AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
August 7-8, 2006

RECOMMENDATION

RESOLVED, that the American Bar Association urges that Fed. R. Civ. P. 12(b)(6) be interpreted to require that a complaint alleging a conspiracy in violation of Section 1 of the Sherman Act must allege facts constituting more than mere parallel conduct and ordinary business behavior.

REPORT

I. INTRODUCTION

This report presents the views of the American Bar Association Section of Antitrust Law concerning the antitrust standards for pleading an illegal conspiracy under Section 1 of the Sherman Act, and the Supreme Court's current review of that issue in an appeal from the decision of the United States Court of Appeals for the Second Circuit in *Bell Atlantic Corp. v. William Twombly*, 425 F.3d 99 (2d Cir. 2005). The Second Circuit held that to plead a Section 1 Sherman Act conspiracy a complaint need only allege parallel conduct and other ordinary business behavior. This pleadings standard erodes the vital role that a motion to dismiss plays in filtering out baseless antitrust claims and is inconsistent with precedent holding that acts that are as consistent with unilateral lawful conduct as with collective action cannot support an inference of an antitrust conspiracy. The Supreme Court has granted certiorari to review this issue.

II. RECOMMENDATION

The Section of Antitrust Law recommends that the American Bar Association urge that Fed. R. Civ. P. 12(b)(6) be interpreted to require that a complaint alleging a conspiracy in violation of Section 1 of the Sherman Act must allege facts constituting more than mere parallel conduct and ordinary business behavior to survive a motion to dismiss.

The Supreme Court in *Monsanto Corp. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) and *Matsushita Elec. Inds. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) established that proof of an illegal conspiracy must show more than mere parallel conduct and ordinary business behavior. This standard is widely recognized as fully consistent with long-standing Sherman Act law and sound antitrust policy. The same standards regarding permissible factual inferences to support a finding of conspiracy should apply at all stages of the litigation process. The Second Circuit's standard would permit a complainant to assert an antitrust claim without pleading any facts that would support a finding of illegal conduct. This standard of pleading would harm consumers by chilling legitimate competition, would clog the courts with meritless claims, and would force defendants to incur needless and burdensome expense to proceed through complex litigation discovery processes without the complainant first alleging a basis for a

claim. This result is not contemplated by the Federal Rules of Civil Procedure and would be bad public policy.

III. REASONS WHY THE AMERICAN BAR ASSOCIATION SHOULD SUPPORT REQUIRING A SECTION 1 SHERMAN ACT COMPLAINT TO ALLEGE MORE THAN MERE PARALLEL CONDUCT AND ORDINARY BUSINESS BEHAVIOR

A. Twombly

The *Twombly* case raises a question of central importance to antitrust civil litigation – what is a sufficient allegation of antitrust conspiracy to survive a motion to dismiss. The issue is of fundamental importance to the role of the federal courts in controlling the judicial docket and setting reasonable standards to allow meritorious cases to proceed to discovery, while terminating cases that have little or no chance of establishing liability. Arguments concerning the enormous cost of antitrust litigation to the parties, the costs associated with congestion in our courts, the need to have consistent standards of business conduct that apply at all stages of the litigation process, and the impact of class action practices – issues that the European Commission and other competition law authorities around the world are watching very carefully – will be central issues in the *Twombly* argument. The members of the ABA have a direct interest in and greater expertise and experience with these issues than the parties.

B. The Monsanto/Matsushita Standard Regarding Antitrust Inferences Are Settled Law.

In *Monsanto* and *Matsushita*, the Supreme Court, recognizing basic economic theory and ordinary business conduct set forth substantive standards limiting the facts that can provide an inference of conspiracy. The Court required facts that tend to exclude the possibility that the alleged competitors acted unilaterally. Indeed, the facts must not be equally poised between lawful, independent action and illegal, collusive conduct, the inferences to be drawn from the facts must tip toward excluding the possibility of unilateral action. Thus, alleging facts equally consistent with independent conduct does not provide adequate notice of the element of conspiracy for a Section 1 Sherman Act claim.

C. Parallel Conduct Does not Establish Agreement

Courts and scholars have recognized, that parallel business behavior often is a sign of an efficient market and does not establish the element of conspiracy for purposes of Section 1 of the Sherman Act.[1] Parallel business behavior is also extremely common. "Mere parallelism . . . is widely present, especially in perfectly competitive markets and is not itself a compelling subject for legal control." 6 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1417(g), at 115 (2d ed. 2002). Parallel business behavior does not suggest collusion. Rather, "it is important to recognize that similar simultaneous actions merely reflect independent responses to common business problems." *Id*. at ¶ 1425, at 172; *see also* Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658 (1962)

D. The Substantive Standards Should Apply to Evaluate Whether Allegations State a Claim for Relief

Courts routinely apply substantive standards regarding the elements of a claim to evaluate the sufficiency of a complaint at the pleading stage. In fact, the Supreme Court has done so on numerous occasions both within and outside of the antitrust context. A recent example is *Anza v. Ideal Steel Supply*, 547 U.S. ___, 126 S. Ct. 1991 (2006); *see also Associated General Contractors of Calif. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (applying substantive antitrust standards regarding standing and injury to uphold dismissal of complaint).

Early filtering out of baseless antitrust cases serves the public because these types of cases are burdensome and expensive, typically costing millions of dollars and requiring an enormous time commitment, as well as a large expenditure of judicial resources. Given the realities of costly and time-consuming discovery and the threat of treble damages liability, it is not surprising that there is great pressure to settle even flimsy antitrust cases that proceed past the pleading stage. Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, ABA Antitrust, Fall 2005, Vol. 5, No.

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[1] *See Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (this "Court has never held that proof of parallel business behavior conclusively establishes agreement")*; Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) ("conscious parallelism, … [is] not in itself unlawful.")

1 at 26 ("the strong inducement to settle class actions – even those presenting weak claims on the merits – may give rise to some abuses"); Steven C. Salop, Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1011 (1986). The ABA has already adopted a policy to encourage courts to take an active role in reducing delay and excessive costs in litigation.[2] This recommendation presents an opportunity to recognize that policy in a specific setting.

V. CONCLUSION

The American Bar Association Section of Antitrust Law respectfully requests approval of the proposed resolution.

Respectfully submitted,

Donald C. Klawiter
Chair
Section of Antitrust Law

[2] **Court Costs and Delay**. Encourage all courts, court supervisory bodies and state and local bar associations to take an active role in reducing delay and excessive costs in litigation. 8/81

GENERAL INFORMATION FORM

Submitting Entity: Section of Antitrust Law

Submitted by: Donald C. Klawiter
Chair

1. Summary of Recommendation

The recommendation urges the Association to adopt a policy urging a requirement a Section 1 Sherman Act complaint to allege more than mere parallel conduct and ordinary business behavior to survive a motion to dismiss. A case pending in the Supreme Court of the United States involves this issue, and the Section of Antitrust Law urges the adoption of policy to support the filing of an ABA brief *amicus curiae* in support of its retention.

2. Approval by Submitting Entity

This report with recommendation was approved by the Section Council on August 2, 2006.

3. Has This or a Similar Recommendation Been Submitted to the House of Delegates or Board of Governors Previously?

No similar recommendation has been submitted to the House of Delegates or Board of Governors.

4. What Existing Association Policies are Relevant to This Recommendation and Would They be Affected by its Adoption?

No relevant policies currently exist.

5. What Urgency Exists Which Requires Action at This Meeting of the House?

The Section of Antitrust Law seeks approval of the report and recommendation at this time to support the filing of an Association brief *amicus curiae* in the U.S. Supreme Court in support of the respondent in the case of *Bell Atlantic Corporation, et al., v. William Twombly, et al*., Case No. 05-1126. Certiorari was granted on June 26, 2006, after the deadline for reports to be submitted to the House of Delegates. The deadline for filing such a brief is August 25, 2006.

6. Status of Matter

See paragraph 5.

7. Cost to the Association (both direct and indirect costs).

Adoption of the recommendations would not result in additional direct or indirect costs to the Association.

8. Disclosure of Interest

There are no known conflicts of interest with regard to this recommendation.

9. Referrals

This recommendation is being submitted to relevant ABA entities prior to the meeting of the House of Delegates at which it will be presented.

10. Contact Person (prior to meeting)

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11. Contact Persons (who will present the report to the House)

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12. Contact Person Regarding Amendments to this Recommendation

James A. Wilson (see item 11 above)

EXECUTIVE SUMMARY

Submitting Entity: Section of Antitrust Law

Submitted by: Donald C. Klawiter
Chair

1. Summary of Recommendation

The recommendation urges the Association to adopt a policy urging a requirement that a Section 1 Sherman Act complaint to allege more than mere parallel conduct and ordinary business behavior to survive a motion to dismiss. This standard is consistent with long standing Supreme Court precedent and sound competition policy.

2. Summary of Issue That the Recommendation Addresses

A case pending in the Supreme Court of the United States involves a decision by the Second Circuit Court of Appeals that this standard does not apply at the pleading stage.

3. Explanation of How the Proposed Policy Position Will Address the Issue

In this Recommendation and Report, the Section of Antitrust Law urges the adoption of policy to support the filing of an ABA brief *amicus curiae* in support of this pleading standard.

4. Summary of Any Minority Views that Have Been Identified

The Section of Antitrust Law is not aware of any minority views that are relevant to this recommendation.