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Why *Twombly* Does (and Should) Apply to All Private Antitrust Actions, Including Alleged Hard-Core Cartels: A Reply to William J. Blechman

Steven F. Cherry and Gordon Pearson

In the October 2007 issue of the ANTITRUST SOURCE, William J. Blechman argues that the "general standard[]" for pleading a claim for relief recently affirmed by the Supreme Court in *Bell Atlantic Corp. v. Twombly*[1] should not be applied to private antitrust cases involving alleged "hard-core cartels."[2] Mr. Blechman contends that extending *Twombly* to such cases is "unsound public policy" and would "chill[]" private antitrust litigation by effectively (1) precluding such lawsuits absent a prior, successful government prosecution and (2) limiting complaints to the "four corners of the government's case."[3] Furthermore, he argues hard-core cartels operate in secret, and, thus, plaintiffs challenging such conduct "cannot reasonably be expected to know" enough facts before discovery to state a claim under *Twombly*.[4]

Such concerns are unwarranted. In fact, *Twombly* itself involved a purported hard-core cartel—an alleged horizontal conspiracy among a small group of competitors not to compete and to allocate customers and markets. Moreover, the antitrust laws provide enormous incentives and tools to encourage private enforcement, and *Twombly* does nothing to diminish them.

While *Twombly* is unlikely to chill private antitrust enforcement, it should have a positive effect that benefits both plaintiffs and defendants, not to mention courts. As the Supreme Court intended, *Twombly* should encourage more careful investigation of claims before the filing of complaints, which in turn should both reduce the waste of private and judicial resources on ill-defined and overbroad claims that now plagues private antitrust litigation, and focus private enforcement on well-pleaded, factually supported claims.

■ ***Steven F. Cherry*** *is a partner and* ***Gordon Pearson*** *is a counsel at WilmerHale. Mr. Cherry and Mr. Pearson concentrate on antitrust litigation and have defended clients in government investigations, civil direct purchaser class actions, civil indirect purchaser class actions, and individual civil actions involving alleged hard-core cartels in a variety of industries.*

Bell Atlantic Corporation v. Twombly

Twombly involved an alleged conspiracy to restrict competition in regional telecommunications markets. The plaintiffs, who sought to represent a class of "subscribers of local telephone and/or internet services,"[5] alleged the regional telecommunications companies had illegally restrained competition by "'agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another.'"[6]

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[1] 127 S. Ct. 1955, 1965 (2007).

[2] William J. Blechman, *Why* Twombly *Does Not (and Should Not) Apply to Hard-Core Cartels*, ANTITRUST SOURCE, Oct. 2007, at 1, http://www.abanet.org/antitrust/at-source/07/10/Oct07-Blechman10-18f.pdf [hereinafter *Hard-Core Cartels*].

[3] *Id.* at 1, 5–7.

[4] *Id.*

[5] *Twombly*, 127 S. Ct. at 1962 (quoting Consolidated Amended Complaint ¶ 53, No. 02 Civ. 10220 (GEL) (S.D.N.Y. Apr. 11, 2003) [hereinafter Am. Compl.]).

[6] *Id.* at 1963 (quoting Am. Compl. ¶ 64).

The plaintiffs specifically alleged (1) the identities of the participating regional telecommunication companies, (2) the approximate time period of the conspiracy, (3) the services affected, (4) the opportunities for collusion between the companies due to their participation in trade and other organizations, and (5) a detailed description of the characteristics and history of the regional telecommunications industry that made it susceptible to cartelization.[7] More important, the plaintiffs alleged the defendants had "engaged in parallel conduct unfavorable to competition," including repeated failures to pursue "especially attractive" and "lucrative [business] opportunities" to compete by entering into each other's regional market, and specific "wrongful acts" aimed at inhibiting competition from third-party providers.[8]

The complaint also alleged (1) the CEO of one defendant stated "it would be fundamentally wrong" for the defendants "to compete," even though they would likely profit from doing so; (2) a consumer group specifically accused defendants of illegal collusion; and (3) at least two members of Congress formally asked the Antitrust Division of the Department of Justice to investigate.[9] Further, the complaint alleged the defendants engaged in "affirmative, deceptive practices and techniques of secrecy . . . to hide their wrongdoing . . . [and] actively misled Plaintiffs and the Class."[10]

Notwithstanding these allegations, the Supreme Court held that the complaint failed to state a claim.[11] After noting "the Sherman Act 'does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy,'"[12] the Court found the plaintiffs' allegations, which focused primarily on the defendants' parallel conduct, equally consistent with either conspiracy or independent action.[13] The Court explained that "an allegation of parallel conduct and a bare assertion of conspiracy" does not by itself state a claim for relief under Section 1 of the Sherman Act.[14] "[W]ithout some further factual enhancement" or "circumstance pointing toward a meeting of the minds," the Court reasoned such allegations neither "raise a right to relief above the speculative level" nor offer "enough facts to state a claim to relief that is plausible on its face."[15]

Twombly Involved an Alleged Hard-Core Cartel

The hard-core-cartel label has typically been used to refer to conduct that is a per se violation of the antitrust laws—i.e., conduct that "always or almost always tends to raise price or reduce output."[16] A survey of enforcement authorities from eighteen countries recently found "widespread consensus" as to "the three common components" of a hard-core cartel: "1) an agreement;

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[7] Am. Compl., *supra* note 5, ¶¶ 1, 3, 12–15, 19–36, 46–47.

[8] *Id.* ¶¶ 39–44, 46–47.

[9] *Id.* ¶¶ 42, 44–45.

[10] *Id.* ¶ 61.

[11] *Twombly*, 127 S. Ct. at 1961.

[12] *Id.* at 1964 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775 (1984)).

[13] *Twombly*, 127 S. Ct. at 1970–74.

[14] *Id.* at 1966.

[15] *Id.* at 1965, 1966 & 1974.

[16] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors § 3.2 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

2) between competitors; 3) to restrict competition."[17] In his article, Mr. Blechman defines a hard-core cartel as "a relatively small number of firms engaged in a horizontal agreement not to compete through a variety of mechanisms, including fixing, maintaining, or stabilizing prices; restricting output; rigging bids; or allocating territories or customers."[18] In addition, Mr. Blechman states that a hard-core cartel "operates in secrecy," and participants often attempt to conceal its existence, making such cartels "difficult to track, and thus difficult to prove."[19]

The mere fact the government has opened an investigation neither is itself evidence of the nature or scope of any antitrust conspiracy nor justifies an exception to the general pleading standard . . .

The alleged conspiracy in *Twombly* is plainly a hard-core cartel: five regional telephone companies secretly engaged in an alleged horizontal agreement not to compete through a variety of mechanisms, including allocating territories and customers. That the *Twombly* plaintiffs relied largely on "circumstantial" allegations of "parallel conduct" to show the alleged agreement does not mitigate the anticompetitive nature of the claimed conspiracy or otherwise distinguish *Twombly* from the typical hard-core-cartel case. To the contrary, the Supreme Court has long held such horizontal agreements to allocate customers and markets are "classic examples of a per se violation" of the antitrust laws,[20] and nothing in *Twombly* suggests otherwise.[21]

Moreover, while *Twombly* did not follow the announcement of an apparently related government investigation (as is often the case in private antitrust class actions), that likewise does not distinguish the alleged conspiracy in *Twombly* from other hard-core cartels.[22] The mere fact the government has opened an investigation neither is itself evidence of the nature or scope of any antitrust conspiracy nor justifies an exception to the general pleading standard for a complaint that otherwise fails to state a claim. As Judge Alsup of the Northern District of California recently explained:

> The [existence of a government] investigation . . . carries no weight in pleading an antitrust conspiracy claim. It is unknown whether the investigation will result in indictments or nothing at all. Because of the grand jury's secrecy requirement, the scope of the investigation is pure speculation. It may be broader or narrower than the allegations at issue. Moreover, if the Department of Justice made a decision not to prosecute, that decision would not be binding on plaintiffs. The grand jury investigation is a non-factor.[23]

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[17] International Competition Network, Defining Hard Core Cartel Conduct; Building Blocks for Effective Anti-Cartel Regimes 9–10 (2005), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf.

[18] *Hard-Core Cartels*, *supra* note 2, at 1; *see also* Organization for Economic Co-operation and Development, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels 57–60 (adopted Mar. 25, 1998), *available at* http://www.oecd.org/dataoecd/39/63/2752129.pdf.

[19] *Hard-Core Cartels*, *supra* note 2, at 3.

[20] United States v. Topco Assocs., 405 U.S. 596, 608–12 (1972).

[21] Indeed, *Twombly* cannot be distinguished in any meaningful way from other more recent hard-core-cartel cases. *See, e.g.*, *In re* Elevator Antitrust Litig., 502 F.3d 47, 49–51 (2d Cir. 2007) (hard-core-cartel claim not plausibly supported by allegations of parallel conduct and unsupported assertions of agreement). Although the *Elevator* complaint included conclusory assertions of "fixing . . . price" and "rigging bids" along with "allocating markets and customers," all three mechanisms independently indicate hard-core cartel conduct. *Id.*

[22] The filing of the *Twombly* complaint, however, did follow the disclosure of a congressional request for such an investigation. *See* Am. Compl., *supra* note 5, ¶ 45.

[23] *In re* Graphics Processing Units Antitrust Litig., No. C06-07417, 2007 WL 2875686, at *12 (N.D. Cal. Sept. 27, 2007). *See also In re* Travel Agent Commission Antitrust Litig., No. 1:03 CV 3000, 2007 WL 3171675, at *11–*12 (N.D. Ohio Oct. 29, 2007) (allegations of arguably related price-fixing investigations of the airline industry combined with allegations of parallel conduct did not state antitrust conspiracy claim).

In short, the *Twombly* plaintiffs asserted a classic hard-core cartel: a horizontal agreement between competitors to restrict competition; they just did not allege "enough facts" to support a plausible inference the cartel existed.

Twombly Will Not Chill Private Antitrust Enforcement

Any concern *Twombly* will chill private antitrust enforcement ignores the economic reality that drives such litigation. Congress, the courts, and the Antitrust Division of the Department of Justice have created financial incentives and strategic advantages that benefit antitrust plaintiffs and ensure vigorous private enforcement of the antitrust laws. *Twombly* leaves those incentives and advantages undiminished.

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Such financial incentives include the ability to recover treble damages, as well as attorneys' fees and costs. Moreover, a defendant cannot reduce the amount of damages by showing that a plaintiff passed on a portion of the alleged overcharge to its customer, even though that customer may also be able to recover the same damages from the defendant under state law.[24] Liability is also joint and several with no right of contribution, which allows the plaintiff to pursue the deepest pocket (or pockets) for full recovery of damages attributable to all participants in the conspiracy.

The strategic advantages granted private plaintiffs provide unmatched aid to plaintiffs in developing and pursuing antitrust claims. To start, the Sherman Act tolls private claims during any government prosecution plus one year.[25] This facilitates private enforcement because the public record from such proceedings can provide a treasure trove for plaintiffs searching for facts to support their claims. In addition, if the government obtains a final judgment or decree against a defendant in such proceedings, a private plaintiff can use it as prima facie evidence against the defendant in a follow-on private action.[26]

Even more important, the Antitrust Division's extremely successful Corporate Leniency Program encourages companies to self-report antitrust violations to obtain full immunity from criminal prosecution.[27] Outside the Leniency Program, companies are encouraged to provide additional evidence voluntarily to obtain a downward departure in criminal sentencing. These incentives substantially increase the frequency of public prosecutions, which in turn facilitates and assists private enforcement through public disclosure of antitrust violations.

In addition, the benefits of the Leniency Program often grow exponentially due to its related Amnesty Plus Program. Under Amnesty Plus, a defendant otherwise ineligible for full immunity for a particular violation can obtain a reduction in penalties for that violation by being first to report another violation for which it will also receive full immunity.[28] This "plus" incentive can produce a cascade effect as the companies involved "clean house." The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) further encourages self-reporting by substantially

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[24] *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 490–94 (1968).

[25] *See* 15 U.S.C. § 16(i).

[26] *See id.* § 16(a).

[27] Since 1993, "cooperation from leniency applications has resulted in scores of convictions and nearly $4 billion in criminal fines." Scott D. Hammond, Deputy Ass't Att'y Gen. for Criminal Enforcement Antitrust Division U.S. Dep't of Justice, Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, Remarks Before the ABA Section of Antitrust Law 2007 Fall Forum Cartel Enforcement Roundtable, at 11 (Nov. 16, 2007), *available at* http://www.usdoj.gov/atr/public/speeches/227740.pdf.

[28] *Id.* at 13.

limiting civil liability for a qualifying company.[29] To obtain that relief, a company must cooperate with the plaintiffs, providing witnesses and documents to help them build cases against the other defendants.

Joint and several liability with no right of contribution provides another valuable tool. Because a private plaintiff can recover full damages from just one or a few of the defendants, the plaintiff can offer an inexpensive settlement to one defendant before filing suit in exchange for cooperation against the other defendants.

Together, these financial incentives and strategic advantages "place[] the private antitrust litigant in a most favorable position."[30] They have produced a knowledgeable private antitrust plaintiffs' bar with a long and successful history of zealously pursuing antitrust cases on behalf of consumers and small businesses.

Twombly does not in any way diminish these financial incentives and strategic advantages. So long as they remain to reward and assist plaintiffs, there is no plausible reason to conclude that *Twombly* will discourage private antitrust enforcement, at least as to well-founded claims.

Twombly Will Not Prevent Plaintiffs from Pursuing Well-Founded Claims

Even aside from the powerful financial incentives and strategic advantages provided to private antitrust plaintiffs that *Twombly* leaves unaffected, there is no reason to believe that a broad application of *Twombly* to hard-core-cartel cases will inhibit or restrict plaintiffs' ability to pursue such cases.

Nothing in *Twombly* should delay private enforcement or prevent such actions from proceeding absent a successful government prosecution. Like plaintiffs in all other types of cases, private antitrust plaintiffs can conduct their own investigation, develop their own facts, and bring their claims before the government has completed its investigation. *Twombly* simply requires plaintiffs to allege enough facts to support a plausible claim for relief whenever they elect to file their complaints. The existence of a government investigation should not excuse that obligation.[31]

Similarly, nothing in *Twombly* should confine private antitrust complaints to the "four corners of the government's case"[32] or otherwise limit the claims private antitrust plaintiffs can pursue. However, to the extent a plaintiff chooses to rely solely on the government's prosecution for the factual allegations in his or her complaint, that plaintiff has no basis to assert claims or sue parties beyond the scope of the government's case. Moreover, given the strong incentives for disclosure provided by the Leniency Program, including the availability of Amnesty Plus, the possibility of downward departures under the sentencing guidelines, and ACPERA, it is highly unlikely the government's investigation will fail to uncover and disclose the relevant facts.

Further, that hard-core cartels generally operate in secrecy is no reason to restrict *Twombly*'s application. As noted, the combination of the Leniency Program and ACPERA's cooperation

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[29] Pub. L. No. 108-237, title II §§ 212–213, 118 Stat. 661, 666–667 (codified as 15 U.S.C. § 1 notes).

[30] Radovich v. Nat'l Football League, 352 U.S. 445, 454 (1957).

[31] The distinction between the role of government investigators and the role of private plaintiffs appears to be at the heart of the criticisms private antitrust plaintiffs and their counsel have leveled at *Twombly*. Of course, the government has the right to use its subpoena power to conduct wide-ranging investigations of an industry to determine whether to pursue legal action. Private antitrust plaintiffs have no such right. Like all other private plaintiffs, they must articulate at the outset the factual basis for their own personal claims that they have been harmed by the defendants. Only if those facts sufficiently state a plausible claim, should a court allow the litigation to proceed and impose the extraordinary costs of civil discovery on the defendants.

[32] *Hard-Core Cartels*, *supra* note 2, at 7.

requirement, along with the threat of joint and several liability, give private antitrust plaintiffs substantial tools to uncover facts. It should also be noted that the *Twombly* complaint included explicit allegations of fraudulent concealment but that did not cause the Supreme Court to allow the plaintiffs any special leeway in pleading their antitrust claim.

Twombly's Potential Effect—Mitigating Unintended Consequences

While it is unlikely *Twombly* will chill private antitrust enforcement, it may have a small, but potentially beneficial, systemic effect on how such litigation proceeds.

The very same financial incentives and strategic advantages that motivate plaintiffs to pursue private cartel enforcement also create costly and unintended consequences. In particular, the economic benefits that accrue to successful antitrust plaintiffs—especially in connection with class actions—engender robust and, at times, overzealous competition among plaintiffs to control the litigation. This competition often leads to wasteful litigation, unnecessary expense, and delay.

[T]he announcement of a government antitrust investigation too frequently commences a race to the courthouse . . .

For example, the announcement of a government antitrust investigation too frequently commences a race to the courthouse as plaintiffs vie for leverage by filing numerous duplicative class action complaints as quickly as possible, often alleging nothing more than the fact of the investigation and conclusory allegations of collusive conduct. In many cases, however, the government's investigation proves fruitless, undermining the only rationale for the private plaintiffs' prematurely filed complaint. Even when the government's efforts ultimately find an actual antitrust violation, the private plaintiffs' initial complaints still frequently are overbroad and misdirected—e.g., brought by plaintiffs unaffected by the conspiracy, against many defendants that did not participate in it, or based on sales in the wrong product or geographic market or during the wrong time period. This occurs because, when plaintiffs rush to draft these initial complaints, they are essentially shooting in the dark with only vague press reports to guide them and a strong incentive to cast the widest possible net.

This leads to further waste as (1) plaintiffs' counsel may hesitate to cooperate with opposing counsel to identify defendants and claims that should be voluntarily dismissed and stake out overly aggressive positions to demonstrate the "zeal" with which they will pursue the putative claims; (2) defendants seek dismissal of unsubstantiated and prematurely filed complaints; and (3) plaintiffs' counsel, uninformed due to little or no pre-filing investigation, seek to identify facts to support a claim through overly broad and unfocused discovery. In addition, the potential for interference with any on-going government investigation will frequently arise as the various plaintiffs' counsel often at the outset know of nowhere else to look for information about the putative claims.

But there is no reason for private antitrust litigation, or any litigation for that matter, to proceed in this fashion. As the Supreme Court made clear, *Twombly* did not create a "heightened fact pleading" standard applicable only to antitrust conspiracies based on parallel conduct.[33] To the contrary, *Twombly* restated the "general standard[]" for pleading a claim for relief under Federal Rule of Civil Procedure 8(a) applicable to all claims, and then applied that standard to the Section 1 claim alleged.[34] In so doing, *Twombly* clearly reaffirms the principle that a plaintiff and his or her counsel should bring claims only *after* a reasonable investigation (not before) and based on "enough facts" (not conclusory assertions) "to state a claim to relief that is plausible on its face."[35]

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[33] *Twombly*, 127 S. Ct. at 1974.

[34] *Id.* at 1964–65.

[35] *Id.* at 1974.

Thus, *Twombly* has the potential to encourage an alternative scenario in which plaintiffs and counsel who seek a lead role in private antitrust class actions are not disproportionately rewarded by the court for being first in line, but instead receive consideration based on the pre-filing work they do to investigate and focus their allegations and potential claims. While such a hope may seem implausible, it aligns precisely with the recent amendment to Federal Rule of Civil Procedure 23(g), governing the appointment of class counsel. Rule 23(g) now provides that in appointing class counsel, the court must consider "the work counsel has done in identifying or investigating potential claims in the action."[36] ●

[36] Fed. R. Civ. P. 23(g).