire was insufficient when the plaintiffs failed to allege a change in the defendants' behavior or particular communications between the defendants).

DEFENDANT-SPECIFIC *TWOMBLY* MOTIONS ARE GIVEN SERIOUS CONSIDERATION

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- *In re Insurance Brokerage,* 618 F.3d at 341 n.44.
- *BanxCorp v. LendingTree LLC*, 2011 WL 541807 (D.N.J. Feb. 7, 2011).
- *Allen v. Dairy Farmers of Am., Inc*., 2010 WL 3430833 (D. Vt. Aug. 30, 2010).
- *Hinds County*, 708 F. Supp. 2d 348.
- *In re ATM Fee Antitrust Litig*., 2009 U.S. Dist. LEXIS 83199 (N.D. Cal. Sept. 4, 2009).
- *In re TFT-LCD (Flat Panel) Antitrust Litig*., 586 F. Supp. 2d 1109 (N.D. Cal. 2008).
- *In re Vitamin C Antitrust Litig*., 584 F. Supp. 2d 546 (S.D.N.Y. 2008).
- *In re Late Fee and Over-Limit Fee Antitrust Litig*., 528 F. Supp. 2d 953 (N.D. Cal. 2007).

IN RE TEXT MESSAGING ANTITRUST LITIG., 630 F.3d 622 (7th Cir. 2010)

- "[T]he complaint must establish a ***nonnegligible probability*** that the claim is valid; but the probability need not be as great as such terms as 'preponderance of the evidence' connote."
- The court affirmed denial of the *Twombly* motions due to the combination of the following factual allegations:
- Highly-concentrated market particularly susceptible to collusion ("it would not be difficult for such a small group to agree on prices and to be able to detect 'cheating,'");
- Defendants "belonged to a trade association and exchanged price information directly at association meetings," at which the "leadership council" of these companies allegedly urged its members to "substitute 'co-opetition' for competition;"
- Simultaneous change to the defendants' pricing structures, which were previously different and complex, to one homogenous, uniform pricing structure; and
- Across-the-board increases in defendants' prices for text messaging services "in the face of steeply falling costs."
- The court found plausible an inference that an actual agreement existed because a company acting in its own interests should be "motivat[ed], in the absence of agreement, to reduce his price slightly in order to take business from his competitors, and certainly not to increase his price."

WEST PENN ALLEGHENY HEALTH SYS., INC. V. UPMC, 629 F.3d 85 (3d Cir. 2010)

- The following allegations of direct evidence were sufficient to adequately plead the existence of an agreement:
  - Statements made by one defendant that another defendant would retaliate against it if the defendant assisted the plaintiff;
  - A statement made to the plaintiff by a defendant admitting that the defendants were part of an agreement that was probably illegal;
  - A statement made by a defendant's key employee that actions taken were the result of an agreement among defendants.
- Anti-competitive conduct was shown by defendants' attempts to exclude and impair the plaintiff's business opportunities.
  - The plaintiff alleged that its employees were hired by the defendant merely to hinder the plaintiff's business;
  - The defendant made false statements about the plaintiff to its potential investors and customers;
  - The defendant coerced customers out of doing business with the plaintiff.

TEXAS STATE COURTS CONTINUE TO IGNORE *TWOMBLY*

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- No published Texas state court case has cited *Twombly*.