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COURT AGREES TO CONSIDER CRACKDOWN ON FRIVOLOUS ANTITRUST SUITS

***(Bell Atlantic Corp. v. Twombly*, No. 05-1126)**

The U.S. Supreme Court yesterday agreed to hear a case that will provide it with an opportunity to crack down on frivolous antitrust lawsuits by making it easier for defendants to win dismissal of such suits before being forced to incur the often colossal expense of discovery.

The Supreme Court's action was a victory for the Washington Legal Foundation (WLF), which had filed a brief urging the Court to hear the case, *Bell Atlantic Corp. v. Twombly*. WLF argued that unless antitrust defendants are provided a fair opportunity to win early dismissal of lawsuits, they will often end up agreeing to pay plaintiffs to settle what would ultimately be shown to be meritless claims. WLF also argued that such suits hurt the economy by chilling pro-consumer activity by companies that seek to avoid potential antitrust liability.

The parties will now file a new round of briefing, with oral arguments scheduled for either December or January. WLF has pledged to file another brief in support of the petitioners, urging that the Court reverse a lower court decision that permitted this antitrust case to go forward.

"The point of the antitrust laws is to protect competition," said WLF Chief Counsel Richard A. Samp after the Supreme Court agreed to hear the case. "But if we allow the antitrust laws to be hijacked by plaintiffs' lawyers who use the threat of expensive litigation to force settlement of frivolous claims, the antitrust laws will end up discouraging the very competition they were designed to promote," Samp said.

The case involves an antitrust suit filed against the four principal companies that maintain local telephone networks in this country (known as Incumbent Local Exchange Carriers or "ILECs"); those companies also provide local telephone service. The plaintiffs are two individuals who complain that the ILECs are not doing enough to facilitate competition in the provision of local telephone service. Specifically, Twombly alleges that the ILECs have conspired, in violation of Section 1 of the Sherman Act, not to compete with one another in their respective geographic markets for local telephone and high-speed Internet service, and to prevent competitors from entering those markets.

The plaintiffs allege no facts directly indicating that the ILECs entered into an actual agreement to restrain trade. They do not allege, for example, when or where the agreement took place, who among the ILECs' hundreds of thousands of employees entered into the agreement, or why the ILECs would enter into such an agreement given that their behavior in resisting competition is fully consistent with economic self-interest. Instead, the complaint makes clear, the plaintiffs' conspiracy allegation is based solely on the fact none of the ILECs has chosen to enter into a new business by competing for customers in the other ILECs' territories.

The U.S. Court of Appeals for the Second Circuit in New York held that the plaintiffs' allegations were sufficient to withstand a motion to dismiss the case for failure to state a claim upon which relief could be granted, despite the absence of specific allegations regarding the alleged conspiracy. The appeals court said that a complaint that alleges the existence of a conspiracy to restrain trade in violation of the antitrust laws is not subject to dismissal unless the claim is totally "implausible," even if no facts are alleged to support the conspiracy claim. The Supreme Court yesterday agreed to review that decision.

In its brief urging the Supreme Court to grant review, WLF argued that the appeals court's extremely lenient pleading standard makes it virtually impossible to win early dismissal of an antitrust lawsuit, no matter how frivolous. WLF argued that a complaint should be subject to dismissal on the pleadings if it fails to give the defendant "fair notice" of the plaintiff's claims. WLF argued that a defendant charged with a conspiracy has not been provided with "fair notice" if it is not told where or when the conspiracy took place, which of the defendant's many employees agreed to enter into the conspiracy, and why the defendant's observed behavior is inconsistent with the behavior one would expect in the absence of a conspiracy.

WLF noted that the only conduct that the plaintiffs point to in support of their conspiracy claim is the fact that none of the defendants chose to enter into a new field by competing for customers in the other defendants' geographic territory. WLF responded that such conduct, generally referred to as "parallel action," proves nothing because it is fully consistent with the economic self-interest of each of the defendants.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared in the federal courts to address the proper scope of the antitrust laws.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.