

Conscious Parallelism: Subtracting Plus Factors Is The “New Math” Of The Second Circuit



**Fishing for §1 Conspiracies Will Assure
Full Employment for Second Circuit
Antitrust Lawyers**

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The purpose of this material is to alert you to new and developing legal and business issues. The contents are not intended to provide legal advice to specific cases or particular legal matters. We expect you will want to consult directly with your own legal counsel if you feel an issue discussed affects you.

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BACKGROUND

- One person acting alone cannot violate §1 of the Sherman Act. That prohibition applies to *contracts, combinations or conspiracies* in restraint of trade. An agreement between two or more persons is necessary before a §1 violation can be found.
- One of the major issues in §1 cases have been the nature of evidence that will prove the existence of a *contract, combination or conspiracy*.
- Over the years, the Supreme Court has dealt with this issue on a number of occasions, approving circumstantial evidence of conspiracy based on industry wide or “parallel action,” but stopping short of the notion that conscious parallelism alone can be considered a Sherman Act violation. In the eyes of the Court, conscious parallelism is not equated to conspiracy. It is merely another evidentiary circumstance to be considered in determining whether or not a conspiracy exists.
- It can be readily seen that in many circumstances conscious uniformity can in no way be elevated to an agreement. Meeting the price of a competitor may result in a conscious uniformity of price, but if the conduct is the result of the individual decisions of businessmen, that uniformity establishes no illegal activity. Uniformity, in and of itself, is not prohibited.

CONSCIOUS PARALLELISM

- In *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954) the Court said: “To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement . . . But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but ‘conscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely.”
- As a result, in cases where the conspiracy claim is based upon evidence of parallel conduct, the courts have required more evidence in the form of certain “plus factors” such as evidence that the defendants attended secret meetings or conducted suspicious discussions at which they had an opportunity to conspire; acted against their own economic best interests; or invited common action by the others. Without such plus factors, the fact that the defendants acted in a parallel fashion is just as likely the result of independent action as an agreement or conspiracy and does not, without more, support even an inference of conspiracy.

APPLICATION TO SUMMARY JUDGMENT; MOTION TO DISMISS

- While proof of conscious parallelism without at least one plus factor will result in summary judgment for the defendant upon the important issue of conspiracy, many district courts have adopted the same standards at the pleading stage, dismissing those complaints that alleged parallel activity without more in response to a Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted.
- For example, in *Levitch v. CBS*, 495 F. Supp. 649, 673-675 (S.D.N.Y. 1980), *aff'd*, 697 F.2d 495 (2d Cir. 1983), the district court considered a case where plaintiffs alleged, “without further elaboration, that through a course of ‘consciously parallel action,’” the defendants conspired in violation of §1. In affirming the district court’s dismissal of the plaintiff’s second amended complaint upon defendants’ motion to dismiss, the court stated that “conscious parallelism, without more, will not state a claim under §1.”
- But the *Levitch* standard is apparently no longer correct – allegations of plus factors are no longer required. Without mention of *Levitch* – but with very significant implications – the Second Circuit has changed the rules of the game.

TWOMBLY V. BELL ATLANTIC CORP.

- In *Twombly v. Bell Atlantic Corporation*, 425 F.3d 99 (2d Cir. 2005), the district court dismissed a complaint for failure to allege at least one “plus factor” tending to exclude independent self-interested conduct as an explanation for the parallel behavior of the four defendants. While the district court was acting in a manner consistent with *Levitch*, the rules had changed.
- According to today’s Second Circuit, Fed. R. Civ. P. 8 now trumps Rule 12. The legal sufficiency of antitrust claims is governed by Rule 8’s notice requirements, not by any heightened pleading standards. In noting a trend in recent district court decisions dismissing §1 claims on the pleadings, Second Circuit litigants are now instructed that such a dismissal is proper only if the conspiracy allegation is “bare bones” without any supporting facts or if the conspiracy pled is implausible on the basis of the facts pled.
- To survive a motion to dismiss (as opposed to a motion for summary judgment), a complaint need allege “only the existence of a conspiracy and a sufficient supporting factual predicate on which that allegation is based.” A pleading of “plus factors” – such as motive to conspire, acts contrary to the defendants’ self interest, or a significant degree of interfirm communications – strengthens the plausibility of the conspiracy allegation. However, plus factor allegations are not required to survive a motion to dismiss in a post-*Twombly* world.

IMPLICATIONS FOR COUNSEL

- ***Twombly* has significantly diminished the prospect of motions to dismiss in antitrust litigation where the necessary element of conspiracy is based upon conscious parallelism.**
- **In the Second Circuit, where the important issue of conspiracy is based on conscious parallelism, the case will have to proceed through discovery before defendants will have a meaningful opportunity to challenge the merits of the plaintiff's claim.**
- ***Twombly* will likely lead defendants to pay plaintiffs to avoid fishing expeditions for sufficient evidence of a conspiracy and settle what may ultimately have been shown to be meritless claims, thereby assuring full employment of all antitrust lawyers who litigate cases in the Second Circuit.**

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