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

MOTION FOR LEAVE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES' PETITIONS FOR REHEARING EN BANC

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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

Pursuant to Fed. R. App. P. 29(b)(3) and 11th Cir. R. 29-3, the Chamber of Commerce of the United States of America (the "Chamber") respectfully files this motion for leave to file a brief as *amicus curiae* in support of the petitions for rehearing en banc. Counsel for Defendants-Appellees consent to this motion. Counsel for Plaintiffs-Appellants does not consent to this motion.

Under Fed. R. App. P. 29(a)(3) and (b)(4), a motion for leave to file an amicus brief in support of a petition for rehearing en banc must state "the movant's interest"; and "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case."

Movant's interest. 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 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, the panel's decision substantially lowers the rigorous pleading standards for antitrust cases 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.

Why an amicus brief is desirable and relevant. "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.). "Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis

by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group." *Id.* (quotation marks and citation omitted).

In this case, the Chamber's proposed amicus brief fulfills all three of these functions. First, the Chamber has "particular expertise." *Id.* In view of its broad and diverse membership, the Chamber has an unparalleled ability to assess whether a particular judicial decision will have a significant effect on cases not before the Court. That insight is particularly useful during consideration of a petition for rehearing en banc, where the Court must consider whether a decision of sufficient practical importance to warrant en banc review. The Chamber's brief elucidates how the panel opinion will affect future antitrust defendants.

Second, the Chamber argues "points deemed too far-reaching for emphasis by a party intent on winning a particular case." *Id.* Although the parties rightly focus on the facts of this case, the Chamber makes more general arguments about the far-reaching impact of the panel's opinion on antitrust law in this circuit. Those arguments are helpful in deciding whether to exercise the discretionary authority to grant rehearing en banc.

Third, the Chamber "explain[s] the impact a potential holding might have on an industry or other group." *Id.* As previously described, the Chamber has a

unique capability to describe how the panel's opinion will affect other antitrust defendants beyond the parties currently before the Court.

Therefore, the Chamber's motion for leave to file an amicus brief should be granted.

October 5, 2017

Respectfully submitted,

/s/ Adam G. Unikowsky

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/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October, 2017, 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

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/s/ Adam G. Unikowsky

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court.

/s/ Adam G. Unikowsky

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* Authorities upon which we chiefly rely are marked with an asterisk.

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, the panel's decision substantially lowers the rigorous pleading standards for antitrust cases 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 Petitions' Statement of Issues and Statement of Facts.

ARGUMENT

The panel's decision is the most lax appellate application of antitrust pleading standards since *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), was decided. Boiled down, the threadbare allegations in this class-action 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. The

panel held that these allegations were enough to state an antitrust claim—and thus opened the door to a host of new antitrust class actions in this Circuit.

En banc review of the panel's decision is urgently needed. The panel's decision will turn the Eleventh Circuit into a hotbed of antitrust litigation, as class-action-plaintiffs' lawyers take advantage of the Court's new plaintiff-friendly pleading standard. Moreover, future panels of this Court may be unable to limit the scope of the panel's ruling. 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. En banc review of the panel's decision is needed to bring this Circuit's antitrust pleading standards into conformance with *Twombly*.

I. The Panel's Rulings Are Wrong and Have Far-Reaching Implications.

The panel's decision that the plaintiffs stated a Sherman Act claim can be subdivided into three rulings. Each of those rulings was wrong—and each will significantly affect antitrust law in this Circuit.

Parallel Pricing as "Plus Factor." The panel's first error was its ruling that the plaintiffs' allegations of parallel pricing was a "plus factor" supporting an inference of a conspiracy. The plaintiffs alleged that "the insurance companies 'specifically advised the [shops] they will pay no more than State Farm pays.'"

Maj. Op. at 19 (bracket in original). The 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 court concluded, the fact that the insurers nonetheless pegged their reimbursement rates to State Farm's rates was evidence that the insurers had *agreed* to fix prices.

The panel badly 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.* 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. *Id.*

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.

The panel's error cannot be confined to this case, or to the insurance industry. To the contrary, it will affect *any* antitrust claim in which parallel conduct is alleged—because under the panel's ruling, virtually *any* allegation of parallel conduct will constitute a "plus factor." 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 that can be carried over to virtually every case—not just those involving insurance.

Further, as the dissent pointed out, auto parts are "ubiquitous, interchangeable, and standardly priced." Dissent at 47. That is also true of many other goods and services across many different industry sectors. The fact that insurers would pay standardized rates is what one would expect in any competitive market.

The panel's response to this point was that it was based on "external knowledge," and thus could not be considered at the motion to dismiss stage. That

holding was wrong too. As the Supreme Court stated in *Twombly*, assessing plausibility requires allegations to 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. Yet under the panel's view, a district court may not engage in this sort of common-sense analysis at the motion to dismiss stage. Rather, any common knowledge about the economic structure of an industry is "external knowledge" that must be ignored.

That aspect of the panel's holding 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. The result is a substantial shift in the law in favor of class-action plaintiffs.

Sharp tactics as "Plus Factor." The panel also erred by ruling that allegations of sharp tactics among multiple insurers supported the inference of an antitrust conspiracy. The complaint alleged 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 accurately observed, as a common-sense matter, such tactics have an obvious justification that is unrelated to anticompetitive agreements. Dissent at 50-51.

The majority concluded that these common-sense considerations were out of bounds because they were based on "external knowledge." Maj. Op. at 25. Yet as previously explained, *Twombly* requires judges to assess plausibility "in light of common economic experience." 550 U.S. at 565. The majority's willingness to jettison common experience in assessing plausibility will have a great effect on antitrust law in this circuit. Under the panel's logic, a plaintiff can defeat a motion to dismiss by advancing allegations of parallel conduct and asserting that such tactics are uncommon—and no matter how counterintuitive those allegations may be, a district court must blindly accept them and disregard common sense as "external knowledge."

Even more troubling was the majority's ruling that those allegations are sufficient to plead a group boycott claim. As the dissent observed, the complaint asserted that multiple insurers engaged in "steering" tactics, and then gave a series

of "[e]xamples of this practice," while offering no allegation that the insurers used the *same* steering practice. Dissent at 54-55 (quoting complaint). And as the dissent explained, an allegation that one insurer uses one steering practice (*e.g.*, accusing a body shop of poor performance), and that a different insurer uses a different steering 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 did not allege parallel steering 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 is a remarkably far-reaching position. According to the panel, the fact that multiple companies engage in different, but allegedly illegal, steering tactics is, in and of itself, evidence of an agreement. Indeed, that evidence *alone* is enough to state an antitrust claim—because that was the sole evidence that justified the court's reversal of the dismissal of the group boycotting claim. This reasoning would allow virtually any antitrust complaint, affecting any industry, to proceed to discovery. So long as the plaintiff alleges that multiple companies are breaking the

law to further their economic interest—even in different ways—an antitrust claim premised on a secret agreement can proceed under that lenient pleading standard.

Sufficiency of "Plus Factors." The panel's final error was to hold that the threadbare "plus factors" in the complaint sufficed to state a Sherman Act claim. In the panel's view, merely alleging (1) parallel pricing, and (2) illegal "steering" tactics among multiple insurers—the specifics of which may have differed from insurer to insurer—was enough to withstand a motion to dismiss. Indeed, the panel held that the second factor was *independently* sufficient to state an antitrust claim, given that this factor was its sole basis for reversing the dismissal of the group boycotting claim.

Many, if not most, antitrust plaintiffs—regardless of the specific industry at issue—will be able to plead each of the two "plus factors" the panel identified. The first "plus factor" requires an allegation that multiple defendants engage in parallel conduct, despite having the ability to differentiate themselves in some respects. The second "plus factor" requires an allegation that multiple defendants engage in illegal conduct—even if that conduct differs from defendant to defendant. As previously explained, plaintiffs will frequently be able to allege these two factors. This low bar may permit innumerable meritless antitrust claims to proceed.

The fact that the panel opinion focused on the allegations in the particular complaints at issue here does not diminish the decision's importance. Antitrust plaintiffs in this circuit will 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). Future antitrust plaintiffs will copy this language in their complaint—accompanied by general allegations of industry misconduct—and will argue that the complaint must survive a motion to dismiss based on the panel's ruling. Only en banc review can avoid that inevitability.

II. En Banc Review Is Warranted.

The Court should grant en banc review because of the great importance of rigorously enforcing antitrust pleading standards.

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).

This factor militates in favor of granting rehearing en banc for two reasons. First, antitrust pleading standards are of great practical importance to 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. Finally, it is the public who will ultimately bear the cost of this discovery, in the form of lower wages and higher prices. Worse, if the panel's holding deters companies from using common cost-cutting tactics, such as steering consumers to lower-price vendors, consumers would be further harmed.

Second, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Id.* Thus, future panels of this Court may be unable to narrow the scope of the panel's opinion. 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 panel'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. Thus, en banc reconsideration is necessary to ensure that the divided panel ruling in this case is not the last word on antitrust pleading standards in this Circuit.

CONCLUSION

The petitions for rehearing en banc should be granted.

October 5, 2017

Respectfully submitted,

/s/ Adam G. Unikowsky

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