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ADDITIONAL DEVELOPMENTS—ANTITRUST

BELL ATLANTIC CORP. V. TWOMBLY

127 S. Ct. 1955 (2007)

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court held that a complaint under Sherman Act § 1 could not survive a motion to dismiss that alleged that major telecommunications providers engaged in parallel conduct unfavorable to competition. The Court required some factual context suggesting an agreement, as opposed to identical, independent action. In so doing, the Court rejected a previous, oft-quoted passage from *Conley v. Gibson*, 355 U.S. 41 (1957), in which the Court had held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

The 1984 divesture of AT&T's local telephone business created a system of regional monopolies known as Incumbent Local Exchange Carriers (ILECs). The Telecommunications Act of 1996 ended the ILEC's regional monopolies and ordered the ILECs to share its network with competitors, known as Competitive Local Exchange Carriers (CLECs). The plaintiffs in this action represent "a putative class action of subscribers of local telephone and/or high speed internet services." The complaint first alleged that the ILECs "engaged in parallel conduct" in their respective service areas to inhibit the growth of the CLECs." Second, the complaint charged that the ILECs agreed to refrain from competing with each other.

The U.S. District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted. The district court held that consciously parallel behavior was insufficient to infer a conspiracy, and that plaintiffs must plead additional facts that "tend to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." The United States Court of Appeals for the Second Circuit reversed, holding that under *Conley v. Gibson*, the complaint was only properly dismissed if there was "no set of facts that would permit the plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."

The Supreme Court held that while Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," this requires "enough factual matter . . . to suggest that an agreement was made." When parallel conduct is alleged in a § 1 claim, the conduct must be placed in a context that suggests a preceding agreement. The Court rejected the *Conley v. Gibson* "no set of facts" passage and said that the appropriate rule of law is "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."

Justice Stevens, joined by Justice Ginsburg, dissented and would have held that the complaint adequately stated a ground upon which relief could be granted. Justice Stevens would have retained the "no set of facts" language from *Conley v. Gibson* and held that this language was consistent with the goals of modern notice pleading.

GOOGLE/DOUBLECLICK MERGER

In April 2007, Google announced its acquisition of DoubleClick, a large online advertising company that delivers display ads from advertisers to websites. Google's business rivals, notably Microsoft, publicly opposed the merger on the basis that it would give Google a monopoly in online advertising. Additionally, consumer advocacy groups were concerned that the personal data collection practices of Google and DoubleClick harmed consumer privacy. Consequently, the advocacy groups filed a complaint with the Federal Trade Commission (FTC), asking the agency to review the merger.

By a 4-1 vote, the FTC approved the Google/DoubleClick merger in December 2007.

The FTC did not examine the merger on the basis of privacy concerns because it lacked authority to block the merger on non-antitrust grounds. The FTC decided that Google's acquisition of DoubleClick was "unlikely to substantially lessen competition" after examining the possibilities of direct and substantial harm to competition after a merger, the elimination of potential competition in any relevant market, and any non-horizontal monopolistic harm.

The FTC noted the importance of privacy concerns in its report and concurrently released a voluntary set of principles to serve as "self-regulatory standards governing online behavioral advertising." The FTC defined online behavioral advertising as advertising tailored to individual consumers' interests through tracking of consumer's activities online. The FTC principles suggest that all websites in the behavioral advertising world should disclose that data is being collected for the purpose of targeting ads to the consumer. Underlying the principles was a message that advertisers should provide consumers with choice about whether they consent to being tracked.

In a ruling that also shied away from privacy concerns—focusing instead on issues of competition—the European Union announced in March 2008 that it would allow the acquisition to go forward, thus removing the last obstacle in Google's path.

IN RE RAMBUS INC.

2007 WL 431524 (FTC Feb. 5, 2007), vacated, 522 F.3d 456 (D.C. Cir. 2008)

RAMBUS INC. V. FTC

522 F.3d 456 (D.C. Cir. 2008)

In February 2007, the Federal Trade Commission (FTC) capped the royalties that memory-chip maker Rambus can charge licensees of its dynamic random access memory (DRAM) products. However, in April 2008, the United States Court of Appeals for the District of Columbia Circuit vacated the FTC's holding that Rambus monopolized the relevant technology markets, finding that the FTC's factual findings were insufficient to sustain the charge.

Back in the 1990s, the Joint Electron Device Engineering Council (JEDEC) set standards for synchronous DRAM (SDRAM) technology. The JEDEC required its members to disclose any patents and patent applications relating to the standards being set. Rambus worked with the JEDEC to set standards for SDRAM without revealing that they had patent applications pending on the same technology. Rambus pushed for standards over which they held patents, and used information from the JEDEC meetings to amend its patent applications so that their patents would cover the standards once adopted. After JEDEC adopted the standards and industry competitors implemented those standards in their products, Rambus sought royalties through patent infringement suits brought against JEDEC members who practiced the standards.

The FTC charged Rambus with antitrust violations in 2002. After a dismissal by an administrative law judge, the case proceeded to a full commission review on appeal. On July 31, 2006, the FTC ruled that Rambus engaged in acts constituting exclusionary conduct under Section 2 of the Sherman Act by contributing to the standard-setting process while hiding its ability to impose royalty obligations and using JEDEC to assemble a patent portfolio to cover the SDRAM and DDR SDRAM standards. In addition, the FTC found that Rambus unlawfully monopolized the markets for four related technologies incorporated into the JEDEC standards in violation of Section 5 of the Federal Trade Commission Act.

On the issue of remedy, the FTC rejected Rambus's contention that the FTC's remedial authority is limited to enjoining Rambus from deceiving a standard-setting organization ("SSO") in the future. Rather, the FTC held that its authority allows it to restore, to the extent possible, the competitive conditions that would have been present "but for" Rambus's unlawful conduct. Additionally, FTC held that it has the authority to issue compulsory licensing on terms it prescribes; the FTC can also order royalty-free licensing where the circumstances justify it, as long as the order bears a reasonable relationship to the unlawful practices.

The FTC's order set a maximum royalty rate that Rambus can collect for any of its JEDEC-compliant DRAM or non-DRAM products. The FTC determined that, but for Rambus's deceptive practices, JEDEC would have either chosen alternative technologies or would have incorporated Rambus's technologies on the condition that Rambus agree to license the technology on reasonable and non-discriminatory ("RAND") terms. However, the government failed to show that restoring competition to what would have otherwise existed required Rambus to license its technology for free. In setting the cap on royalty, the FTC chose 0.5% for DDR SDRAM over three years and 0.25% for SDRAM over three years, numbers which reflected the bottom of what the Commission determined to be the range of reasonableness.

In April 2008, the D.C. Circuit overturned the 2006 FTC ruling that found Rambus in violation of the Sherman Act. The court reasoned that the FTC had merely identified the consequences of Rambus's conduct in the alternative. Rambus's conduct *either* prevented JEDEC from (1) adopting a non-proprietary standard, which the D.C. Circuit assumed without deciding amounted to an antitrust violation, *or* (2) requiring Rambus to license its patents on RAND terms, which the D.C. Circuit held did not entail anticompetitive effect. The FTC had not found that it was more likely JEDEC would have adopted a different standard, rather than simply extracting lower license terms. Rather, the FTC had simply found two equally probable consequences of Rambus's deceptive conduct, only one of which the D.C. Circuit considered anticompetitive. Accordingly, the D.C. Circuit found that the FTC's findings were insufficient to support an antitrust violation in the eyes of the D.C. Circuit.

The D.C. Circuit's decision turns on its holding that the second consequence—failure to extract a commitment from Rambus to license its technology on RAND terms—is not anticompetitive, despite Rambus's deception. Citing *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), the court stated that "[d]eceptive conduct—like any other kind—must have an anticompetitive effect in order to form the basis of a monopolization claim." The court went further, stating that "an otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition."

The court's vacatur of the FTC decision relied on the aforementioned reasoning, while accepting the FTC's factual findings concerning Rambus's deceptive conduct. However, the court went on to express serious reservations about the sufficiency of the evidence for those findings. The court characterized the FTC findings as "murky," and expressed concern that testimony regarding JEDEC's disclosure requirements "significantly stretch[ed]" the language of the policies to require disclosure of potential amendments to pending patent applications. While criticizing one finding of deception as relying on "weak evidence," the court did not formally hold that the FTC's factual conclusions fell below the applicable sufficient evidence standard.

Further developments in the case remain possible on remand to the FTC.

The FTC has not been the only one pursuing antitrust charges against Rambus. Since 2000, Rambus had been involved in antitrust and patent infringement litigation with other major memory chip-makers such as Hynix and Micron Technology. Most recently, on March 26, 2008, a federal jury found Rambus not guilty of breaking antitrust laws and in favor of Rambus on its patent infringement claim.

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