Legal Opinion Letter

WLF Washington Legal Foundation

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2009 Massachusetts Avenue, NW
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Vol. 16 No. 14 May 19, 2006

SUPREME COURT SHOULD REVIEW PLEADING STANDARDS FOR ANTITRUST MEGA-LITIGATION

by
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Conley v. Gibson, meet Milberg Weiss.

Currently pending before the U.S. Supreme Court is a chance to consider an antitrust lawsuit against an entire industry, purportedly brought on behalf of *hundreds of millions* of individuals and businesses. *Bell Atlantic Corp. v. Twombly*, No. 05-1126. The Court has been asked to decide whether the case should be allowed to proceed past the pleading stage when the plaintiffs do not even claim to have any evidence of the critical factor that distinguishes unlawful from lawful conduct. A respected and conscientious district judge dismissed the case in a well-reasoned opinion, but the United States Court of Appeals for the Second Circuit thought that the judge had applied a higher pleading standard than the law allowed. The court thought that modern mega-litigation brought by the organized plaintiffs' class-action bar was no different in any relevant respect from Civil Rights Era litigation brought by victims of racial discrimination in employment. The Court should accept the case for review and remind the Second Circuit that "all pleadings shall be so construed as to do substantial justice," FED. R. CIV. P. 8(f), a standard that does not require the travesty of letting a massive case like this one proceed with no facts.

Every law student learns in first-year civil procedure 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." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). That rule encapsulates the American "notice pleading" system, and it protects plaintiffs – especially those with unsophisticated counsel – from having meritorious cases thrown out of court on technicalities.

Setting such a low bar for surviving a motion to dismiss invites abuse, however. Enter the organized class-action bar. If all it takes to proceed with litigation is pleading enough to make it not "beyond doubt" that recovery would be possible under *some* "set of facts," then sophisticated counsel can look for factual situations in which some but not all of the facts necessary to constitute a violation of law are ascertainable.

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Add to the mix a search for deep-pocket defendants, and for things that affect very large numbers of people. The concoction produced by this recipe is a putative class action against big companies based on a very thin complaint. If the complaint can only get past the motion-to-dismiss stage, millions of dollars of discovery costs are virtually automatic for the defendants, and the case immediately has a seven-figure "nuisance" settlement value.

The *reductio ad absurdum* of the *Conley v. Gibson* formula came in *Twombly*. Famous class-action firm Milberg Weiss filed a complaint purportedly on behalf of "all individuals and entities who purchased local telephone and/or high speed internet services in the continental United States" from February 8, 1996, to the present. The basic theory of the complaint was that all the "Baby Bells" had refrained from entering each other's service areas to compete. If each company acted unilaterally, its actions were lawful. So the complaint added "on information and belief" an allegation that defendants conspired with each other not to compete, which would be unlawful.

Judge Gerard Lynch dismissed the complaint. 313 F. Supp. 2d 174 (S.D.N.Y. 2003). The Second Circuit reversed. 425 F.3d 99 (2005). Yet the Second Circuit did not suggest that it was blessing potentially meritorious litigation. Rather, it recognized that counseling against its action was "the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted." *Id*. at 117. But the court thought that its hands were tied by *Conley* and by *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), and that only Congress or the Supreme Court could "re-calibrate" the balance. 425 F.3d at 117 & n.13.

The Supreme Court should accept the Second Circuit's invitation to recalibrate, but the Second Circuit was wrong in thinking that it had so little freedom to do justice in this case. In cases arising at the summary-judgment stage, the Supreme Court has made it clear that "[a]ntitrust law limits the range of permissible inferences from ambiguous evidence." *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574, 588 (1986). There is no reason not to apply the same substantive principle of antitrust law at this stage of the litigation. Moreover, in securities cases, *without* relying on the heightened pleading standards in recent legislation, the Supreme Court has twice invited lower courts to take account of the *in terrorem* effect on settlement value of denying motions to dismiss in nonmeritorious cases. *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627, 1634 (2005); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975). Existing law allows courts to treat mega-litigation brought to coerce settlements differently from cases like *Conley* v. *Gibson*, in which 45 African-American railroad workers sued after losing their jobs, or *Swierkiewicz*, in which one plaintiff lost a job.

Last and not least, the key to correct resolution of this case could have been found in *Conley* v. *Gibson* itself, a case few of us ever read after the first year of law school. The Court in *Conley* did not state its pleading standard as an end in itself, but as a means to the end stated in Federal Rule of Civil Procedure 8(f): "do substantial justice." It is not substantial justice to allow mega-litigation to proceed when the plaintiffs have no facts to separate lawful from unlawful conduct, and want to go on a fishing expedition to coerce settlement. The Supreme Court can – and should – take this case to correct an error and lessen the power of the class-action bar to hold up corporate America with massive but completely unmeritorious lawsuits.

ISBN 1056 3059