Legal Opinion Letter

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TWOMBLY RULING COMPELS DISMISSAL OF ANTITRUST CLASS ACTION

by
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In the *Late Fee and Over-Limit Fee Litigation,* U.S. District Judge Saundra B. Armstrong recently granted six defendant banks' motion to dismiss a class action complaint alleging they violated Section 1 of the Sherman Act and that their late and over-limit fees exceeded the limits on punitive damages set by the U.S. Supreme Court in its *State Farm* decision. *See In re Late Fee and Over-Limit Fee Litigation*, No. C 07-0634 SBA, 2007 WL 4106353 (N.D. Cal. Nov. 16, 2007) [hereinafter *Credit Card Fees*]. Relying on *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), Judge Armstrong found that the allegations in the complaint were insufficient to allege a conspiracy among the banks and that their late and over-limit fees were not constrained by the constitutional limits on punitive damages. The ruling illustrates the degree to which *Twombly* is promoting more rigorous assessment of pleadings in antitrust and other business law cases.

Background. On behalf of all credit card holders who paid a late fee or over-limit fee since 2003, the *Credit Card Fees* plaintiffs claimed that six of the largest credit card issuing banks in the United States violated antitrust, banking, and other laws by charging fees the plaintiffs considered too high. The defendant banks moved to dismiss each of the counts in the consolidated complaint, and the court granted the motion as to all counts.

Plaintiffs' antitrust claims alleged that the defendant banks conspired to fix their late fees in violation of the federal Sherman Act, 15 U.S.C. § 1, and California's antitrust statute. They asked the court to infer from the defendants' somewhat similar fee structures that they must have reached an agreement on fee levels.

The plaintiffs in *Twombly* sought a similar inference. They claimed that, despite the encouragement offered by the Telecommunications Act of 1996 (the "1996 Act"), local telephone companies (known as "ILECs") conspired not to expand into territories where they had not previously operated. Though their complaint alleged that the ILECs entered such an agreement, it cited no evidence of any agreement, apart from the simple fact that the ILECs did not compete against each other after the 1996 Act passed. As the Supreme Court described it, "nothing contained in the complaint invest[ed] either the action or inaction alleged with a plausible suggestion of conspiracy." *Twombly*, 127 S. Ct. 1971. The "few stray statements speak[ing] directly of agreement" amounted to no more than "mere[ ] legal conclusions," *id.* at 1970, and the allegations that ILECs did not invade each others' territories failed to suggest any conspiracy because it would have been "natural" for the ILECs to "sit[ ] tight, expecting their

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neighbors to do the same thing," *id.* at 1973. The Court held, therefore, that the district court had properly dismissed the complaint.

As in *Twombly*, the *Credit Card Fees* complaint included "several conclusory allegations that the defendants agreed to increase late fees, but it provide[d] no details as to when, where, or by whom th[e] alleged agreement was reached." *Credit Card Fees* at *7. The court also recognized that some of the plaintiffs' more specific allegations showed that the banks raised their late fees not because of an illegal agreement, but to tap an important new source of revenue after competition forced them to slash interest rates and annual fees. *Id.* at *7. Further, the court noted allegations showing that many of the banks' current late fees were not that similar and actually "followed different pricing paths at different times, not even roughly in parallel." *Id.* at *6.

Even the plaintiffs' allegations of "plus factors" – i.e., facts and circumstances suggesting that conspiracy could be possible – could not save their antitrust claims. Judge Armstrong reviewed seven different "plus factors" that the plaintiffs claimed to have alleged and found none of them, "taken singly or together," sufficient to raise an inference that the defendant banks conspired to fix late fee levels. *Id.* at *8. Many of the factors – including opportunities to communicate, market concentration, motive to conspire, and price leadership – were present in *Twombly* and/or other cases but were found insufficient to suggest any agreement among defendants in those cases. *Id.* at *8-9. Judge Armstrong also found that plaintiffs simply had not included allegations in the complaint regarding a few of the factors on which they relied. *Id.* at *9. For all of these reasons, Judge Armstrong concluded that plaintiffs' allegations had failed to "raise[ ] a suggestion of a preceding agreement" and therefore dismissed their antitrust claims. *Id.* at *7.

Judge Armstrong dismisses plaintiffs' non-antitrust claims as well. In support of their banking law claims, plaintiffs argued that late and over-limit fees exceeded the Due Process limitations on "punitive damages" described in *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) – i.e., that those fees could not lawfully exceed nine times the costs banks incurred due to late payments and customers exceeding their credit limits. The court rejected the notion that credit card fees are "punitive damages" within the meaning of the Supreme Court's Due Process precedents, found *State Farm*'s Due Process limits on state action inapplicable to private credit card agreements, and recognized that federal banking laws explicitly permit the banks to charge late and over-limit fees at their current levels. *Credit Card Fees*, at *3-5. Judge Armstrong also dismissed plaintiffs' remaining state law claims as premised on the federal claims already found lacking, preempted by federal banking law, and/or otherwise deficient. *Id.* at *10-11.

Analysis. The decision in *Credit Card Fees* suggests that district judges appreciate that *Twombly* requires them to analyze antitrust complaints rigorously. Allegations must describe facts showing that an antitrust conspiracy is not merely "conceivable," but actually "plausible." *See Twombly*, 127 S. Ct. at 1974. When considering a motion to dismiss, judges must grapple with precisely what a plaintiff alleges (and does not allege) to determine whether the alleged parallel conduct "suggests a preceding agreement" and could not "just as well be [attributed to] independent action." *Id.* at 1966. By that standard, the dismissal in *Credit Card Fees* is unremarkable. The complaint there alleged facts showing not only that the defendant banks' late-fee pricing policies *could* have been adopted independently for each bank's own business reasons, but that they actually *were* adopted because each bank needed to replace revenue from declining interest and other charges.

More notably, *Credit Card Fees* demonstrates how mechanical recitation of "plus factors" cannot save an otherwise deficient complaint from dismissal. Courts have long recognized that evidence of "plus factors" does not automatically entitle plaintiffs to evade summary judgment, but simply alleging that "plus factors" existed was often sufficient to escape dismissal on the pleadings. In *Twombly*, however, the Supreme Court more closely aligned motion-to-dismiss standards with traditional summary-judgment standards. Thus, pleading "plus factors" will not alone support an inference of conspiracy, as *Credit Card Fees* demonstrates. There, the plaintiffs claimed their complaint included allegations of at least seven "plus factors," but the court found that none of them, "whether taken singly or together," were sufficient to raise the inference of conspiracy necessary to state a claim under Section 1. *Credit Card Fees*, at *8.

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