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Recently, the United States Supreme Court issued an important decision that will make it more difficult for plaintiffs in federal court to survive a motion to dismiss and subject defendants to costly discovery.

In *Bell Atlantic Corp. v. Twombly,* No. 05-1126 (U.S. May 21, 2007), the Supreme Court held by a margin of 7 to 2 that a civil plaintiff must present facts in his complaint that would be sufficient, if later proven in the case, for the plaintiff to win on his claim. The question in *Twombly* was whether subscribers of local telephone and high-speed internet services had adequately stated an antitrust conspiracy claim when they alleged that the so-called "Baby Bells" engaged in "parallel conduct" in their respective service areas to inhibit the growth of upstart service carriers. The plaintiffs did not allege any facts that would show a conspiratorial agreement among the Baby Bells other than pointing out their parallel actions.

The Supreme Court held that more was needed. Because evidence of "parallel conduct" standing alone was not sufficient to prevail on an antitrust conspiracy claim, the Court concluded that Rule 8 of the Federal Rules of Civil Procedure required plaintiffs to plead additional facts even in their complaint. In other words, antitrust conspiracy plaintiffs must now plead—in addition to proving—facts of improper agreement and cannot simply rest their claims on the possibility of discovering later on in the litigation that a group's parallel activity was, in fact, part of a coordinated agreement.

Although *Twombly* arose in the antitrust conspiracy context, much of the Court's opinion would seemingly apply to other civil plaintiffs as well. For example, the Court expressly "retire[d]" its 50-year-old statement from a non-antitrust conspiracy case 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." No longer will plaintiffs be able to hide behind that "standard" in opposing a motion to dismiss.

The Court also noted the "problem of discovery abuse" and explained that the "threat of discovery expense will push cost-conscious defendants to settle even anemic cases" prematurely. The Court thus concluded that "it is only by taking care to require allegations that reach the level" of showing a plausible entitlement to relief that "we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support [the] claim." Slip Op. at 12-13 (internal quotation marks and citations omitted).

Only time will tell whether *Twombly* is ultimately understood as a broadly applicable "civil procedure" case or a more limited "antitrust" case. For now, any civil defendant that finds itself in federal court should be ready to highlight the *Twombly* decision in making a motion to dismiss.

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