IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

Case No. 15-14160-AA

QUALITY AUTO PAINTING CENTER OF ROSELLE, INC.,
Traded as Prestige Auto Body,

Plaintiff-Appellant,

v.

STATE FARM INDEMNITY COMPANY, *et al.*,

Defendants-Appellees.

Case No. 15-14162-AA

ULTIMATE COLLISION REPAIR, INC.,

Plaintiff-Appellant,

v.

STATE FARM INDEMNITY COMPANY, *et al.*,

Defendants-Appellees.

Case No. 15-14178-AA

CAMPBELL COUNTY AUTO BODY, INC.,

Plaintiff-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

Case No. 15-14179-AA

LEE PAPPAS BODY SHOP, INC., *et al.*,

Plaintiff-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

Case No. 15-14180-AA

CONCORD AUTO BODY, INC.,

Plaintiff-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida, Orlando Division

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

To *amicus curiae*'s knowledge, there are no interested persons other than those identified in the petitions for rehearing en banc.

/s/ Adam G. Unikowsky

CORPORATE DISCLOSURE STATEMENT

Amicus curiae certifies that it has no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No publicly held company has a 10% or greater ownership interest in *amicus curiae.*

/s/ Adam G. Unikowsky

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IDENTITY AND INTEREST OF AMICUS[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community. In particular, the Chamber has participated as an amicus in numerous cases regarding pleading standards.

The Chamber believes that the fair and equitable enforcement of the Sherman Act is good for business: it promotes fair competition that is at the heart of a market economy. In the Chamber's experience, however, the goals of the Sherman Act are undermined, rather than advanced, by permitting antitrust claims based on threadbare and speculative allegations of conspiratorial conduct to proceed. Discovery in such lawsuits is typically burdensome and enormously

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

expensive, and rarely yields any actual evidence of an antitrust conspiracy. And the cost of such discovery frequently drives defendants to settle meritless cases. Such lawsuits stifle, rather than promote, competition, by forcing companies to spend money on litigation costs that would otherwise be put to productive use.

In this case, Plaintiffs contend that the en banc court should adopt a pleading standard that is substantially more lenient than the standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The panel's decision will expose the Chamber's members to burdensome antitrust litigation within the Eleventh Circuit. *Amicus curiae* and its members thus have a strong interest in this case.

STATEMENT OF ISSUES AND STATEMENT OF FACTS

The Chamber agrees with the Statement of Issues and Statement of Facts as stated in the Petitions for Rehearing En Banc.

ARGUMENT

The District Court correctly held that Plaintiffs had not pleaded an antitrust claim under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Boiled down, the threadbare allegations in this case are as follows: (1) multiple insurers pegged their reimbursement rates to State Farm's rates; (2) multiple insurers engaged in bad-faith tactics to reduce their reimbursement rates, although not necessarily the same bad-faith tactics. Even if Plaintiffs could prove that these allegations were true, they would be "just as much in line with a wide swath of rational competitive

business strategy prompted by common perceptions of the market," and would be perfectly consistent with "the possibility that the defendants were acting independently." *Id.* at 554. Accordingly, they do not suffice to state a claim of an illegal conspiracy.

A contrary conclusion would have serious ramifications. Permitting an antitrust claim to proceed on this record would turn the Eleventh Circuit into a hotbed of antitrust litigation, as plaintiffs' lawyers take advantage of the Court's plaintiff-friendly pleading standard. Plaintiffs bringing suit in this circuit will use the complaints in this case as templates that they know will surmount a motion to dismiss—and once the motion to dismiss is denied, they will have the leverage to quickly extract a settlement, in light of the high cost of antitrust discovery. The Court should affirm the District Court's decision and ensure that this Court's case law governing antitrust pleading standards remains in conformance with *Twombly*.

I. No Per Se Illegal Price Fixing Agreement Or Conspiracy Can Plausibly Be Inferred From The Allegations In The Complaints.

In connection with the grant of rehearing en banc, this Court directed the parties to focus their briefs on two questions. The first question was: "Can a *per se* illegal price fixing agreement or conspiracy between and among the several defendant-insurance companies plausibly be inferred from the allegations of the complaints in the several cases before this Court?" The answer is no.

The complaints do not offer any direct allegations of price fixing. Nowhere do they state, for instance, that any two defendants actually communicated with each other and agreed on pricing. Instead, Plaintiffs' allegations of an illegal price fixing agreement are based primarily on their allegations of parallel pricing: They allege that "the insurance companies 'specifically advised the [shops] they will pay no more than State Farm pays.'" Maj. Op. at 19[2] (bracket in original). The three-judge panel concluded that this allegation supported an allegation of an agreement. *Id.* It reasoned that the insurers are differently situated: for instance, they have locations in different physical offices. *Id.* It also observed that "the companies have the ability to differentiate themselves." *Id.* Thus, the panel concluded, the fact that the insurers nonetheless pegged their reimbursement rates to State Farm's rates was a "plus factor" supporting Plaintiffs' theory that the insurers had *agreed* to fix prices.

With respect, the panel erred. As the panel itself noted, firms routinely engage in "conscious parallelism"—that is, intentionally matching each other's prices or strategies. Maj. Op. 14-15. So long as that conscious parallelism is not the product of an agreement, it does not violate the Sherman Act. *Id.* Importantly, companies may engage in conscious parallelism because the companies are "interdependen[t] with respect to price and output decisions." *Id.*; *see Twombly*,

[2] "Maj. Op." refers to the now-vacated panel opinion.

550 U.S. at 553 (noting that "conscious parallelism" is a "common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions"). Thus, matching other companies' price and output strategies might be the profit-maximizing strategy *regardless* of whether they are differently situated or might have the ability to differentiate themselves. Maj. Op. 14-15.

Yet, although the panel recited that rule, it failed to apply it. Instead, the panel held that *because* different insurers had different characteristics and had the theoretical capability to differentiate themselves, those insurers' parallel conduct supported the inference of a conspiracy. Yet the whole premise of the economic theory of conscious parallelism is that parallel conduct *does not* support the inference of a conspiracy, even if the companies have different characteristics and the capability to differentiate themselves. In this case, as the dissent pointed out, auto parts are "ubiquitous, interchangeable, and standardly priced." Dissent at 47. The fact that insurers would pay standardized rates is what one would expect in any competitive market. Pegging reimbursement rates to State Farm rates may arguably be *consistent* with a price-fixing agreement, but it is also perfectly consistent with rational, independent business behavior. Thus, it is insufficient to state a claim. Under *Twombly*, a complaint must be dismissed unless it contains

"allegations plausibly suggesting (not merely consistent with) agreement." 550 U.S. at 557. No such allegations appear in Plaintiffs' complaint here.

The far-reaching implications of the panel's reasoning confirms that it cannot be correct. Under the panel's ruling, virtually *any* allegation of parallel conduct will constitute a "plus factor" supporting an antitrust claim. So long as a plaintiff alleges that two companies are copying each other, yet are differently situated in some respects, the plaintiff alleges a "plus factor" under the panel's analysis. And it is almost *always* possible to distinguish between competitors in some respects. For instance, the panel emphasized that different insurers have offices in different physical locations. Such an allegation can be carried over to virtually every case—not just those involving insurance. Thus, if Plaintiffs' complaint can proceed, it is difficult to see how any complaint alleging parallel conduct by differently-situated competitors could ever be dismissed at the pleading stage. That result is irreconcilable with *Twombly*'s core holding, which is that mere allegations of parallel conduct are insufficient to state an antitrust claim.

The panel's decision conflicts with *Twombly* in an additional respect. The panel concluded that it could not consider the defendants' argument that auto parts are "ubiquitous, interchangeable, and standardly priced," Dissent at 47, on the ground that it was based on "external knowledge" outside the complaints. Likewise, the panel relied on allegations that insurers "steer" policyholders from

body shops which charge excessively high rates by badmouthing them in various respects, such as accusing them of poor performance. Maj. Op. at 20-21. The panel majority rejected the dissent's observation that such tactics have obvious justifications that are unrelated to anticompetitive agreements, Dissent at 49-51, finding that this observation was based on "external knowledge." Maj. Op. at 25-26.

But *Twombly* took a contrary view, emphasizing that allegations of antitrust violations must be "viewed in light of common economic experience." 550 U.S. at 564-65. For instance, the Court held that telecommunications providers' refusal to compete did not support the inference of a conspiracy, but instead reflected the fact that historically, "monopoly was the norm in telecommunications." *See id.* at 567-58. This was the very sort of common-sense economic reasoning that the panel held was out of bounds at the motion to dismiss stage.

Taken together, the panel's two errant holdings will make it dramatically more difficult to file successful motions to dismiss Sherman Act claims. A court's consideration of whether there are "plus factors" will naturally depend on the characteristics of the industry at issue. If a court is precluded from considering those characteristics, other than those that appear in the complaint, a plaintiff can easily state a claim in any antitrust case. The plaintiff need merely recite that the characteristics of the industry at issue make it unlikely that parallel conduct could

occur. Even if those allegations conflict with common economic knowledge, the judge would be forced to deny the motion to dismiss—because that knowledge would be deemed "external" under the panel's ruling. And if courts cannot consider such well-known and obvious facts about the world at the motion to dismiss stage, then meritless antitrust cases will proceed, yielding the outcome *Twombly* warned against: "the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support a § 1 claim." *Id.* at 559 (quotation marks and brackets omitted).

II. No Per Se Illegal Group Boycott Can Plausibly Be Inferred From The Allegations In The Complaints.

The en banc court's second question to the parties was: "Can a *per se* illegal agreement or conspiracy between and among the several defendant-insurance companies to boycott Plaintiffs' body shops plausibly be inferred from the allegations of the complaints in the several cases before this Court?" The Court should answer that question in the negative as well.

The complaint alleges that insurers "steer" policyholders from body shops which charge excessively high rates by badmouthing them in various respects, such as accusing them of poor performance. As the dissent observed, the complaint asserts that multiple insurers engaged in these tactics, and then gave a series of "[e]xamples of this practice," while offering no allegation that the insurers

used the *same* practice. Dissent at 54-55 (quoting complaint). And as the dissent explained, an allegation that one insurer uses one practice (*e.g.*, accusing a body shop of poor performance), and that a different insurer uses a different practice (*e.g.*, stating that policyholders must pay a body shop's excess fees), does not support an allegation of a conspiracy. *Id.*

The panel did not dispute the dissent's observation that the complaint does not allege parallel tactics. Instead, the panel concluded that an allegation that multiple insurers are engaging in ostensibly illegal tactics—*even if those tactics are different*—suffices to establish a "plus factor." As the panel put it, the critical "allegations in the complaint" were that "each tactic was misleading or false." Maj. Op. 27. Thus, "the insurance companies' misleading or false tactics together create an idiosyncrasy, the repetition of which is hardly 'common.'" *Id.* at 27-28.

This position cannot be correct. According to the panel, the allegation that multiple companies engage in different, but allegedly illegal, steering tactics is, in and of itself, a sufficient allegation of an agreement for a group boycott case to proceed to discovery. The panel deemed it "idiosyncratic" that multiple companies would be engaging in illegal tactics, and therefore deemed it plausible that these companies were engaged in a different illegal tactic: a secret antitrust conspiracy. This epitomizes the sort of speculative reasoning that *Twombly* warned against. 550 U.S. at 555-56 ("Factual allegations must be enough to raise a right to relief

above the speculative level," and must "raise a reasonable expectation that discovery will reveal evidence of illegal agreement"). Pleading an antitrust claim requires something more: "Conduct that indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement." *Id.* at 556 n.4 (quotation marks, citation and brackets omitted). Plaintiffs allege no such conduct in this case.

The panel's reasoning would allow virtually any group boycott claim, affecting any industry, to proceed to discovery. So long as the plaintiff alleges that multiple companies are breaking the law to the detriment of an industry participants—even in different ways—the plaintiff can state a group boycott claim. This low bar may permit innumerable meritless antitrust claims to proceed and is irreconcilable with *Twombly*'s rigorous pleading standard.

III. Reversing the District Court Would Have Grave Practical Implications.

As previously described, the panel's reasoning cannot be limited to the facts of this case. To the contrary, if the Court holds that Plaintiffs' complaint states an antitrust claim, then future antitrust plaintiffs will be able to use the allegations in these complaints as a pleading template. For instance, the operative complaint recites that "[t]hrough various methods, the [insurance companies] have, independently and in concert, instituted numerous methods of" coercion, and then separately enumerates "examples" of this practice. Dissent at 49, 54-55 (quoting

complaint). If the Court allows that complaint to proceed, then future antitrust plaintiffs will copy this language in their complaint—accompanied by general allegations of industry misconduct—and will be able to surpass a motion to dismiss.

That outcome would have grave implications. As the Supreme Court explained in *Twombly*, there is no area of law where discovery is more burdensome than antitrust. 550 U.S. at 558-59 (citing authorities describing the "unusually high cost" and "extensive scope" of antitrust discovery). Thus, "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence to support a § 1 claim." *Id.* at 559 (internal quotation marks and alteration omitted).

Indeed, adopting Plaintiffs' proposed lenient pleading standard would harm courts, litigants, and the public. From courts' perspective, a more lenient pleading standard will require district judges to preside over complex discovery disputes, clogging up the courts despite the underlying claims having little chance of success. From antitrust defendants' perspective, a more lenient pleading standard will have dramatic economic consequences. Even if the defendant can ultimately defeat the claim at summary judgment, the damage will already have been done, in the form of millions of dollars in discovery costs. And it is the public who will

ultimately bear the cost of this discovery, in the form of lower wages and higher prices. Worse, if a plaintiff-friendly pleading standard deters companies from using common cost-cutting tactics, such as steering consumers to lower-price vendors, consumers would be further harmed.

Further, as the court observed in *Twombly*, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Id.* Thus, reinstating the panel's ruling would significantly constrain the development of antitrust law in this circuit. Savvy antitrust plaintiffs will copy the allegations in the complaints at issue here as closely as possible, in an effort to surmount a motion to dismiss. When district courts, bound by the Court's ruling, will deny motions to dismiss, the case may well settle—and even if the case proceeds to summary judgment, the sufficiency of the complaint will become moot. Affirming the District Court's faithful application of *Twombly* would ensure that this outcome will not arise.

CONCLUSION

The judgment of the District Court should be affirmed.

June 29, 2018

Respectfully submitted,

/s/ Adam G. Unikowsky

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(b)(4) because it contains 2743 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 29-3.

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/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June, 2018, a true and correct copy of the foregoing Brief was served on all counsel of record in this appeal via CM/ECF.

/s/ Adam G. Unikowsky