

## TOP STORY

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### Seventh Circuit weighs in on pleading standard under *Twombly*

***In a case alleging that a group of wireless carriers conspired to fix prices for text-messaging services, a three-judge panel of the Seventh Circuit, led by Judge Richard Posner, found that the plaintiffs had sufficiently alleged behavior that pointed to collusion. An attorney representing two of the plaintiffs said the decision “makes it clear that Twombly/Iqbal does not create an impossible burden.”***



By Allison Torres Burtka

In a decision that lawyers say is likely to extend beyond antitrust cases, the Seventh Circuit recently allowed a price-fixing case to proceed after determining that the plaintiffs sufficiently stated a claim under new, stricter pleading standards announced in two landmark Supreme Court rulings.

Noting that “pleading standards in federal litigation are in ferment after *Twombly* and *Iqbal*,” the court held that the plaintiffs’ complaint “alleges a conspiracy with sufficient plausibility to satisfy the pleading standard of *Twombly*.” (*In re Text Messaging Antitrust Litig.*, 2010 WL 5367383 (7th Cir. Dec. 29, 2010).)

In *Bell Atlantic Corp. v. Twombly* in 2007 and *Ashcroft v. Iqbal* in 2009, the Supreme Court heightened the federal pleading standard holding that a claim must contain enough facts to make it plausible, not just possible. Since then, courts have disagreed about what exactly the new standard requires. Some have cited these cases in granting motions to dismiss.

The Seventh Circuit offered its interpretation in the price-fixing case.

“The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed,” Judge Richard Posner wrote for the three-judge panel. “The complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as ‘preponderance of the evidence’ connote.”

The decision “makes it clear that *Twombly/Iqbal* does not create an impossible burden,” said Joe Whatley of New York City, who represents two of the plaintiffs. “Posner said, ‘Here’s an example of how it can be done.’”

The plaintiffs had alleged that a group of wireless carriers conspired to fix prices for text-messaging services. Among the allegations, Posner noted, were that they exchanged price information at trade association meetings and “that all at once the defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third” —behavior that pointed to collusion. This was enough to allow the plaintiffs’ case to proceed, the court held.

The district court had dismissed the plaintiffs’ first complaint but ruled that their second amended complaint could move forward. The defendants sought an interlocutory appeal, and the Seventh Circuit granted it, proceeding to the merits of the case without oral argument.

The decision is important because it addresses the issue of “informational asymmetry”—the unequal information that the parties have at the time of a motion to dismiss—an issue that has come up frequently in post-*Iqbal* and -*Twombly* cases, said Claire Prestel, a staff attorney with Public Justice in Washington, D.C. The decision also “emphasizes that the plaintiff does not

have to prove his or her case in the complaint," she said. **Prestel is the coordinating attorney for the organization's *Iqbal* Project, which aims to prevent misuse of the *Iqbal* and *Twombly* decisions.**

Whatley noted that the Seventh Circuit decision is especially significant because Posner is a well respected judge who is generally considered conservative.

Posner wrote that "*Twombly*, even more clearly than its successor, *Iqbal* . . . , is designed to spare defendants the expense of responding to bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit. . . ." Still, the court said the plaintiffs had done enough to proceed to discovery, which "may reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability."