appearances in the Second Circuit Court of Appeals.[13] Eventually, several issues reached the Supreme Court, including the question of whether the district court was right to allocate 90% of the notice costs to the defendants based on a finding that the plaintiff was likely to win on the merits.[14] The Supreme Court held that Federal Rule of Civil Procedure 23, which required notice, does not provide a judge with discretion to choose who must pay the notice costs. In the absence of authority under Rule 23, the Court found that the "usual rule . . . that a plaintiff must initially bear the cost of notice to the class" was controlling.[15]

Eisen ended discussion of who should bear the costs of notice in federal cases. Although the Court left open previously existing exceptions to the "plaintiff pays" rule and explicitly declined to decide how notice costs should be decided in such cases, no subsequent case has raised the issue of what is constitutionally required before making a defendant pay notice costs.[16]

IV. Post-*Eisen* Cases

In the wake of *Eisen*, several states changed their rules of civil procedure to provide judges with the authority to force defendants to pay notice costs.[17] One such state, California, soon confronted the issue of whether a defendant could be compelled to pay notice costs. In *Civil Service Employees Insurance Co. v. Superior Court of San Francisco*, the California Supreme Court split 4-3 over the issue of whether a defendant may be required to pay notice costs, thereby forcing him to finance the plaintiff's suit.[18]

The majority opinion held that courts may require a defendant to pay notice costs because "the adoption of efficient class action procedures unquestionably rationally relates to the vindication of a wide range of legitimate public purposes."[19] The court analogized the rule allowing the court to allocate the costs to defendants to other rules regarding costs, such as the rule that defendants are required to pay some discovery costs to benefit plaintiffs.[20]

The dissent disagreed, stating that "[t]he trial court's order requiring defendant to pay costs of notice to plaintiff constitutes a permanent deprivation of property without a final or even tentative adjudication of liability. As such the order constitutes a denial of due process."[21] The

continued page 7

District Court Dismisses Claims in Nationwide Text Messaging Class Action

by Seth Cooper

Text messaging is a booming advanced wireless service. This service for using cellular telephones to send and receive short messages was first introduced by AT&T in 2002 but was quickly launched by other wireless providers. Monthly text messages have soared from 4.7 billion during December 2005, to 9.8 billion during December 2006, all the way up to 48.1 billion in December 2008.[1] In 2008 alone, some one trillion text messages were sent and received.[2] This business has been the target of class-action litigation. But owing to a failure to allege facts sufficient to state a claim of unlawful conspiracy, a recent federal trial court ruling put the brakes on a nationwide class-action antitrust suit alleging collusive per-message price-fixing by all major wireless carriers.

Consumers typically purchase text messaging services either on a per-message basis or through a bundled plan. Bundled plans can include either set allotments of text messages or unlimited amounts. Moreover, since 2005, wireless carriers' "prices for other wireless services, such as voice calling and data transmission, decreased."[3] Nonetheless, per-message prices for text messaging have become the target of congressional inquiry and a Department of Justice investigation that recently concluded without any action being taken. But per-message prices are also the subject of a sweeping class action lawsuit: *In Re Text Messaging Antitrust Litigation*.[4]

Over a dozen separate lawsuits against the four national wireless carriers—AT&T, Sprint, T-Mobile, and Verizon—were transferred to the U.S. District Court for the Northern District of Illinois by the Judicial Panel on Multidistrict Litigation.[5] Plaintiffs' attorneys filed suit on behalf of "all those who purchased text messaging services on a fee-per-message basis from defendants or their predecessors, subsidiaries, or affiliates from January 1, 2005 to the present."[6] At issue in the district court's December 2009 ruling was the defendants' Rule 12(b)(6) motion to dismiss the plaintiffs' claims that all four national wireless carriers violated Section 1 of the Sherman Act.[7] Horizontal price-fixing is per se illegal under antitrust law. Plaintiffs' alleged that the defendants colluded to fix prices for per-message text messaging services.

As of the second quarter of 2006, all four carriers charged ten cents for each individual text message; in the fourth quarter of 2006, Sprint-Nextel raised its prices to fifteen cents. In the first and second quarter of the following year, the other three carriers all raised their per-message prices to fifteen cents.[8] Also, in late 2007, Sprint-Nextel once more raised its per-message rates, this time to twenty cents. In the first quarter of 2008, AT&T and Verizon both raised their rates to twenty cents, and in the third quarter T-Mobile raised its rates to twenty cents as well.[9] The plaintiffs pointed to these instances of "parallel pricing" and added some specific allegations, namely: (1) per-message prices for text messaging include significant mark-ups over per-unit costs; (2) as per-message prices for text messaging charged by the carriers increased, transmission costs decreased; (3) absent collusion, per-unit prices for text messages should have decreased as costs decreased; (4) all four carriers are members of CTIA and GMSA—national and international trade associations for the wireless industry; and (5) heavy concentration and high barriers to entry facilitate collusion in the wireless industry.[10] The plaintiffs alleged that those facts supported a reasonable inference that the wireless carriers conspired to raise and fix prices.

On December 10, 2009, U.S. District Judge Matthew F. Kennelly dismissed the plaintiffs' claims for failure to allege facts sufficient to state a claim under Section 1 of the Sherman Act.[11] Judge Kennelly relied primarily upon the U.S. Supreme Court's standards for considering motions to dismiss set out in *Bell Atlantic Corp. v. Twombly*.[12] In order for the plaintiffs' claims to survive such a motion, Judge Kennelly described the application of *Twombly* to require that:

> (1) a plaintiff must allege a "plausible" conspiracy to fix prices; (2) an allegation of conspiracy that rests on conduct "merely consistent with" an agreement does not rise to the level of plausibility; and (3) allegations of conspiracy that do not rise to the level of plausibility do not give rise to a reasonable inference of a conspiracy that a court must draw in the plaintiff's favor.[13]

Although acknowledging that the plaintiffs' two alleged episodes of parallel pricing by Sprint-Nextel and the other major wireless carriers in 2006 and 2007 sufficed as "parallel conduct," Judge Kennelly concluded that the plaintiffs' scattered references to collusive behavior amounted to "'merely legal conclusions resting on the prior allegations,' and thus they are not entitled to the assumption of truth."[14] Surveying the whole of the plaintiffs' allegations, Judge Kennelly found no specifics, particulars, or details suggesting the presence of an agreement between the wireless carriers.

Judge Kennelly also concluded that none of the plaintiffs' structural economic arguments supported any reasonable inference of an agreement to fix prices. "Though it may be true that defendants could attempt to compete for customers based on per-messaging rates," wrote Judge Kennelly, "it does not follow that their failure to do so results from an agreement."[15] In particular, Judge Kennelly observed that "[w]here, as here, the fixed costs associated with an industry are high . . . self-interested producers might attempt to charge higher than marginal cost prices for their products in order to recover some of their fixed costs."[16]

Bringing the broader text messaging and wireless services market into view, Judge Kennelly pointed to the more likely explanation:

> [A]s text messaging became more popular, [wireless carriers] sought to encourage consumers to purchase text messaging services as part of a bundled plan. . . . By increasing the per-message price for text messages and encouraging subscribers to increase their usage of text messages through initiatives like the development of CSCs [common short codes], providers could create an incentive for subscribers to purchase bundled plans to avoid the wildly varied (and sometimes wildly expensive) bills that could result from per-message pricing.[17]

Judge Kennelly considered that consumers' primary means of obtaining lower text messaging prices is by purchasing bulk packages.[18] And, accordingly, Judge Kennelly found it a far more likely inference that Sprint-Nextel's upward per-message price increases were designed to push consumers to purchase bundled calling and texting plans instead of per-message plans.[19]

Moreover, Judge Kennelly concluded that parallel pricing in a narrow slice of the market such as per-messaging prices hardly supported a reasonable inference of an agreement not to compete in a wireless services market where "price competition is fierce for voice calling, data services, and bundled plans," where "[m]ost consumers purchase text messaging services on a bundled or unlimited basis,"[20] and where overall rates for wireless services have decreased.[21]

To be sure, a nationwide class action against all four major wireless carriers and all citizens nationwide who have purchased text messages on a per-message basis constitutes a telecommunications

case of enormous importance. Given the scope of the claims and the remedies ordered, an adverse ruling on merits for the wireless carriers could create a sweeping instance of price regulation by litigation. And, had Judge Kennelly instead held that parallel pricing combined with membership in a trade association satisfies Rule 12(b)(6) and *Twombly* standards for stating a claim, the case would have had significance for all business trade associations that facilitate industry-wide standards for technological interoperability and quality-of-service.

Ultimately, the granting of the defendant wireless carriers' motion would have resulted in the dismissal with prejudice of the plaintiffs' claims, unless the plaintiffs sought leave to file an amended claim by early January 2010. However, the plaintiffs have indeed sought leave to file a second amended complaint (SAC), and the district court's consideration of the plaintiffs' motion and its SAC are pending as of this article's writing.

Whatever the outcome of the district court's consideration of the SAC, plaintiffs will find little support from the Department of Justice's investigation. The Department announced the conclusion of its investigation of text messaging pricing in January.[22] No action is planned by the Department.

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Endnotes

1 Fed. Commc'ns Comm'n, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, WT Docket No. 08-27, at 7 (2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-54A1.pdf.

2 *CTIA—The Wireless Association[R] Announces Semi-Annual Wireless Industry Survey Results*, Business Wire, April 1, 2009, http://www.allbusiness.com/media-telecommunications/12272555-1.html.

3 *Id.* at 30 ("[P]laintiffs note that defendants' prices for related products (such as data transmission, voice mail, and downloading music files) *have* decreased as capacity has increased.) (citing Plaintiffs' Complaint at 69).

4 2009 U.S. Dist. LEXIS 115513 (N.D. Ill. 2009).

5 *See* 28 U.S.C. § 1407.

6 *In re Text Messaging*, 2009 U.S. Dist. LEXIS at *3-*4.

7 15 U.S.C. § 1.

8 *See id.* at *6.

9 *See id.*

10 *See id.* at *7-*10, *15-*24.

11 *Id.*

12 550 U.S. 444 (2007).

13 *In Re Text Messaging*, 2009 U.S. Dist. LEXIS at *16 (*quoting Twombly*, 550 U.S. at 564).

14 *Id.*

15 *Id.* at *24.

16 *Id*. at *27-*28

17 *Id*. at *27.

18 *Id.* at *29.

19 *Id.* at *33.

20 *Id.* at 34.

21 *See supra* note 3.

22 Amy Schatz & Thomas Catan, *Justice Ends Probe of Texting Rates*, Wall St. J., Jan. 15, 2009 ("The Justice Department has informed several wireless carriers that it has concluded an inquiry into whether the carriers colluded to set text-messaging rates and has no plans to take action on this issue, according to industry and government officials with knowledge of the agency's inquiry."), *available at* http://online.wsj.com/article/SB10001424052748704281204575003321521100514.html#mod=todays_us_section_b.