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Interlocutory Appeals of Denials of Motions to Dismiss in the Wake of *Twombly*: A New Option for the Defense?

By Hon. Timothy K. Lewis & Theresa E. Loscalzo

In a decision more critical for procedure than its end result, the United States Court of Appeals for the Seventh Circuit considered, and ultimately rejected, an interlocutory bid by Verizon Wireless LLC, AT&T Mobility LLC, Sprint Nextel Corp., and T-Mobile USA Inc. — who allegedly control 90% of the U.S. text messaging market — to dismiss a putative class action alleging that they conspired to fix text message prices. The Court held that the second amended complaint alleged an antitrust conspiracy with sufficient plausibility to satisfy the heightened pleading standard established by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009). *In re Text Messaging Antitrust Litig.*, No. 10-8037 (7th Cir. Dec. 29, 2010). *Twombly* and *Iqbal* created more rigorous pleading requirements for Federal civil cases, requiring that plaintiffs include enough factual information in their complaints to make it plausible — not merely possible or conceivable — that they will be able to prove their claims. Of significance, writing for the panel, Judge Richard Posner concluded that the difficulty courts have had with properly interpreting the *Twombly* and *Iqbal* decisions justified granting a Section 1292 motion for interlocutory review of an order denying a motion to dismiss.

While the end result, an affirmance, was not what the defendants had sought, the allowance of an interlocutory appeal under these circumstances creates a new procedural vehicle for a defendant aggrieved by the denial of a motion to dismiss. As Judge Posner concludes:

> When a district court by misapplying the *Twombly* standard allows a complex case of extremely dubious merit to proceed, it bids fair to immerse the parties in the discovery swamp — 'that Serbonian bog . . . where armies whole have sunk' (Paradise Lost ix 592-94) — and by doing so create irrevocable as well as unjustifiable harm to the defendant that only an immediate appeal can avert. Such appeals should not be routine, and won't be, because as we said both district court and court of appeals must agree to allow an appeal under section 1292(b); but they should not be precluded altogether by a narrow interpretation of 'question of law.'

Slip Op. at 5. Judge Posner's exhortation that "[s]uch appeals should not be routine" suggests that this extraordinary relief should be sought only in potentially mammoth controversies involving significant and expensive discovery.

The underlying case revolved around the plaintiffs' efforts to file an amended complaint alleging the controlling U.S. wireless carriers had conspired to fix prices and not compete against each other in providing text messaging services. The defendants argued that *Twombly* requires a plaintiff to allege specific acts of collusion among the defendants, in addition to the absence of competition among them. Instead, plaintiffs merely alleged an absence of competition, which defendants argued was insufficient under *Twombly*.

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The court first addressed whether a proper case for a Section 1292(b) appeal was present. Section 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves ***a controlling question of law as to which there is substantial ground for difference of opinion*** and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (emphasis added).

The core issue was whether the application of a legal standard — factual pleading requirements under *Twombly* — was a controlling question of law under 28 U.S.C. §1292(b). The court concluded that in this case the question presented required the interpretation, not just the application, of the legal standard set forth in *Twombly*. And because *Twombly* is a recent decision, unsettled both in scope (especially in light of *Iqbal* — from which the author of the majority opinion in *Twombly* dissented and two of the Justices who participated in those cases have since retired) and in its application to antitrust cases, the grant of an appeal seeking clarification might stave off protracted litigation. This, of course, is one of the specific purposes of a Section 1292(b) appeal.

After allowing the interlocutory appeal, the court proceeded to a less surprising discussion of antitrust pleading and theory. The court agreed with the defense that, in the absence of collusion, the Sherman Act does not prohibit wireless carriers from each making the same unilateral decisions not to compete with respect to text messaging services. The court disagreed that *Twombly* requires a plaintiff to allege a specific "smoking gun" in the complaint. The court summarized the complaint as containing "a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion." (Slip Op. at 9). The court went on to explain:

> There is nothing incongruous about such a mixture. If the parties agree to fix prices, one expects that as a result they will not compete in price — that's the purpose of price fixing. Parallel behavior of a sort anomalous in a competitive market is thus a symptom of price fixing; though standing alone it is not proof of it; and an industry structure that facilitates collusion constitutes supporting evidence of collusion. * * * [T]he complaint in this case alleges that the four defendants sell 90 percent of U.S. text messaging services, and it would not be difficult for such a small group to agree on prices and to be able to detect "cheating" (underselling the agreed price by a member of the group) without having to create elaborate mechanisms….

Slip Op. at 9-10.

The court specifically noted that, according to the complaint, the defendants belonged to a trade association and exchanged price information directly at association meetings; were all on the "leadership council" within the trade association (the stated mission of which council was to "substitute 'co-opetition' for competition"); each chose to raise prices in the face of steeply falling costs; and last, "all at once the defendants changed their pricing structures, which [had been] heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up prices by a third." Plaintiffs argued that the change in the industry's pricing structure was so rapid that

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it "could not have been accomplished without agreement on the details of the new structure, the timing of its adoption, and the specific uniform price increase that would ensure on its adoption." Slip Op. at 9-10. While the parties agreed that unprecedented changes in pricing structure made at the same time by multiple competitors for no other discernible reason would support a plausible inference of conspiracy, what is missing here, claimed the defendants, is any direct evidence — a smoking gun — that an agreement was formed between defendants, which defendants argued *Twombly* required. Slip Op. at 11.

The court held that direct evidence of conspiracy is not the *sine qua non* of a Sherman Act case, and that an antitrust conspiracy can be established by circumstantial evidence. Slip Op. at 11-12. But the court also concluded that it did not need to decide whether the circumstantial evidence alleged was sufficient to compel an inference of conspiracy; rather, to satisfy *Twombly* and *Iqbal*, the court need only decide whether the complaint was "plausible" — that there was "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." Here, the court concluded that no direct evidence was necessary to satisfy the plausibility standard, and that the complaint provided a sufficiently plausible case of price fixing to allow the plaintiffs to proceed to discovery. Allegedly conscious parallel conduct, for pleading purposes, satisfied *Twombly* on these facts. Slip Op. at 12-13.

In re: Text Messaging is likely to spur an increase in requests (first at the district court level, and then, if granted, at the appellate level) for Section 1292 relief. This is true even outside the antitrust context, and is likely to occur in any context where massive discovery is likely to ensue after the denial of close questions on a motion to dismiss. Securities litigation, employment disputes, mass tort, and civil rights cases come to mind as other areas that are likely to see an uptick in Section 1292 applications as a result of this decision. It is certainly true, as Judge Posner notes, that relief will be granted sparingly. That such relief is available at all is significant to a defendant facing potentially sizeable discovery proceedings in a borderline case. ◆

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