Second Circuit Adds to Post-*Twombly* Antitrust Pleading Jurisprudence

In the latest case to apply the developing pleading standards in antitrust cases, the United States Court of Appeals for the Second Circuit yesterday, in *Anderson News, L.L.C. v. Am. Media, Inc.*, 10-4591-CV, 2012 WL 1085948 (2d Cir. Apr. 3, 2012), unanimously vacated and remanded a suit based on allegations under Section 1 of the Sherman Act that had been dismissed, without leave to amend, by the United States District Court for the Southern District of New York. The Court held that the proposed amended complaint ("PAC") proffered by the plaintiffs in connection with their motion for reconsideration in the Southern District stated a claim on which relief could be granted, applying the standards set forth by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ("*Twombly*") and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) ("*Iqbal*").

Background

Magazines are produced by publishers, sold to wholesalers and distributed to retailers (*i.e.*, newsstands and bookstores) for ultimate sale to customers. Anderson, at one time the second largest wholesaler in the United States, claimed that the magazine distributors, publishers and a competitor wholesaler conspired to drive it and another wholesaler, Source, out of business by ceasing to sell to Anderson and Source. Anderson claimed that as a result, it lost access to 80 percent of the magazines it previously distributed, ultimately being forced into bankruptcy. Anderson sued its suppliers and competitors alleging violation of Section 1 of the Sherman Act.

The PAC alleges that, after Anderson announced that it would impose a surcharge on the publishers, the publishers initially responded in various ways -- some refusing to negotiate, others agreeing to surcharge alternatives. But then, the PAC alleges, based on various conversations and meetings outlined in the PAC, the various defendants met and conspired to cut off Anderson and Source.

The District Court dismissed the original complaint for failure to state a claim, denied reconsideration and refused to allow Anderson to amend, ruling that the alleged conspiracy was facially implausible under the standards set by *Twombly* and *Iqbal* and finding the defects in the original complaint incurable. In so holding, the District Court made the following findings:

- The defendants' alleged goal of eliminating Anderson and Source from the magazine industry was not plausible because publishers and distributors have an economic self-interest in having more, not fewer, wholesalers.
- The fact that defendants initially had different reactions to the surcharge undermined a theory of conscious parallel conduct.
- The complaint failed to provide sufficient context lending itself to an inference of collusion because it lacked allegations of *direct* evidence of a conspiracy.
- The fact that defendants stopped shipping to Anderson was a common response to a common stimulus, and in such a context, *unilateral* parallel conduct was "completely plausible."
- As to the defendant wholesaler, Anderson's competitor, the District Court found that there was no conceivable basis for a claim against it because as a wholesaler rather than supplier, that defendant could not engage in conduct that paralleled that of the publishers or distributors.

The Second Circuit Opinion

On *de novo* review, the Second Circuit took issue with both the District Court's evaluation of the factual allegations in the pleadings and the District Court's "analytical constructs."

First, in examining whether the PAC contained allegations of joint or concerted action sufficient to state a Section 1 violation, the Court acknowledged that "[c]onclusory allegations of participation in a conspiracy have long been held insufficient to state a claim." Rather, pursuant to *Twombly*, "Rule 8(a) contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" -- facts that do more than merely allege parallel conduct but rather contain "some setting suggesting the agreement necessary to make out a § 1 claim [, some] further circumstance pointing toward a meeting of the minds." Having made these observations, though, the Court also emphasized that "conspiracies are rarely evidenced by explicit agreements, but nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators."

Providing substantial guidance, the Court explained what it means "to present a plausible claim" regarding the existence of an agreement:

- "[T]he plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action. . . ."
- There is no "probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." In fact, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and that a recovery is very remote and unlikely."
- "Because plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible."
- "The choice between or among plausible inferences or scenarios is one for the factfinder," and "fact-specific question[s] cannot be resolved on the pleadings" "[e]ven if their truth seems doubtful." Therefore, "[a] court . . . may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible."

The Court determined that the District Court's plausibility inquiry was misdirected because it focused on the plausibility of an alternative to plaintiff's theory instead of the plausibility of plaintiff's theory: "the district court ruled that Anderson did not state a plausible § 1 claim because '[u]nilateral parallel conduct [by the defendants wa]s completely plausible,' 732 F.Supp.2d at 399; *see also id.* at 400, 407. "The question at the pleading stage is not whether there is a plausible alternative to the plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible." Likewise, the District Court should not have chosen "between or among plausible interpretations of the evidence" which is properly "a task for the factfinder." Specifically, the Court noted that "there is nothing implausible about coconspirators' starting out in disagreement as to how to deal conspiratorially with their common problem."

The Second Circuit found that the PAC was "vastly different" from the *Twombly* complaint which alleged a conspiracy based solely on parallel conduct and not any independent allegation of actual agreement among the defendants, and which was bereft of facts specifying the time, place and identity of persons involved in the alleged conspiracies. In contrast, the PAC:

- "alleges actual agreement; it alleges not just that all of the defendants ceased, in virtual lock-step, to deal with Anderson, but alleges that on various dates within the preceding two-week period defendants and [another wholesaler]-- through their executives, 10 of whose names or positions are specified -- had met or communicated with their competitors and others and made statements that may plausibly be interpreted as evincing their agreement to attempt to eliminate Anderson and Source as wholesalers in the single-copy magazine market and to divide that market between [the two remaining wholesalers]."
- "alleged that in those meetings and communications the defendants planned a concerted boycott of Anderson, or Source, or both. Lending support to an inference of such planning, the PAC includes other allegations of communications between defendants and of statements by certain of the defendants to Anderson and Source."

The Court concluded that "the facts alleged in the PAC are sufficient to suggest that the cessation of shipments to Anderson resulted . . . from a lattice-work of horizontal and vertical agreements to boycott Anderson." The Court therefore ruled that the antitrust claim as pled in the PAC was plausible and could withstand a motion to dismiss.

The Circuit Court briefly evaluated, and criticized, some of the District Court's specific conclusions. The Court noted that "[t]he presentation of a common economic offer may well lend itself to innocuous, independent, parallel responses; but it does not provide antitrust immunity to respondents who get together and agree that they will boycott the offeror." The Court also rejected the notion that a competitor could not be part of such a conspiracy or that eliminating Anderson was necessarily against the defendants' self-interest.

The Impact of the Decision

Early post-*Twombly* decisions appeared to greatly heighten antitrust conspiracy pleading requirements. Like other recent decisions, the Second Circuit decision here swings the pendulum back toward letting more claims through the motion to dismiss screen. Given the Circuit's strong disagreement with the District Court's analysis of the PAC, it is hard to say whether the Second Circuit's decision here relaxes the requirements in general or reflects a reaction to the specific facts of this case. In any event, the case makes clear that, at least in the Second Circuit, plausibility does not mean probability. Moreover, unlike the level of analysis they are obliged to apply at the summary judgment stage, District Courts may not at the motion to dismiss stage decide whether alternative theories of lawful conduct are more or less plausible on the way to determining whether the pleaded theory is plausible enough to permit the case to go forward.

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