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Interlocutory Appeal From Denial Of *Twombly* Motion to Dismiss in Text Messaging Antitrust Litigation

Judge Posner authored a unanimous opinion at the close of 2010 holding that a denial of a Rule 12(b)(6) motion to dismiss based on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), raised a "controlling question of law" suitable for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *In re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010) (based largely on the uncertainty surrounding the Twombly legal standard). The court then held that the district court had properly denied the motion to dismiss based on *Twombly*.

Text Messaging concerned consolidated class action proceedings accusing defendants of conspiring to fix prices for text messaging services. The district court denied a *Twombly* motion to dismiss and certified its ruling, at defendants' request, for interlocutory appeal, stating that the application of *Twombly* remained unclear; that reasonable minds could differ on its application here; that the question was controlling because granting the motion to dismiss could terminate the case; and that immediate review would materially advance the ultimate conclusion of the case. Plaintiffs opposed certification for appeal in the district court, asserting that no controlling question of law was involved, and then asked the court of appeals to refuse the required permission for an interlocutory appeal.

Judge Posner found the appeal to concern a controlling question of law, which was the legal significance of the facts as alleged, rather than the resolution of disputed facts. A question of law under 1292(b) includes the "question of the meaning of a . . . common law doctrine . . ." 630 F.3d at 626. The legal standard set forth in *Twombly* was not settled, but instead had placed pleading standards "in ferment." Thus, the case did not concern the "routine application[] of well-settled legal standards to facts alleged in a complaint . . ." (630 F.3d at 626), which would not meet the requirements for a Section 1292(b) interlocutory appeal. Instead, the "question requires the interpretation, and not merely the application, of a legal standard – that of *Twombly*." 630 F.3d at 625.

Granting an appeal would promote the "main task of an appellate court, which is to maintain the coherence, uniformity and predictability of the law . . ." *Id*. In addition, concerns underlying the holding in *Twombly* supported empowering the district court and court of appeal to authorize an interlocutory appeal. *Twombly* is "designed to spare defendants the expense of responding to bulky, burdensome discovery unless the

complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand." 630 F.3d at 625. Permitting a complex case of extremely dubious merit to proceed would place defendants in a "discovery swamp," and create "unjustifiable harm to a defendant that only an immediate appeal can avert." *Id*. at 626.

The court then held that "the complaint alleges a conspiracy with sufficient plausibility to satisfy the pleading standard of *Twombly*" (630 F.3d at 627), discussing, *inter alia*, the following types of allegations as supporting that result:

--- "Parallel behavior of a type 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." 630 F.3d at 627-628. "[D]efendants 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' . . ." *Id*.

--- "[T]he defendants belonged to a trade association and exchanged price information directly at association meetings. This allegation identifies a practice, not illegal in itself, that facilitates price fixing that would be difficult for the authorities to detect." 630 F.3d at 628.

--- "[I]n the face of steeply falling costs, the defendants increased their prices." *Id*.

--- "[A]ll at once the defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third." *Id*., citing *Twombly*, 550 U.S. at 557 n. 4.

--- No "smoking gun" was alleged, nor need it be. The allegations in the complaint need not "*compel* an inference of conspiracy" since the test at the motion to dismiss stage is "plausibility." The "plausibility standard is not akin to a probability requirement." *Text Messaging*, 630 F.3d at 629 (court's emphasis).

--- "[T]he complaint must establish a nonnegligible probability that a claim is valid; but the probability need not be as great as such terms as 'preponderance of the evidence' connote." *Id*.

In Judge Posner's view, the district judge was right to rule that the complaint "provides a sufficiently plausible case of price fixing to warrant allowing the plaintiffs to proceed to discovery." *Id*.