Oral Arguments before the Supreme Court in
Bell Atlantic Corporation v. Twombly
AT-Conversation
Nov. 30 – Dec. 4, 2006

Anthony Chavez (AChavez@Univation.com)
If you have waded through the transcript of the oral arguments before the Supreme Court in Bell Atlantic Corporation v. Twombly (http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1126.pdf), you may wish to review the Amicus Brief of the American Bar Association “In Support of Neither Petitioners Nor Respondents,” available at http://www.abanet.org/antitrust/at-comments/2006/08-06/AMICUS_20060824200954.pdf. (Also, when I mentioned that Michael Miller had posted a hyperlink to the Supreme Court transcript on AT-CorpCounsel and Paul Friedman had posted the transcript on the listserv for the Civil Practice and Procedure Committee, I failed to mention Jennifer Driscoll’s earlier posting on the Sherman Act Section 2 Committee Listserv. I was slowly working through my emails.)

Paul Friedman has volunteered to help explain what was really going during the oral argument and will be posting his observations tomorrow.

Cecile Kohrs Lindell (ckohrs@THEDEAL.COM)
For those of you who don’t subscribe to THE DEAL, here’s the article I wrote after the argument. The justices were all very engaged, (sans Thomas) and I thought a very amusing moment occurred when Justice Breyer asked Tom Barnett what his best precedent for a particular issue was. At Tom's response, Breyer said, "Oh, I like that case. You know, I wrote it. I was just hoping there was something more that what I already said..."

I found it very interesting that so many of the justices were weighing in.

Supreme Court hears antitrust case
by Cecile Kohrs Lindell in Washington Posted 03:40 EST, 27, Nov 2006
U.S. Supreme Court Justice Stephen Breyer on Monday, Nov. 27, didn't seem too impressed with the notion that competitors taking similar actions is enough to file a lawsuit charging antitrust violations. "If you're right," Breyer told J. Douglas Richards, attorney for respondent William Twombly, who filed a class action against Bell Atlantic Corp. and the rest of the telecommunications companies, "I guess we can engage in a major restructuring of our economy."

1 The actual posted messages are available at http://mail.abanet.org/archives/at-conversation.html. Some of the notes in this summary document have been revised to correct typographical errors and have been reformatted for ease of use.
Twombly charged the phone companies had violated the Sherman Act — which prohibits conspiracies — by agreeing not to compete outside the regions in which each was essentially the dominant phone provider. The proof that there was an actual agreement was a statement in the initial brief that said that the same decision by all the companies was contrary to the interest of the firms, Richards told the court.

"Conduct against self interest is a way [for the court] to infer a violation" of the Sherman Act, Richards said. But he was having a hard time arguing with eight justices who appeared incredulous and at times jockeyed for a chance to ask more questions, with only Justice Clarence Thomas remaining apart from his querulous brethren.

"You have a suspicion and you want to use the discovery process to see if that is true, isn't that the case?" Justice Ruth Bader Ginsberg asked Richards.

The high cost of discovery, which would trigger class actions that businesses would have to settle rather than litigate, is the big fear of the various companies and individuals filing friend of the court briefs in this matter, including the Chamber of Commerce of the United States, The Commonwealth of Virginia and 15 other states, a group of economists and MasterCard International Inc.

Without a clear statement of the actual illegal acts in the pleading, the courts would be clogged with antitrust lawsuits, according to several parties who filed friends of the court briefs in the matter, including the government. And antitrust cases, unlike any other type of law, permit courts to triple the damages.

Breyer, a former antitrust professor, pressed each of the lawyers before him to clarify how an antitrust complaint could be written, while still consistent with the standards of federal "notice pleading," which simply requires enough information to make it clear why the defendant is being sued, and state a claim.

Michael Kellogg, who represented the phone companies, told the court the pleadings couldn't be vague, and Assistant Attorney General Thomas Barnett went farther, arguing the pleadings needed to specify a place and time for any illegal agreement.

"Parallel activity is ubiquitous in our society," Barnett said as he argued the case for the government. He explained that "the facts need to demonstrate some unlawful action."

Scalia seemed to agree, and said this process of making decisions about competition affects "every business, every day."

Barnett seemed to get nods from justices, while heads were shaking as Richards suggested that economists should be allowed to prove the correct decisions corporate executives should make about competition.

Chief Justice John G. Roberts leaned forward in his chair to say, "companies get proposals all the time. They don't have to do everything that is in their economic self interest, do they?"
"Life is short," Roberts said, and so some companies would limit investments or growth opportunities, because you can't do everything. In that case, how do the companies prove they just made decisions on their own without entering into an agreement?
"They have to document all of that," Richards said, as his time expired.

Paul Friedman (paul.friedman@DECHERT.COM)
The Supreme Court heard oral argument in Bell Atlantic Corporation v. Twombly, No. 05-1126, on Monday, November 27, 2006. As many of you know, Twombly raises a very significant issue: whether, as the Second Circuit held in the decision below, allegations of parallel conduct by the defendants coupled with a bare bones allegation of conspiracy, without more, suffice to state a claim of conspiracy in violation of Section 1 of the Sherman Act. Plaintiffs in Twombly sued the regional Bell Operating Companies due to their failure to enter each other's territories to compete in the provision of local telecommunications services after the passage of the Telecommunications Act of 1996, which enabled such competition. Plaintiffs alleged that the RBOCs conspired to stay out of each other's territories and to impede entry by competitive local exchange carriers. The allegation of conspiracy was predicated only on allegedly parallel behavior by the defendants and the claim that the RBOCs' behavior was inconsistent with their independent business interest. The District Court granted the defendants’ motions to dismiss, but the Second Circuit reversed. In reversing, the Second Circuit adopted a standard that arguably would permit a complaint to survive a motion to dismiss simply by alleging, as Twombly did, parallel behavior plus the label of “conspiracy.” The case attracted numerous amici, including the Solicitor General (in support of Petitioners), the ABA (in support of neither party), industry, economists, and legal scholars. In the interest of disclosure, I submitted an amicus brief in support of the petition for certiorari.

The argument before the Court was quite dynamic. Early on in the argument, for example, Justices Stevens and Ginsburg pressed counsel for Petitioners to distinguish the allegations in this complaint from those “in dozens of antitrust complaints that are no more specific….” The Court seemed to be looking to counsel to articulate a standard that would be appropriate to the pleading stage but would not impose a summary judgment standard on a plaintiff. Tom Barnett, arguing for the United States, offered a standard, based on the Court’s Dura decision: “the facts [alleged] need to demonstrate some reasonably founded expectation that there is an unlawful agreement within the meaning of Section 1 of the Sherman Act.” In response to questioning from Justice Scalia, Mr. Barnett acknowledged that some parallel action would be sufficient to state a claim (for example, where 9 firms changed their prices at the same hour of the same day for 10 months in a row). Mr. Barnett argued that substantive antitrust law will necessarily inform whether the facts alleged give rise to a reasonably founded expectation of an agreement. Justice Breyer, the author of the Dura opinion, asked Mr. Barnett for authority that would clarify the amount of factual specificity needed to satisfy the “reasonably founded expectation” standard. Mr. Barnett responded that Dura was the best, to which Justice Breyer replied, “I'm not drawing total comfort from it.” The questioning of counsel for Respondents seemed to reveal a coalescing of views among
the justices that the costs – economic and otherwise – of allowing a complaint to go forward that did not provide some fact allegation beyond parallel conduct to support the conspiracy allegation were too high. The justices also seemed to be troubled by Respondent’s argument that a complaint would be sufficient if it additionally alleged, in conclusory terms, that the parallel action was against the defendants’ independent self interest.

For additional background, I suggest reviewing the amicus brief of the ABA, which is posted on the Section’s website, http://www.abanet.org/amicus/briefs/bell_atlantic_v_twombly.pdf, as well as the amicus brief of the United States, which is posted on the Antitrust Division’s website, http://www.usdoj.gov/atr/cases/f218000/218048.htm.

I would like to start off our discussion by inviting readers to suggest an answer to the question the Court seemed to be struggling with: If Rule 8 requires more than an allegation of parallel behavior and a bare bones allegation of conspiracy, what standard should the lower courts apply in deciding motions under Rule 12 (b) (6)? How are the courts to gauge whether the facts give rise to a reasonably founded expectation of an agreement? How do we avoid imposing a summary judgment standard at the pleading stage?

Robert M. Langer (RLanger@wiggin.com)
Ms. Lindell
Although I was not present at the Twombly oral argument, I have now read the entire transcript and it would appear from my reading of the transcript that Mr. Kellogg, representing the petitioners, was given just as hard a time by the Justices, including Justice Breyer, as Mr. Richards, a fact which does not appear in the article. Is this a correct assessment? Thanks.

Douglas Rosenthal (drosenthal@CONSTANTINECANNON.COM)
I think so. Yes.

Cecile Kohrs Lindell (ckohrs@THEDEAL.COM)
I didn’t realize that Mr. Langer’s comments went to the entire listserve, but here goes: In a short story for the general DEAL readership, it is impossible to convey everything that occurred during oral argument.

Yes, the entire oral argument was robust. Yes, Mr. Kellogg was asked a lot of questions that seemed to indicate an unwillingness on the part of SOME justices (and here, I would single out Stevens and Ginsburg) to craft a rule that requires different pleading standards for different areas of law.

Tom Barnett was heavily questioned and did a very good job.

But there’s no doubt about the amount of head shaking that was going on during Mr. Richards’ session at the podium. Justice Ginsburg, I thought somewhat remarkably,
seemed to want to explore the flip side of her previous interchange with Mr. Kellogg—which I found noteworthy.

Justice Scalia did beat up on Mr. Kellogg as well—for agreeing that the word "orally" inserted into the pleading might have been sufficient to state a claim (a hypothetical posed by one of the other justices. Scalia’s question was something along the lines of "I wish you would rethink that..." and Mr. Kellogg essentially said, "I stand corrected, I should not have said that would be sufficient."

Please note, these are not exact quotes, as I don't have my notes, nor the transcript, in front of me. The purpose of these comments, and my story, was to convey something of the courtroom drama that took place. There was a lot of head shaking when Mr. Richards was speaking—not just from Justice Breyer, and the body language isn't in the transcript.

So, yes, all of the lawyers were asked a lot of tough questions. I thought the lawyers advocated their positions well, and I found it interesting that 8 of the justices were clearly interested in the various nuances of the case.

I hope this helps.

By the way, Paul Friedman's comments are interesting as well.

**Anthony Chavez (AChavez@Univation.com)**
Paul Friedman did a great job of articulating some of the crucial issues before the Court:

> "If Rule 8 requires more than an allegation of parallel behavior and a bare bones allegation of conspiracy, what standard should the lower courts apply in deciding motions under Rule 12 (b) (6)? How are the courts to gauge whether the facts give rise to a reasonably founded expectation of an agreement? How do we avoid imposing a summary judgment standard at the pleading stage?"

Any answers for these questions?

**Roxann Henry (HenryR@howrey.com)**
One obvious possibility is that the evidentiary standards of Monsanto and Matsushita are given reference in the review of the facts that are pled in terms of whether those facts if assumed to be true would survive those hurdles. Is this too high a burden?

**Donald Klawiter [dklawiter@MORGANLEWIS.COM]**
I appreciate the excellent efforts of Paul, Anthony and Roxann to frame the argument and Cecile’s description of what went on. From my perspective sitting in the Courtroom, the Justices aggressively questioned all the counsel in the case, which is what they do in most cases. They seemed especially active after a restful holiday weekend. The
tone and focus of the questions to Petitioners and Respondent were, however, very
different.

Michael Kellogg and Tom Barnett were pressed about where to draw the line-- where
they would set the standard. The exchange between Tom Barnett and Justice Breyer
on the Dura case was very interesting. My sense was that Justice Breyer was asking
Tom to help him out in crafting a standard that would be different than the Second
Circuit's standard. He was clearly trying to create a more appropriate standard and
improve on his opinion in Dura. In contrast, Justice Breyer's close questioning of Doug
Richards was premised on his belief that the standard cannot possibly be what Richards
was arguing. Justice Breyer came to the heart of the argument by commenting that
plaintiffs' standard would result in a "major restructuring of the economy" because any
company doing business in a concentrated industry would be subject to antitrust
lawsuits by simply reacting to what its competitors did in the market place and making
decisions that were not always consistent with its economic self-interest.

Justice Breyer came back to this issue two or three times. My modest reading of his
questions is that plaintiffs' standard cannot be the appropriate standard in an antitrust
case. A chorus of Chief Justice Roberts and Justices Scalia, Souter and Alito, asked
questions that went to the same place. Cecile is absolutely right about the body
language during this stage of the argument. Justice Breyer seemed to be saying, with
great respect to Justice Stewart, "I know it when I see it, and this isn't it."

Other Justices, particularly Justice Scalia, put the "restructuring of the economy"
comment in context by discussing the massive discovery process that often follows
denial of the motion to dismiss. That was really the subtext of much of the argument --
Justice Scalia articulated it much more aggressively than anyone else.

As the nuanced discussion suggests, this is hard stuff. When the Section of Antitrust
Law's Council was discussing the amicus brief that we filed, much of the discussion
agonized over the Second Circuit's standard and that articulating the fair standard is
extremely difficult. It appears that Justice Breyer's agony -- and that of several of his
colleagues -- was founded on exactly the same concerns. It will be fascinating to see
how they resolve this issue.

So, while everyone was pummeled by the Justices, the questioning of Petitioners was
very different from the questioning of Respondent. That, at least, is how it looked from
the third row of the members' section -- the box seats, as it were.

To be fair, I will state my "interests" in the case. I prepared an amicus brief in support of
cert. for a client, and I was closely involved in the Council discussion and decision to file
the Section's brief which was neither in support of Petitioner or Respondent.

I hope these issues contribute to this important discussion.
Thomas Goldstein (tgoldstein@AKINGUMP.com)
It seems quite likely to me that the defendants will win Twombly, and that the Court will not permit plaintiffs to plead an antitrust conspiracy in which the complaint calls for an inference of a conspiracy from parallel conduct, or even from parallel conduct with the plus factor that the defendants failed to enter into each others' markets.

Only Justices Stevens and Ginsburg seemed inclined to the plaintiffs' position in the questioning of the defendants' lawyer, Michael Kellogg. Stevens' strategy was to focus on a paragraph in the complaint that has broad allegations of a conspiracy. Ginsburg, who is a specialist in civil procedure, emphasized that the federal rules allow notice pleading. They both suggested that such a complaint is sufficient for pleading purposes.

Justice Breyer closely questioned Kellogg as well. His questions were attentive to Ginsburg's concern that plaintiffs are permitted to write broad allegations into a complaint. But he did not express genuine concern that it would be wrong to hold that an inference of conspiracy cannot arise from conscious parallelism.

The plaintiffs' lawyer, Doug Richards, emphasized that his complaint alleges not only parallelism but also the "plus factor" that the defendants' conduct was against their self-interest. When pressed, he explained that the allegation arose principally from the fact that the defendants could make more profit by entering each others' markets than by staying out.

The Justices most interested in antitrust law – Scalia and Breyer – expressed the view that this further allegation was no stronger than the basic allegation of an inference of a conspiracy through parallelism because companies frequently make a non-conspiratorial decision not to compete with each other. According to Breyer, on the plaintiffs' view, "you can go sue half the firms in this economy."

The Chief Justice, Justice Kennedy, and Justice Alito all followed up with skeptical questioning of Richards.

The questioning produces a nose count in which the defendants win the case on a vote between 6-3 and 9-0, depending on the breadth of the majority opinion.
Background Information on AT-Conversation
To post a note on a suggested topic or other matter of interest, send an email to AT-
CONVERSATION@MAIL.ABANET.ORG. You will need to be a member of the listserv
to post any messages. To sign up for AT-Conversation, simply provide your name and
email address at http://www.abanet.org/antitrust/at-listserv/at-listserv.html. The Antitrust
Section has made it real easy to subscribe and unsubscribe to listservs.

Before posting any hyperlink to a non-ABA website, you should review the Antitrust
Section’s hyperlinks policy at http://www.abanet.org/antitrust/at-links/pdf/hyperlinks-
memo.pdf.

From Roxann E. Henry’s welcome note to members of AT-Conversation:

AT-Conversation will provide you with timely news of case and policy
developments, online interviews, and discussion papers. More importantly,
it will allow you to discuss the issues of the day with many other
competition lawyers and economists who possess diverse experiences
and perspectives.

AT-Conversation is structured as a moderated list to ensure that the
conversation will be active, and that the decorum will be professional and
collegial. However, the moderator will not screen for content, as AT-
Conversation welcomes and encourages a competition discussions.

We encourage you to participate whenever you find it interesting and
convenient. Remember that this a classic network product which becomes
more valuable and interesting as more people participate.

The Section welcomes you as members of AT-Conversation. We hope
that you will encourage others to join too. If you have any questions,
comments, or concerns, please contact any of the moderators.

The list serve address is at-conversation@mail.abanet.org. If you would
like to unsubscribe please click here.

Rest assured that you will not receive any advertising on this list, just
substantive content and good conversation. If you want to post or receive
announcements for upcoming antitrust events and publications, please go
to at-announcements@mail.abanet.org to post and to subscribe please
click here.